Transcript of Proceedings

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SUPREME COURT OF QUEENSLAND

CIVIL JURISDICTION

BYRNE J

Indictment No 3772 of 2001

LILY ARTHUR	Plaintiff
and	
THE STATE OF QUEENLSAND	Defendant

BRISBANE

..DATE 04/11/2004

..DAY 4

WARNING: The publication of information or details likely to lead to the identification of persons in some proceedings is a criminal offence. This is so particularly in relation to the identification of children who are involved in criminal proceedings or proceedings for their protection under the *Child Protection Act* 1999, and complainants in criminal sexual offences, but is not limited to those categories. You may wish to seek legal advice before giving others access to the details of any person named in these proceedings.

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THE COURT RESUMED AT 10.00 A.M.

MR DAUBNEY: I call Professor Harvey Whiteford.

HARVEY ALEC WHITEFORD, SWORN AND EXAMINED:

MR DAUBNEY: Professor Whiteford, could you tell us your full name?-- Harvey Alec Whiteford.

You are a consultant psychiatrist?-- I am.

You practise from rooms at the Toowong Private Hospital?-- I do.

You have prepared two reports in relation to this matter, the first dated 24 October 2003 and the second dated 21 September 2004?-- That's correct.

Your Honour, may I inquire whether the copy of Exhibit 33, that's the second report which your Honour has, has a copy of Professor Whiteford's curriculum vitae exhibited to it or attached to it.

HIS HONOUR: It does.

MR DAUBNEY: Thank you.

HIS HONOUR: It has a document headed "Brief Curriculum Vitae".

MR DAUBNEY: Thank you, your Honour. Do you have a copy of your curriculum vitae or your brief curriculum vitae, Professor Whiteford?-- I don't think so.

I will show you this - perhaps if the witness could please see the exhibit, your Honour. If I could ask you to turn to the brief curriculum vitae?-- Yes.

Does that document set out accurately in brief your qualifications and experience?-- Yes, it does.

In relation to each of the reports that you have prepared, are the facts and matters that you have stated in those reports true and correct to the best of your information and belief?-- They are.

And are the opinions expressed in each of those reports your own opinions honestly held?-- They are.

Could ask you - I'm sorry, do you have spare copies with you of each of your reports?-- I do.

In which case I might ask for the exhibit to be returned to his Honour. Could I ask you to go to your report of the 24th of October 20003 and in particular page 4 of that report. In the paragraph at the top of that page you discuss the plaintiff's report to you of returning to live with her husband and his family after she had fallen pregnant to another man and his family treating her like a servant, and her reporting being grateful that "they would have me back seeing as I had children with two different men". Can I supplement that with further information that's emerged in the course of the trial, that is, that for the next 18 years the plaintiff, while living with her husband and his family, suffered almost daily abuse, that is emotional abuse, from her husband and that for many of those years, while she was living with her husband with his parents, she suffered sexual harassment from her father-in-law on a constant, almost daily basis. Knowing those extra facts in relation to that period of time in the plaintiff's life, does that affect the opinion that you have expressed in your reports?-- Well, I expressed the opinion in my report that Ms Arthur had had a particularly difficult life and had been exposed to some significant stressors throughout her life and that further emphasises the extent to those stressors to which she was exposed over an extended period of time.

HIS HONOUR: Wouldn't you need to know what was intended to be conveyed by the expressions "emotional abuse" and "sexual harassment" before you could form a view about the likely impact of things characterised in that fashion?-- If - if it was perceived by the - by Ms Arthur to be abuse and to be harassment, then it is her perception that's important. And certainly when I spoke to her, I gained a clear impression that that was an extremely difficult time for her, after she returned back to the family. So I'm not surprised to hear what I have just heard.

MR DAUBNEY: Now, since you prepared your report of the 21st of September 2004 you have seen the report by Dr Pickering of the 30th of September 2004?-- 30th of?

September 2004?-- September.

I think there's only one report from Dr Pickering?-- I have that report. I also have a letter.

All right. Dr Pickering, we have heard, has been treating the plaintiff with hypnotherapy as a psychiatric therapy technique. What is the prevalence of the use these days of hypnotherapy as a technique for psychiatric therapy?-- Oh, it's very uncommon to be used as a - as a therapy for psychiatric disorders.

Why is that?-- Most psychiatrists aren't trained to use hypnotherapy. It's not taught routinely in psychiatric training, primarily because it's not considered to have a common role in the treatment of mental disorders. Other treatments have been shown to be more effective.

And what are the shortcomings in relation to the use of hypnotherapy as a psychiatric technique that had led to that situation?-- Well, it doesn't work on the majority of patients. It works on a minority of patients. It requires considerable skill by the practitioner. It often requires a long period of treatment and sometimes the information gained under hypnotherapy turns out not to be accurate.

All right. Could I ask you to turn-----

HIS HONOUR: Just before you do that.

MR DAUBNEY: Sorry.

HIS HONOUR: Are the reasons why the information gained under hypnotherapy not be accurate known?-- Well, it's believed that a person under hypnosis is very susceptible and suggestible to being led by the hypnotherapist. The hypnotherapist, therefore, has to be very skilled that they are not leading the patient into responding the way to which the patient feels they should be responding. That requires considerable skill. The classic cases in the medical literature have evolved around childhood sexual abuses, your Honour is probably aware, and where these memories have been found and recalled have subsequently been established to have been impossible to occur. The perpetrator, for example, wasn't even in the country or may have even been deceased. So that's led to some criticism of the technique by the psychiatric establishment. I'm not saying it hasn't got a place but I'm saying its place is particularly limited and therefore it is very much a subspeciality area.

MR DAUBNEY: What are the alternatives to hypnotherapy?-- Well, it depends on the condition you're treating.

Having seen Mrs Arthur, what are the alternatives for Mrs Arthur?-- Mrs Arthur was diagnosed with depression and post-traumatic stress disorder. The practice guidelines from the College of Psychiatrists for the treatment of those two conditions would be pharmacotherapy - appropriate drug treatment - plus cognitive behaviour therapy, cognitive behaviour therapy, a particular form of psychological counselling.

All right. Dealing with each of those in Mrs Arthur's case, are you aware of what medication regime she has been on since she first undertook treatment?-- Well, it's surprised me a little bit. I saw Ms Arthur in I think - let me check - October 2003. She'd started treatment for the first time as I understood it three years earlier in October 2000. She had only commenced medication three weeks prior to seeing me, which I found would be unusual. She hadn't had cognitive behaviour therapy at all so far as I was able to elicit. She'd had intensive weekly psychotherapy which appeared to have involved regression, some form of regression, over nearly three years.

HIS HONOUR: What do you mean by regression?-- Well, taking

her back in time to try and recall memories from the past. So - and get her to express emotions related to those memories in a cathartic sort of way. For that therapy to go on for three years before moving to what would be accepted today to be optimal treatment for either post-traumatic stress disorder or depression was unusual.

What clinical objective is sought to be achieved by this process of attempting to have this particular patient recall the memories she may have?-- The rationale behind that would be that a considerable amount of the anger and anxiety, frustration and depression she's experiencing is a result of emotion which is dammed up in her unconscious and that if you can access that, almost oversimplifying it, like lancing a boil, and releasing that emotion, that the patient gains considerable symptomatic relief. And so, if you can tap into the memories, get the patient to recall them and get the patient to express the emotions specifically that's attached to those memories, then the patient's condition will improve.

What is suppressing memory?-- If something traumatic happens to an individual, the emotion that goes with that memory is so powerful that the individual cannot recall it into their consciousness and so it is suppressed and it's in their unconscious and that it won't come to the surface because defence mechanisms, psychological defence mechanisms, prevent that emotion from reaching the surface because the patient does not want to deal with the emotional pain that will engender.

Is there literature or a generally accepted understanding amongst psychiatrists concerning the extent to which in adult patients this suppressed or repressed or withheld memory when extracted in this fashion may be reliable?-- The reason the hypnotherapy is going and has gone out of favour is because the connection between the emotion which re-emerges and the memory to which that attached - is attached is almost impossible to establish. What comes back is emotion. The memory to which that emotion is connected, when it returns, is not reliable. By that I mean that you can't assume that the anger or the depression, the fear that comes back as the emotion and the memory that comes back at the same time are causally related. So that, many memories come back, emotion comes back but connecting those, even if the patient says they're connected, cannot be reliably established and that's the problem that's occurred with the recollection of childhood sexual abuse.

MR DAUBNEY: In the present case we're talking about events which occurred nearly 40 years ago, some 37 or so years ago?-- Mmm.

Does the length of time have an impact on the matters that you have just been discussing?-- Not really. Memories can be buried for a very long time and may not come back for 30 years.

Does the impact or do - does the fact that the patient has

suffered other traumas, insults, stressors in their life have an impact on the matters you have just mentioned?-- In my opinion, very much so. Each of those subsequent insults would have some psychological trauma and some emotion and that would have increasingly, over time, clouded and coloured the emotions associated with the traumatic event when Ms Arthur was 16. With Ms Arthur's case, the memory, although vague, seemed to be there when I spoke to her. What had happened is that a huge amount of emotion had become attached to that particular memory and it detached from all these subsequent events which happened in her life, some of which were extremely traumatic.

You have already noted that a diagnosis has been made of post-traumatic stress disorder, of this lady suffering post-traumatic stress disorder, and if I could ask you to go to page 7 of Dr Pickering's report you will see that he says there that, "The post-traumatic stress disorder was brought about by the events that occurred when she was 17 years old. While her arrest played some role, it was the loss of her son by being pressured into adopting him away that was the substantial cause of this disorder." Can I approach this in two phases. Firstly, in your opinion, is Mrs Arthur suffering from post-traumatic stress disorder?-- No.

And the corollary to that is, in your opinion, is Mrs Arthur suffering from any kind psychiatric disorder?-- Probably, yes.

What is that in your opinion?-- I think the predominant symptoms when I examined her were depression and - and anxiety. Now, post-traumatic stress disorder is an anxiety disorder, one of many. However, I was not convinced that she had that form of anxiety disorder.

Coming back then to Dr Pickering's view that it was the loss of her son by being pressured into adopting him away that was a substantial cause of that PTSD, in your opinion does Dr Pickering's attribution of that incident as the prime cause of the PTSD hold good?-- Not to me, no.

Why is that?-- Well, for multiple reasons. The - the loss of the son would not in my opinion be sufficient to trigger it. It is not the sort of trauma, the life threatening trauma that you expect to see in post-traumatic stress disorder. It is a loss. The reaction you would expect to see would be grief, stress but not the sort of event which would trigger post-traumatic stress disorder. Her recollection of what went on then was an obsessive rumination and not the sort of re-experiencing phenomena, ie flashbacks, which you see in post-traumatic stress disorder. Thirdly, rather than avoiding the memories, which people with PTSD do because they're traumatic, Ms Arthur seemed to be preoccupied with them, obsessively preoccupied with them, and kept revisiting them. I did not see any signs in the clinical interview that approaching those subjects and talking about them produced any reliving of the phenomenon, and many of the other things that Dr Pickering lists, the - there was no numbing of emotion. In fact, there was profound emotion when she discussed it with

me, things like the estrangement from her family, loss of pleasure in other activities and negative expectation of the future, et cetera, all explainable by depression or other forms of anxiety.

In expressing your opinion - sorry. In expressing the opinions that you have just given to the Court, have you had regard to the criteria listed in DSMIV?-- That's what I used to make my diagnosis.

I see. And you are familiar with the DSMIV criteria relating to a diagnosis of post-traumatic stress disorder?-- I am.

And in your opinion does Ms Arthur's condition and symptoms meet those criteria?-- They don't.

HIS HONOUR: Mr Daubney, why is there this emphasis on post-traumatic stress disorder? I ask because I'm looking at paragraph 17 of the statement of claim. There is no allegation there of any psychiatric illness or disorder.

MR DAUBNEY: If your Honour would bear with us for a moment, please?

HIS HONOUR: Has the pleading been amended to make a claim of a psychiatric condition? By that, I mean a recognisable or recognised psychiatric illness or disorder?

MR DAUBNEY: If your Honour would just bear with me for a moment, I'm actually looking at another document. The direct answer to your Honour's question is there has been no amendment to the pleading. But if we could take your Honour to the statement of loss and damage?

HIS HONOUR: Why am I concerned with that?

MR DAUBNEY: Because that's the case where - the plaintiff was ordered to deliver that document in-----

HIS HONOUR: But its agreed status now in the proceedings before me is as a document which, if it is to assume new relevance at all, can only assume relevance against the plaintiff.

MR DAUBNEY: And I'm about-----

HIS HONOUR: That's the agreed basis, isn't it?

MR DAUBNEY: And I'm about to use it for that purpose, by pointing your Honour to the case that we're here to meet.

HIS HONOUR: The case you're here to meet is the case expressed in the pleading, unless you're content for me to treat the statement of loss and damage as expanding in some fashion the nature of the claim against the defendant.

MR DAUBNEY: Well, no, I don't invite your Honour to do that. Your Honour's observation as to the scope of the pleading of

course is correct. In taking your Honour to the statement of loss and damage, we were doing no more than attempting to answer your Honour's initial question, which is why are you concerned with post-traumatic stress disorder and so on and so forth. We were attempting to give your Honour some elucidation on that.

HIS HONOUR: Well, what I want to be sure about is the basis upon which this aspect of the case is going forward. On the face of it, it seems that you are content that the damages case go forward on the basis that you are confronting and have set about meeting all the claims for damages which are the subject of evidence in the plaintiff's case.

MR DAUBNEY: The other reason we do that, your Honour, is that's the case that was opened against us. At page 3 of the transcript, our learned friend opened his case, amongst other things, in these terms: "As a result of evidence that I will turn to shortly the plaintiff herself has suffered considerably emotionally and her case is that she has developed psychiatric illnesses as a result of the forced separation from her child."

HIS HONOUR: That was not her case as pleaded. But, in any event, you're not seeking to suggest that in respect of the damages at any rate, her case is confined by her pleading?

MR DAUBNEY: What we will say is that if your Honour considers it appropriate to consider the evidence as a whole and not be confined to the pleading - sorry, and not be confined to the case advanced strictly on the pleading, then we will refer your Honour to the psychiatric evidence that-----

HIS HONOUR: No, this is not a matter for me; it is a matter for you.

MR DAUBNEY: Well, with - and, with respect, we understand why your Honour sees it that way; I'm on my feet at the moment. But, with respect, it is also a matter for my learned friend. We're here to meet a case advertised one way or the other - by that we mean on the pleadings and in other documents, and opened in a particular way. I understand, with respect, that your Honour is seeking presently to have me nail my colours to the mast on this but, with respect, I can't anticipate, for example, whether my learned friend is going to stand up and ask your Honour for leave to amend the statement of claim. I'm sorry to appear to be unhelpful to your Honour.

HIS HONOUR: I'm concerned about this, as a general rule in litigation I am, because what tends to happen afterwards, disputation in an appellate Court about the basis upon which the case was conducted with one side asserting that it was conducted without regard to the pleadings. My impression so far is that with respect to the damages claim at least, this case has been treated on your side as not confined by the pleadings.

MR DAUBNEY: May I answer your Honour's question this way, and we're not being cute, we're really trying to grapple with the task your Honour has given. Were our learned friend now to stand up and ask leave to amend his pleading to include a claim for psychiatric injury, we could not contest that application. We cannot say to your Honour that we haven't come here for this trial prepared to meet a case of an allegation that she suffered psychiatric injury by reason of the events in September 1967.

HIS HONOUR: I hope you haven't been distracted by this, Professor-----?-- Not at all.

-----Whiteford?-- That's why I did medicine not law, your Honour.

MR DAUBNEY: You referred before to an alternative of cognitive behaviour therapy. What would such therapy entail in the case of a patient in Mrs Arthur's situation?-- As far as the content or the extent of the treatment?

Both?-- The content would be assisting the patient, and Miss Arthur in this case, to manage her anxiety and her depression with changing the way in which she thinks about her symptoms and using techniques of a cognitive type, which could include relaxation, it could include distraction, et cetera, to manage her anxiety symptoms. It would continue and in most cases we would be looking at some 20 one hour treatment sessions over a six month period.

You are aware that Dr Pickering has treated Miss Arthur on some 130 occasions over a period of three years or so?-- That appears to be the case, yes.

What is your opinion in relation to the frequency and duration of that treatment?-- I would accept that psychodynamic or analytical psychotherapy, which is a more Freudian based psychotherapy - apologies, for your Honour, for this - was traditionally taught as the major psychological treatment to psychiatrists for several generations. The problem with analytical psychotherapy is that when we try to establish its efficacy in a research setting it fell much - fell far shorter of the outcomes which were achieved with cognitive behaviour therapy. It has, therefore, lost its preeminence and has largely been replaced by cognitive approaches to psychotherapy. However, there are many practitioners who are still trained in that mode of therapy and because that is the way they are trained that is the therapy they do.

HIS HONOUR: Professor Whiteford, these days increasingly legal practitioners are encouraging experts on both sides to confer, as no doubt you know. Have you spoken to Dr Pickering about his treatment?-- No, I haven't.

MR DAUBNEY: And do you have an opinion about the efficacy of any of the treatment being administered by Dr Pickering?-- I accept that it is a form of treatment which has in the past been commonly used. It wouldn't be the first line of

treatment that we would teach, as I do, the psychiatric registrars of today to do, and in fact in 1996, November 1996, the Commonwealth government reduced by 50 per cent the rebates paid to private psychiatrists or psychiatrists under the Medical Benefits Schedule who do this sort of therapy because there was no efficacious base for the length of time and the type of treatment, with some clinical exceptions being granted to psychiatrists of which post-traumatic stress disorder was not one.

With the therapy the plaintiff Mrs Arthur has been having up until now such as intense therapy, what sort of results would you have expected to see by now?-- Well, if I take the Court back to my earlier comment that I understand the rationale for identifying the emotion attached to memories and traumatic events and allowing the patient to express those emotions, when that happens, and I have seen it happen and the response, the improvement is quite substantial, and that catharsis does produce symptomatic relief. I would have expected that to have happened well before 130 sessions.

HIS HONOUR: Might the ongoing litigation have an impact upon recuperation, if I can call it that?-- Yes, your Honour.

MR DAUBNEY: Thank you, your Honour. That's the evidence of Professor Whiteford.

CROSS-EXAMINATION:

MR WILSON: Thank you, your Honour. Professor Whiteford, you saw Mrs Arthur on one occasion?-- I did.

In October 2003?-- I did.

And that consultation probably took, what, a couple of hours?-- Hour and a half, something like that.

Do you accept that in determining the type of treatment to be afforded to Mrs Arthur the approach or the opinions taken by her treating psychiatrist should be given weight?-- I think it's the case of what is the diagnosis that you are treating and once you arrive at a diagnosis there are well established treatment modalities for someone with that diagnosis.

So in terms first of the diagnosis, you'd give weight to the opinion of the treating psychiatrist?-- I would consider that a psychiatrist who has seen the patient repeatedly over time has a better chance of arriving at a diagnosis than a person who's seen the patient only once.

And just so I understood the evidence you gave earlier, you accept, putting aside nomenclature of the disorder, you accept that Mrs Arthur has an anxiety disorder?-- Yes. I think in my statement I called an atypical anxiety disorder, which is a

- an escape valve for psychiatrists who aren't sure what they are seeing, but the predominant symptoms are anxiety and they can't fit it cleanly into another box. Sorry, to answer your question I accept that she has clinically significant anxiety, yes.

And in order to reach a more definite diagnosis you may need to see her on more than one occasion?-- Yes, that would help.

In terms of the account which you have set out in your first report, that's the report of the 24th of October 2003, you have set out the account that Mrs Arthur gave to you?-- That's correct.

And she related to you a number of the events to which she had been exposed during the course of her life?-- She did.

And can I suggest to you that the event which caused her the most distress as expressed to you was the separation from her son?-- That's correct.

And in terms of her describing to you things such as the stabbing of her father-in-law, her living with the dysfunctional bikie, and matters of that, she related really in a matter of fact sort of way?-- She did.

But when it came to relating the loss of her son, that caused her considerable emotion?-- It did.

And in your first report you mention - sorry, before I come to that, in your first report at page 3 you refer to Mrs Arthur saying to you that she felt until she found her son it was like she had been living in a vacuum for 30 years. Is that a typical statement of someone who has suffered a traumatic experience and, in effect, suppressed it for a period of time?-- I have not heard a patient say something like that to me before. I took that to mean that her life had been somewhat empty.

Yes?-- And that until she was able to reconnect with her son that everything that had gone on in between seemed in some way less relevant. That's how I took that statement, and I put it in inverted commas because that is what she said to me and I didn't wish to try and paraphrase it because I wasn't sure what she meant.

Would it be a fair summary of the expression that she gave to you, your understanding of it, that she had lost much of the enjoyment of life for the 30 years between when she lost her son and when she refound him?-- That would be - that would be consistent with that statement.

And consistent with the way that Mrs Arthur presented to you?-- She presented to me in a very distressed and agitated state.

And that distress and agitation reached peaks or crescendos when she was asked to relate the circumstances of separation

from her son?-- Yes, yes. She was particularly concerned that reconnecting with her son had not in fact produced the resolution she was hoping for at the end of that 30 years but in fact had made things worse. I think somewhere else I quoted because she started to go off rails at the end of 2000. So, in fact, she was distressed by the fact that her symptoms appeared to be worsening and not getting better.

Well, can I suggest to you that there were really three events that Mrs Arthur particularly found distressing. One was the separation from her son at birth?-- Mmm-hmm.

The second was when she tried to find her son and he lodged a contact objection?-- Mmm.

And the thirdly the matter that you have just spoken of, the feeling that the reunion hadn't gone as she had expected?-- Mmm-hmm.

They were the three predominant matters that caused her distress?-- They were the three predominant matters - they were three of the predominant matters she expressed to me had caused her distress.

And in terms of your report at - first report still at page 5 under the heading "Mental State Examination", you said, "Ms Arthur was labile at times when discussing the loss of her son." Can you just expand on what occurred then?-- She broke down into tears.

Did she breakdown into tears when describing the fact that her father had been stabbed?-- No, she didn't.

Or she'd been threatened by a bikie?-- She didn't.

Or that she'd been in an unhappy marriage?-- She didn't.

In your first report you accept, do you not, that Mrs Arthur decompensated at the end of the year 2000?-- That's correct.

And in paragraph numbered 2 on page 6 of your first report you accepted that the removal of her son was a significant contributing factor to her current condition?-- That was what I - I considered to be the case, yes.

And in terms of the treatment which has been afforded to Mrs Arthur by Dr Pickering, did I understand your evidence correctly that hypnotherapy is a tool which can be used?-- Yes.

In your view it's uncommon?-- That's right.

And the reason it's uncommon is that because most psychiatrists aren't properly trained in hypnotherapy and it's not taught, I think you said, routinely?-- Yes, because there are other treatments available.

And then you said that it doesn't work on the majority of

patients?-- It's not useful in the treatment of majority of the psychiatric conditions.

But that, I suppose, presupposes that you can try it and see if it works?-- You can.

It's not wrong to do that?-- Well, there would be some conditions where it's contraindicated, but that would not be - PTSD would not be one of those conditions.

You also said that it requires a long period of treatment?-- Often - much longer than other forms of treatment.

And Mrs Arthur's had a longer period of treatment, hasn't she?-- Yes. I'm sure that's not all hypnotherapy.

Oh, quite. But in terms of deciding which types of treatment to use and when, you'd defer to the position of the treating psychiatrist?-- Well, I would defer to that psychiatrist's knowledge of the detail of the patient's history. However, that psychiatrist has arrived at a diagnosis, put that diagnosis on paper, and I would have to say that if a psychiatrist attempting to pass their college exams and be admitted to the fellow of the college said that they would treat post-traumatic stress disorder with hypnotherapy as their first choice they would fail their college exams.

Perhaps not as the first choice but as a choice?-- Yes, as a choice. It would not be something which today we would be accepting as frontline treatment.

You say you'd also give consideration to cognitive behavioural therapy?-- Had a patient failed pharmacotherapy, failed cognitive behaviour therapy, then you may then bring hypnotherapy into the realm of options you'd consider.

You have no doubt that Mrs Arthur requires medication to alleviate her symptoms?-- I would consider medication very valuable, yes.

That medication may be required for at least two years?-- Well, at least one year and probably two years.

Probably two years?-- It would depend on her response. As I said, when I saw her she only started it three weeks earlier, so much too early to make a decision about-----

Yes?-- -----how she was going to respond.

And as I understand your diagnosis and your disagreement with Dr Pickering's diagnosis of post-traumatic stress disorder, you are both talking about anxiety disorders, aren't you?-- Yes.

Is that you don't consider that the removal of one's baby a sufficiently traumatic event to satisfy criteria A?-- I don't.

Your Honour, that's the cross-examination.

RE-EXAMINATION:

MR DAUBNEY: Professor, you were asked about Mrs Arthur's demeanour and mode of presentation to you when you saw her, it being put to you that when discussing the events surrounding separation from her child she displayed considerable emotion, whereas in relation to other stressors in her life she related those in a matter of fact fashion. What significance do you attach to her recounting those various episodes in that manner?-- It appeared to me that she had disengaged the emotion attached to those incidents and connected it to the removal of the child. There was profound emotion around the removal of the child and negligible, surprisingly little emotion attached with other traumatic events, as if they didn't matter very much. So, that was the clinical significance to me.

Thank you. Unless your Honour has any further questions, may the professor be excused, please?

HIS HONOUR: Thank you professor. You are accused from further attendance?-- Thank you, your Honour.

WITNESS EXCUSED

MR DAUBNEY: I call Mr Graham Zerk.

GRAHAM JOHN ZERK, SWORN AND EXAMINED:

MR DAUBNEY: Mr Zerk, can you tell us your full name, please?-- Graham John Zerk.

That's Z-E-R-K?-- Correct.

You live at Salford Waters Retirement Estate at Victoria Point?-- Yes.

You are now retired?-- Yes.

Between 1981 and 1987 you held the position of director of the Department of Children's Services; is that so?-- Correct.

Back in 1967 you were employed as a child-care officer by the Department of Children's Services?-- Yes.

And after commencing your employment did you come to know a lady by the name of Jay Whalley?-- Yes.

Did you have contact with Miss Whalley during the late 1960s?-- Yes.

With what frequency did you have contact with Miss Whalley?-- Probably several times weekly.

What was her position, to your recollection?-- She was a child-care officer at that stage.

And what was the role of child-care officers? What were the functions of child-care officers?-- They had a multiplicity of responsibilities relating to the Adoption of Children Act and the Children's Services Act basically.

Were child-care officers, amongst other things, delegated the task of attesting the consents for adoption?-- Not all, some - some were.

Which of the child-care officers were delegated that function?-- Do you want me to name those who I can recall would have been or-----

Or what qualifications were held by those who were given that function?-- On my recollection they would have each been qualified nurses.

And to your knowledge was there a reason for that?-- Well, the consents were normally given by mothers who were still in hospital at the time and they - after the birth of their babies. Typically it would be given within a hospital setting, and nurses were accustomed to that sort of situation and worked well in cooperation with both patients and medical staff.

All right. From your knowledge what was the position in the

late 1960s so far as the requirement for obtaining babies for adoption or the department obtaining babies to put them out for adoption?-- Well, the department would - when advised that a mother in a hospital was - had raised the possibility of signing a consent for adoption we would send one of those officers to that particular hospital for consultation with the mother and then after the prescribed period between the birth of the child had elapsed would then take the consent if the mother had indicated that that was her wish.

And the baby was then put out for adoption. Was that an easy task, to put babies out for adoption in the 1960s, in the late 1960s?-- Not so much in the 1960s. There were lots of children available for adoption in those days, but they were all placed. Sometimes they were placed with people who had had adoptions beforehand and with whom we were satisfied that the upbringing of the child that had placed previously was successful and a second child could be placed there. But the - if you're speaking about the relative numbers of children available for adoption then as compared to in later years there would have been a larger number at that time than subsequently.

Well, in the late 1960s was there any shortage of babies for adoption?-- Oh, no.

No. It has been suggested in the course of these proceedings that Miss Whalley in dealing with a prospective adoptive mother wasn't friendly, was dominating, bombarded the mother with information or requests and coerced by threats the mother to sign a form of consent of adoption. Does that describe the Jay Whalley that you knew in the late 1960s?-- No, sir.

How would wrote describe Ms Whalley in the late 1960s?-- I would say that she would have been the least assertive of the child-care officers that we had on staff and a person who was very professional in the way she went about her duties and the manner in which she discussed and her cases and liaised with her colleagues. I would - I saw those comments in a news publication this week and I thought then it's not the person that I knew.

Was she unfriendly or aggressive?-- She was not at all unfriendly. She was an exceedingly friendly and likable person.

Was she a harsh person?-- No, sir.

Was she slipshod or hasty in her work?-- No.

What was her attitude that you saw to her work?-- I didn't supervise her work but in discussions between colleagues one got the clear impression of a person who was thorough and concerned to meet the requirements of the Act and professional expectations.

What degree of supervision was there at that time of compliance with the legislative requirements?-- There would

have been supervision by a - at the next level above Miss Whalley and me at that stage there would have been a graduate social worker in the position, if my memory serves me, of senior child-care officer.

And it has been suggested that Ms Whalley threatened a mother with a transfer to Karrala. You are familiar with Karrala?-- Yes.

What do you say about the proposition that Ms Whalley threatened a person with a transfer to Karrala?-- Well, she couldn't do it for a start. I mean, she was not in a position to do that. She would have had to have made a substantial submission to a senior officer to have such a transfer authorised.

Thank you, your Honour. That's the evidence of Mr Zerk.

CROSS-EXAMINATION:

MR WILSON: Thank you. Mr Zerk, you were a child-care officer in 1967?-- Yes, sir.

But not a child-care officer who was tasked with obtaining consents from mothers in hospital?-- That is correct.

You worked in a separate area to Miss Whalley?-- Yes.

You knew her as a work colleague?-- Yes.

And you formed your impression of her as a result of discussions you had with her at work? You never attended with her when she took a consent from a mother?-- No, sir.

And you were familiar that child-care officers attended on their own to take such consents?-- That would be my understanding, yes. There may have been some occasions when a person who was learning the role would go with an experienced person but by and large it would be done alone.

Like trainees and the like?-- Yes.

And do I understand your evidence before to be that there was a, as it were, surplus of babies for adoption in 1967, in the late 1960s I think you were asked?-- I wouldn't like to use the term "surplus", sir, in respect to babies.

There were more babies available for adoption than there were applications for adoption?-- I couldn't comment with confidence about that.

Are you familiar with the reports that were made by the Director of Children Services to the Queensland parliament?-- I know that those reports were made annually.

And in those reports, details were provided of applications received and adoption orders issued?-- That's correct.

And the adoption orders would be issued in respect of babies who were available for adoption?-- That is correct.

And can I suggest to you that for each of the years 1966 to 1970 inclusive, there were more applications received than there were adoption orders issued?-- That may well be the case. I'm not - I'm not aware of the numbers.

Which would tend to suggest that there wasn't - sorry. That there weren't more babies available for adoption than there were applicants for adoption?-- Well, that's your statement, sir. I don't - I said to you I don't know the numbers.

Would you like to look at the Director's reports for each of those years?-- Mmm, yes.

There should be a year written on that one, Mr Zerk?-- This is headed 1966.

You will see that there is a report there to the parliament of applications received?-- Yes.

What's the number?-- 1401.

And the adoption orders issued?-- 1398.

So there is a deficiency there of three?-- The - the difference is three between those two numbers.

Yes?-- But an application is not necessarily approved immediately. An application has to be assessed of course.

Quite?-- And so there's not a - an immediacy of application equals approval equals order made.

And there may be carry over between years?-- There would be.

Can I ask you then to turn to the page with 1967 on it.

HIS HONOUR: You will be putting this in at some stage I take it, Mr Wilson.

MR WILSON: Yes.

HIS HONOUR: Does the material disclose the failure rate of application?

MR WILSON: No, I don't think so?-- I can't see the '67 one.

HIS HONOUR: Mr Zerk, are you able to say whether in 1967 or thereabouts every application for an adoption was favourably received? That's to say, a view was taken that the proposed adoptive parents, that they were suitable and ought to have a baby?-- I'm sorry?

Let me speak up then. I'm inquiring about the position that attained in 1967, if you recall it, or thereabouts and the extent to which applications to adopt a child succeeded. Do you recall now whether every application to adopt a child in that period was favourably received by the department, the proposed adopting parents being regarded as suitable to have a baby?-- I - I very much doubt if there would be 100 per cent approval in any given period of time, your Honour, but the proportion was probably reasonably high.

MR WILSON: I'm sorry, had you found page 1967?-- No, I can't see page-----

Could you hand it back to me, please?-- Thank you.

You will see in 1967 there was details provided for applications received and adoption orders issued?-- Yes.

Again there was a deficiency between the adoption orders issued as it compared to applications received?-- Yep.

In that year, what was the deficiency?-- The difference between 1,646 and 1,386 is the difference between applications received and adoption orders issued.

So in the order of 260-odd?-- I'll believe that, yeah.

And would you turn then to the page which is 1968. It might be - oh, have you got it? Again, the figures are there expressed applications received and adoption orders issued?-- Yes. The applications received, 1,735, and orders issued, 1,371.

So that's in the order of 400 deficiency there?-- Mmm.

Your Honour, I will tender those pages.

HIS HONOUR: The extracts from these reports will be admitted and marked Exhibit 34.

ADMITTED AND MARKED "EXHIBIT 34"

MR WILSON: Your Honour, during the morning break, if we could photocopy those and place those with the record. Mr Zerk, to your knowledge did Ms Whalley remain as a child-care officer until her retirement from the department?-- I'm not sure when she retired from the department, sir.

Are you aware that she changed occupation from child-care officer to something else within the department?-- No.

Thank you, Mr Zerk.

MR DAUBNEY: No re-examination, thank you, your Honour. May Mr Zerk please be excused?

HIS HONOUR: Yes, thank you, Mr Zerk, you're excused from further attendance?-- Thank you, sir.

WITNESS EXCUSED

MR DAUBNEY: That's the defendant's case if your Honour pleases.

HIS HONOUR: Any case in rebuttal, Mr Wilson?

MR WILSON: No, your Honour.

HIS HONOUR: Now, before the addresses begin, I would appreciate some clarity with respect to the nature of the case which the defendant is meant to meet. May I direct your attention to the pleadings, Mr Wilson. Paragraph 15, that issue appears to me not to have been litigated.

MR WILSON: That's correct.

HIS HONOUR: May I take it that paragraph 15 is abandoned?

MR WILSON: That's correct. But as a matter of evidence, the plaintiff will say that she's entitled to rely on the fact the Director knew she was in the care of the Sisters of Mercy, but the allegation there is not pursued.

HIS HONOUR: I'm right in thinking, aren't I, that there is no claim for breach of statutory duty?

MR WILSON: Correct.

HIS HONOUR: Nor is it alleged or implicit in the pleading that Ms Whalley owed a duty which she breached and for which the government is vicariously liable.

MR WILSON: There is no allegation of vicarious liability.

HIS HONOUR: Now then, that brings me to paragraph 8. Paragraph 8(b) sets up the fiduciary duty which I understand you propound. Does that mean that paragraphs 8(a) and 8(c) are abandoned?

MR WILSON: No.

HIS HONOUR: Then what is the foundation for the case sought to be developed in 8(a)?

MR WILSON: That-----

HIS HONOUR: What is the source of the duty?

MR WILSON: The source of the duty is the relationship between the Director and the plaintiff as to guardian and ward respectively.

HIS HONOUR: The reason I ask is that of the three pleaded, only one, that mentioned in subparagraph (b), is said to be fiduciary, and yet as I understand the case you have foreshadowed in the things which you have said since the trial began, the case is founded exclusively on an allegation of breach of a fiduciary duty.

MR WILSON: That is certainly the case, your Honour. What I was endeavouring, perhaps, to say is that that fiduciary duty could be expressed either as in paragraph (a) or (b) or (c) but, certainly, it is confined to a case of breach of fiduciary duty.

HIS HONOUR: That, then, brings me to paragraph 16. I can ignore 16(b)?

MR WILSON: (B), yes.

HIS HONOUR: So far as 16(a) is concerned, the reference to "in the premises" picks up the previous allegations that have been made against the state government and not the Sisters of Mercy.

MR WILSON: Correct.

HIS HONOUR: Now, that being so-----

MR WILSON: And could I make it plain, your Honour, that we don't intend that the government is vicariously or otherwise liable for the acts of the Sisters of Mercy.

HIS HONOUR: That being so, the facts which appear to be picked up by the reference to "in the premises" from paragraph 8 onwards are confined, are they not, to the allegations in paragraph 10, 11, 12 and 13?

MR WILSON: That's so.

HIS HONOUR: Now, this, then, presumably means that the legal contention upon which the case is founded is that the

misconduct of Ms Whalley referred to in paragraph 13 constitutes a breach by the government of its fiduciary duty.

MR WILSON: Yes.

HIS HONOUR: Is that correct? That must mean, I take it, that on the plaintiff's case, the case is one of strict or absolute liability.

MR WILSON: Full breach of its fiduciary duty, yes.

HIS HONOUR: So that the contention is not that the department failed to exercise due or proper care for the interests of your client, the case essentially comes to this: there was a fiduciary duty to further her best interests and her best interests were not furthered because Ms Whalley coerced her into giving up the child.

MR WILSON: Yes.

HIS HONOUR: Now-----

MR WILSON: Now, your Honour - I'm sorry, did your Honour finish?

HIS HONOUR: Not quite. This would mean, essentially, that a serious misadventure which befell the plaintiff would necessarily have involved a contravention of the duty. Let me give you an illustration. If, for example, at the birth a member of the hospital staff had failed to attend to his or her responsibilities, as a consequence of which your client suffered some form of personal injury, the government would be liable because it had failed to perform its duty to further her best interests.

MR WILSON: There are two points I'd make in response to that. On one view of the case, yes. But on this case, not necessary to go that far.

HIS HONOUR: Or if as she had been taken towards the hospital in the ambulance, the vehicle had been involved in an accident and she had been injured, the state would be liable on the footing that in the result her best interests had not been furthered and therefore the state is in breach of its fiduciary duty.

MR WILSON: That's more difficult to say an unqualified yes to because the state isn't involved perhaps in the transportation of her to the hospital.

HIS HONOUR: But the obligation is to further her best interests and if her best interests are not in the result furthered, as I understand it on your case the breach of the fiduciary duty follows.

MR WILSON: As a result of what the state does or omits to do. But in the example which your Honour just put to me, it may be the act of a third party that the state has nothing to do

with.

HIS HONOUR: I'm puzzled by this. In one breath you say it's a strict or absolute liability to further her best interests.

MR WILSON: In terms of the acts and omissions of the state, that's our case. But the state's not the protector of third parties or the insurer of third parties.

HIS HONOUR: Perhaps I should let you develop it in address. The reason I'm anxious to know of these things before Mr Daubney begins is so that the submissions are confined to the particular case which he has to meet and I raise it because, for example, there is no suggestion that there was a breach of the duty on the footing that Ms Whalley was an unsuitable person for the role.

MR WILSON: No.

HIS HONOUR: There is no allegation of want of reasonable case in supervision.

MR WILSON: No, and for obvious reasons with the cases which your Honour has been referred to, that would cause even more problems for the plaintiff than she currently faces.

HIS HONOUR: On your case if, assuming for this purpose that your client's account is accepted, Ms Whalley was having an aberrant day, nonetheless the state is strictly or absolutely liable for her conduct.

MR WILSON: The answer to that is yes and, secondly, there is no pleading by the state that what Ms Whalley did was a misadventure of her own.

Could I add, your Honour, the point I was going to add before when your Honour was asking me some questions about how the duty is phrased? Can I say that there may be some debate in light of comments particularly in Breen, and your Honour raised this the other afternoon, about them being proscriptive rather than prescriptive, whether - we'll contend that it should be the positive duty to act in her best interests but we say the other side of the same coin is not to act against her best interests.

HIS HONOUR: You will have a chance to take me to the paragraph of the pleading that advances that case, Mr Wilson. We may as well take the morning break at this stage. I will adjourn until 25 to 12.

THE COURT ADJOURNED AT 11.18 A.M.

THE COURT RESUMED AT 11.35 A.M.

MR WILSON: I hand up those pages.

HIS HONOUR: Yes, thank you. Mr Daubney?

MR DAUBNEY ADDRESSED HIS HONOUR FROM 11.35 A.M.: Thank you, your Honour. May we hand up two copies of our written outline together with a bundle in two volumes containing copies of the authorities to which we refer, and supplemented by a separate bundle containing copies of the Adoption Act and regulations applicable as at 1967, an extract from the Children's Services Act as at 1967, and an extract from the current edition of Margo v. Lehane c to which we refer in our outline.

HIS HONOUR: Exhibit 35 will be the outline of submissions.

ADMITTED AND MARKED "EXHIBIT 35"

HIS HONOUR: Shall I read these?

MR DAUBNEY: If that's convenient, your Honour.

HIS HONOUR: Mr Daubney, where does the word "Lillian" first appear in point of chronology in the documents? Who first writes it down? Does Ms Whalley do that? Does Ms Robinson do it? Who's the first one shown to have used that word?

MR DAUBNEY: From memory, it appears on, I think, the card recording the making of the order of the Childrens Court, but we will check that, your Honour. We will find that for you. Sorry, I was wrong. The earliest document in time is the Authority to Receive a Child in Care document, which is dated the 16th of February 1967. It refers to her as Lillian and, indeed, all documents from about that time refer to her as "Lillian". We think - we will check - that the name "Lily" doesn't appear in the documents until the 1990s when she's writing to the department, your Honour. We will check that for your Honour.

Sorry, is your Honour on page 11 yet?

HIS HONOUR: Yes.

MR DAUBNEY: I have just seen a typo. I'm sorry about that, your Honour. On page 11 paragraph 18 and 19 should run together. Your Honour probably picked that up on the way through.

HIS HONOUR: Yes, Mr Daubney?

MR DAUBNEY: Thank you, your Honour. We don't - your Honour having been good enough to read the submissions, we don't propose addressing simply by going over those submissions in full now.

May we summarise the position in this way: to say as the plaintiff does that the parties are in a fiduciary relationship does not define the extent of the duties owed. There is, with respect, no doubt about that proposition on the authorities. When one looks at the Australian cases and we have, we hope, by way of assistance set those out comprehensively in our written outline, it is clear that judicial authority in this country is clearly against a finding of the sort of duty contended for by the plaintiff in this case, and even in Canada where a more liberal and expansive approach had been adopted in the approach to the identification and application of fiduciary duty principles it is now clear that the plaintiff's claim would fail.

Even if your Honour were to accept the plaintiff's full version of Ms Whalley's dealings with her on the 8th of September 1967 and even if your Honour accepts that the plaintiff suffered a psychiatric injury as a consequence, the very best, the very best, that the plaintiff could have done would have been to seek to mount an argument in negligence for breach of common law duty. She hasn't done that. The limitation period for such an action has long since expired. There is no suggestion that she tried to get an extension of the limitation period. There is no claim made. At the risk of repeating ourselves and repeating what's fallen from your Honour already, the only claim advanced is for breach of a fiduciary duty.

HIS HONOUR: I don't for the moment see what the difficulty is in suggesting that in principle a fiduciary duty could not be recognised simply because a claim might otherwise have been available in tort. I say that because the source of the duty propounded here is the relationship guardian and ward that derived from the making of the order. This is not a case, for example, where the plaintiff says, "I was a citizen and the government was under a fiduciary obligation not to wrongfully separate me from my baby." This is a case where the claim is founded essentially upon the special burden which the director of the Children's Services assumed as a consequence of the order of the Childrens Court.

MR DAUBNEY: Yes, and - I'm sorry, I didn't mean to interrupt your Honour. There are a number of questions that arise out of that. The first is whether a fiduciary duty or a fiduciary obligation would be superimposed on a corresponding duty of care at common law.

HIS HONOUR: I just find this concept puzzling in circumstances where the relationship was that effectively of guardian and ward.

MR DAUBNEY: Yes.

HIS HONOUR: I don't follow why it's said that some superimposition of a fiduciary duty is inconsistent with the circumstances. I could understand why the - why your client might be advancing such a case if there were nothing more to the relationship between the plaintiff and the government than that she was an infant, that is to say someone who had not attained her majority, but that is not this case. This case is founded upon the special relationship that exists between the director at least and the plaintiff as a consequence of the making of the order.

MR DAUBNEY: That then comes to the second aspect which is it - in the course of discussion it doesn't assist to speak of a fiduciary duty. Perhaps the finer approach, more focused approach, would be to seek to identify what is said to be the fiduciary duty owed.

HIS HONOUR: The pleading does that.

MR DAUBNEY: The pleading does that, and if nothing else to seek to set up the fiduciary obligation in those terms is comprehensively answered by the judgment of her Honour the Chief Justice in the Supreme Court of Canada in the judgment to which your Honour referred to yesterday. May we take your Honour to-----

HIS HONOUR: Perhaps, but before you do, as you will have gathered I'm interested in the notion that the liability for breach of the pleaded fiduciary duties is said to be strict, at least where as in this case the person whose misconduct is said to have given rise to the relevant complaint was an employee of the government.

MR DAUBNEY: Yes.

HIS HONOUR: Now, what, if anything you wish to say, and by reference to the authorities preferably, is the significance of the contention that the liability in this case, at least where the misconduct is that of a government employee, is said to be strict or absolute?

MR DAUBNEY: We're not in a position to say anything because that's not the case that has been advertised against us, with respect, your Honour. We're here to meet the pleaded case.

HIS HONOUR: No, the case is that because an employee of the government exercised coercion as a consequence of which the consent was unwillingly procured the government is strictly liable.

MR DAUBNEY: I'm sorry to be difficult, your Honour. Yes, we heard that for the first time this morning. That is not the case that's been advertised.

HIS HONOUR: It is, however, the pleaded case. It is not said against you, for example, that the government is liable

because it failed to exercise reasonable care----- 1

MR DAUBNEY: No.

HIS HONOUR: -----for example, by putting Ms Whalley forward as a suitable person to take consent when she was not, for example by failing to insist that another person was present when the consent was taken, by failing to ascertain whether the plaintiff was in a physical or psychological condition which would have enabled her to give proper consideration and 10 so on. The case is, that I understand it, the government is strictly liable for Ms Whalley's misconduct.

MR DAUBNEY: Yes.

HIS HONOUR: And I'm interested in that notion.

MR DAUBNEY: May we address that, perhaps in a roundabout way by taking your Honour to the judgment of the Chief Justice in the Canadian case, because it's only by identifying what her 20 Honour, who delivered the judgment of the Court, said there about the content of the duty said to be - the duty sought to be set out against us in this case that we can give your Honour the reason for directly answering your Honour's question now.

HIS HONOUR: By all means, but do I take that it that means that so far as your researches go there is no consideration in the Australian cases and commentaries of this notion? 30

MR DAUBNEY: If your Honour will bear with me for a moment, we have it in mind that there has been discussion. I might have my junior turn that up while I take your Honour to the Canadian case.

HIS HONOUR: As you may have gathered from what I said yesterday, I had read it.

MR DAUBNEY: In which case we won't detain your Honour too long with it, save to take your Honour or highlight for your 40 Honour what was said by her Honour starting at paragraph 41 of the judgment.

HIS HONOUR: This comparative jurisprudence is interesting but it is not binding.

MR DAUBNEY: No, it's not.

HIS HONOUR: Has this question not been addressed in Australia? 50

MR DAUBNEY: Well, I was about to take your Honour, appreciating that your Honour has read this, to paragraphs 47 and then to 49 because what her Honour says there is it's positive for an understanding of and is consistent with, with respect, the notion that what is sought to be protected in the current context by the imposition of a fiduciary duty are the matters to which her Honour refers in paragraph 49, and an

element of that - as your Honour says these discussions of comparative jurisprudence are interesting. It is interesting that there is still tension between us and our Canadian cousins in relation to the requirement that the interest be economic or proprietal. It is still the position in Australia that that's the nature of the interest, that the fiduciary duty imposed needs to be protected.

But, importantly, what her Honour's judgment shows is that it's not just enough to say somebody did something bad to me, somebody who stands in a fiduciary relationship did something bad to me, or didn't do something good for me. It has to be somebody did something bad to me with a consequence of preferring their own interest or preferring somebody else's interest above that of the person who has the benefit of the fiduciary relationship.

HIS HONOUR: Now, here again we come to the question of the relationship between the misconduct alleged against Ms Whalley and the absence of an allegation of a basis upon which either the Director of Children Services or the state government is liable for it on the footing of breach of fiduciary duty. Ordinarily these questions of breach of fiduciary duty arise in the context of principal and agent, partners and the like. This is a different case. But there might have been, one would think, some consideration given to these problems in relation to cases like Cubillo where no personal fault on the part of the relevant head of the government department was alleged. This, it seems to me, is an unusual aspect. There is no case that Ms Whalley was in breach of a relevant duty for which the government is vicariously liable.

MR DAUBNEY: No.

HIS HONOUR: The allegation is that the government is liable for breach of its fiduciary duty because an employee engaged in relevant misconduct.

MR DAUBNEY: Yes.

HIS HONOUR: And I'm interested in seeing what the cases say concerning that connection.

MR DAUBNEY: May we add - we'll do that but may we add to what's just fallen from your Honour by saying this: nor is there an allegation and nor is there any evidence that Ms Whalley, assuming all of the things against her, acted in that way with a consequence of preferring her own interest or that of the state. There is just no evidence of - there is neither an allegation of that nor any evidence of that.

HIS HONOUR: It may be, if the facts have been reliably recounted by the plaintiff, that Ms Whalley thought it would be in her best interests and/or in the best interests of the child if the child were adopted.

MR DAUBNEY: But with respect, your Honour, that's not enough. That's why I took you to the Chief Justice's decision in the Canadian case.

HIS HONOUR: Yes, but-----

MR DAUBNEY: That might be a goal, a laudable object, but to express it in those terms isn't enough with respect. And her Honour's judgment in Canada - in the Canadian case, with respect, really puts paid to that notion that one can simply

fly the kite of some general notion of acting in somebody's best interests as being expositive or descriptive of the fiduciary duty owed.

HIS HONOUR: I have noted that her Honour's reasons contain no reference to authorities in other jurisdictions that might matter to this question.

MR DAUBNEY: No, no.

HIS HONOUR: It is hard to believe that this is the first occasion on which the problem may have been usefully considered either by a report or even, perhaps, by a commentator.

MR DAUBNEY: Well, it is certainly - indeed, we understood our learned friend to concede this in his opening, this is a novel case as we understand it, your Honour. We haven't in our researches being able to come up with a case directly dealing with the same fact situation.

HIS HONOUR: I wouldn't expect that except, perhaps, in Europe or the United States.

MR DAUBNEY: Can we take your Honour - if your Honour has the judgment of the Full Court in Cubillo. That's in the bundle of cases that we gave your Honour.

HIS HONOUR: Where do I see that? Yes, I have it.

MR DAUBNEY: And can we take your Honour to page 573 of that judgment.

HIS HONOUR: Yes.

MR DAUBNEY: Your Honour will see, starting at the bottom of page 573, the invocation of the sort of relationship.

HIS HONOUR: Well, one can see from the foot of page 573, that is to say the last sentence of paragraph 452, the basis upon which the liability was sought to be sheeted home to the Commonwealth.

MR DAUBNEY: Yes.

HIS HONOUR: It wasn't said to be strict or absolute.

MR DAUBNEY: No.

HIS HONOUR: It wasn't said to be vicarious.

MR DAUBNEY: No.

HIS HONOUR: This is a Barnes and Addy type liability.

MR DAUBNEY: Mmm.

HIS HONOUR: On the footing of knowing participation in the

breach.

MR DAUBNEY: Yes.

HIS HONOUR: Well, there is no suggestion of that in this case. No such allegation has been made.

MR DAUBNEY: No.

HIS HONOUR: The case against the government is that Ms Whalley's misconduct, which they are not said to have been complicit, results automatically in a breach, presumably by the Director, who presumably is implicitly said to be the defendant.

MR DAUBNEY: Yes.

HIS HONOUR: But you don't put it in question that the Director may be treated as your client for this purpose, do you? There is no allegation in your pleading-----

MR DAUBNEY: No, no, that's not-----

HIS HONOUR: -----that you can resist this case on the footing that the government is not liable for any breach of fiduciary duty by the Director.

MR DAUBNEY: That's so.

HIS HONOUR: Well, the connection then between the misconduct in the case of Cubillo and the Commonwealth government is identified in that passage.

MR DAUBNEY: Yes. Then if we could take your Honour to page 575, starting at paragraph 460 under the scope of fiduciary duties.

HIS HONOUR: Yes.

MR DAUBNEY: Paragraph 461 picks up the point that your Honour has just been making.

HIS HONOUR: I haven't read this case.

MR DAUBNEY: Mmm. I'm sorry, I won't rush your Honour.

HIS HONOUR: Yes.

MR DAUBNEY: Particularly relevant is the passage starting from paragraph 462 on, your Honour, and it extends then for some pages.

HIS HONOUR: Yes.

MR DAUBNEY: And in particular, what was found by his Honour in paragraph 466 as the second of insurmountable obstacles faced by the plaintiffs in that case.

HIS HONOUR: As I say, I don't see it, for the moment at least, as much of a point for the reason that the relationship of guardian and ward exists here and that adds an extra dimension that attracts fiduciary obligations of some sort.

MR DAUBNEY: And at the risk of repeating ourselves, your Honour, it may well do so but one needs to identify the ambit of those fiduciary obligations, and in doing so, those fiduciary obligations will not extend over or impinge on duties that are owed at common law. That's really the extent of the point with respect, your Honour. They won't replace the common law duties.

We have sought in our outline, your Honour, to give your Honour full reference to the authorities. Unless your Honour requires us to, we weren't proposing to take your Honour chapter and verse through those cases. Your Honour will have seen that there is also a section of the submissions on pages 18 and 19 under the heading, "Any plan by the plaintiff was in tort".

HIS HONOUR: If that proposition expressed in that fashion is correct, it has the consequence that if the general law afforded some kind of remedy, then there is no scope for the imposition or superimposition of a fiduciary duty. I would be very surprised if that is a comprehensive statement of the law.

MR DAUBNEY: Can we take your Honour then to Breen and Williams?

HIS HONOUR: It's a way of saying that if, for example, any aspect of the conduct of Ms Whalley could be characterised as giving rise to some liability in tort, that there is no scope for the imposition of a fiduciary duty. That would just be remarkable.

MR DAUBNEY: Well, with respect, as was said by Chief Justice Brennan in Breen and Williams at page 83:

> "In this respect the notion of fiduciary duty in Canada does not accord with the notion in the United Kingdom nor, in my opinion...there is no relevant subject matter."

I'm sorry, I have given your Honour the wrong reference.

HIS HONOUR: That's a different issue.

MR DAUBNEY: Yes. The correct-----

HIS HONOUR: Mr Daubney-----

MR DAUBNEY: I'm sorry.

HIS HONOUR: -----expressed in that way, there would never be a scope, the scope of the operation of a fiduciary duty in a relationship between principal and agent. You could always

characterise that as giving rise to express or implied contractual obligations.

MR DAUBNEY: Yes.

HIS HONOUR: If the general proposition for which you contend is correct, that would be the end of the notion that there can be in addition fiduciary duties. Yet that is not the law.

MR DAUBNEY: No, it is not, and that was made clear by the judgment of Justice Mason as he then was in Hospital Products so that's-----

HIS HONOUR: Presumably you have better fish to fry than this one.

MR DAUBNEY: We raise it - sorry, we're referring to it simply because this was one of the points that was opened against us, your Honour.

HIS HONOUR: You pleaded it against the plaintiff.

MR DAUBNEY: Mmm. I'm sorry, the reference I should have given your Honour in Breen and Williams was the judgment of Justices Dawson and Toohey at pages 93 and 94.

Perhaps a better way of resolving the discussion that your Honour and I have just been having is by reference to the judgment of Justice Pincus quoted in the joint judgment of Justices Gaudron and McHugh on page 110 of the report, where his Honour remarked, "Fiduciary duty should not be superimposed on these common law duties simply to improve the nature or extent of the remedy." That, of course, is another question.

On page 113 of Breen and Williams, their Honours noted that:

> "One significant difference between...application to those relationships."

We have otherwise given your Honour the references to Breen and Williams.

Be all that as it may, with respect, for the reasons advanced in our outline, it is our submission that as a matter of law, the fiduciary obligation of the nature contended for in this case simply does not arise or exist.

HIS HONOUR: It would mean, I suppose, if it existed, that if a government vehicle had been sent to transport the plaintiff from one place to another and in the course of it the driver, let us assume a government employee, had been negligent, as a consequence of which the plaintiff suffered personal injury, your client would be liable.

MR DAUBNEY: That would be the effect of what's contended against us, yes.

HIS HONOUR: At least for the acts and omissions of government employees, there is no escape appears to be the proposition.

MR DAUBNEY: Yes. And that, with respect, is clearly contrary to principle.

HIS HONOUR: Yes.

MR DAUBNEY: The only case sought to be maintained by the plaintiff is for equitable compensation for breach of the alleged fiducial duty said to arise from Ms Whalley's contact with the plaintiff on the 8th of September 1967. Expressing it that way, your Honour, focuses attention on the narrow scope of the factual issues for determination. We have-----

HIS HONOUR: You're proposing to pass past paragraph 15 on page 10, are you? I have some difficulty following the proposition.

MR DAUBNEY: Oh, I beg your Honour's pardon.

HIS HONOUR: Could I raise it then so you can clarify it in my mind?

MR DAUBNEY: Of course, your Honour.

HIS HONOUR: As I understand the case, it is that the forced separation has resulted in psychiatric injury put shortly.

MR DAUBNEY: Yes.

HIS HONOUR: Why is that not compensable?

MR DAUBNEY: At common law it is, your Honour.

HIS HONOUR: Why is it not compensable in equity?

MR DAUBNEY: Oh, we were referring there, your Honour, really to the nature of equitable compensation, making the point, perhaps inelegantly, that equitable compensation as it is understood and been expounded, explained in the texts of the authorities, goes to economic interests. It is not apt - it is not an apt system of providing compensation for damages for personal injuries.

HIS HONOUR: So that, if Ms Whalley had said, coercibly, "Give up the child", and if that was a breach of a fiduciary relationship, there can be no compensation in equity. But if she had said to the plaintiff, "I see you've been knitting a baby's bonnet", and coerced her into giving up the bonnet, she could get money for the deprivation for the bonnet. That's what it comes to, doesn't it?

MR DAUBNEY: No, we wouldn't have put it in those terms, your Honour.

HIS HONOUR: I know. But that's the consequence of accepting the proposition that the claim protects only economic

interests.

MR DAUBNEY: But, your Honour, we advance that, because that, with respect, is the law in this country. That fiduciary obligations protect economic or proprietorial interests. That's one of the elements.

HIS HONOUR: So the Full Court or the Federal Court seems to have assumed. But there is no decision binding on me that holds that that is the law, is there?

MR DAUBNEY: I'm just doing a quick review in my mind as to whether there is anything in Breen and Williams about this, your Honour. Would your Honour bear with me for a moment?

HIS HONOUR: Yes. Mr Wilson might not mind if you deal with it in reply. Do you, Mr Wilson?

MR WILSON: I don't, your Honour, no.

MR DAUBNEY: Thank you, your Honour.

HIS HONOUR: Yes. You want to come to the facts?

MR DAUBNEY: We do.

HIS HONOUR: Yes.

MR DAUBNEY: The only direct evidence of what occurred on the 8th of September 1967 is that which fell from the plaintiff and in our submission your Honour should be very slow indeed to accept her evidence on what is in her case the central, factual issue.

We have set out in paragraph 20 of our outline of our submissions in respect to the matters in relation to which we would submit your Honour can make findings of fact on the evidence before you, the nature and extent of her relationship with Mr Benko for only about a month prior to her falling pregnant to him, the taking into custody by the police on the night of the 15th of February 1967, the fact that, at highest, Mr Benko visited the Holy Cross Home only twice, the fact that on the morning of - I'm sorry, and otherwise made no attempt to re-visit her or contact her or follow up on the marriage papers that he said he had left there.

HIS HONOUR: You refer to his evidence, or perhaps his and hers, as involving some delivery of the marriage papers. Is it allegedly you say?

MR DAUBNEY: Yes, your Honour. The reason I qualify it in that way is because in paragraph 23 of the outline, we invite your Honour to be slow to accept the evidence, their evidence, about the marriage consent papers.

HIS HONOUR: How can you raise a Jones v. Dunkel point without having cross-examined the plaintiff about this? There is no suggestion to her that these people are alive, no facts put to

her from which - which give her an opportunity to comment upon the absence of these witnesses, nothing.

MR DAUBNEY: We understand that, your Honour.

HIS HONOUR: Well, how is it open to you to advance a Jones v. Dunkel point without raising these things in the course of the plaintiff's case?

MR DAUBNEY: Your Honour, whether or not it was put to the plaintiff of course is a relevant consideration but, by the same token, there was no, as we say, evidence from any of the people that your Honour would have expected to hear from to support that.

HIS HONOUR: But that only matters if there's some reason to suppose that they may have been in a position to offer useful evidence and that their absence from the witness box is to be explained upon the footing that the plaintiff apprehends that if called to testify, the evidence would not assist her case.

MR DAUBNEY: We accept that, your Honour, and I won't push the point any further.

HIS HONOUR: I could understand that you might have - if the case had been conducted differently had been in a position to suggest that the absence of close relatives, especially the plaintiff's mother, might have assumed significance. But in the absence of exploring it in the plaintiff's case I think it would be wrong principally to evoke Jones and Dunkel.

MR DAUBNEY: We won't press it on that point, your Honour. Returning to the chronology which does arise on the evidence, however, the next relevant event is that on the morning of the 1st of September 1967 the plaintiff went into labour and was transported to hospital and gave birth later that evening. Two or three days after the birth Mr Benko went to see her. He'd been contacted by her sister and told of the birth and the location of the plaintiff. He went to the hospital with a friend, Mr McCabe, who we note wasn't called, and your Honour will recall the evidence was that after that visit Mr Benko made no attempt to do any of the matters that we have listed there on page 13: contact the plaintiff, either at the hospital or at the Holy Cross home, contact the hospital to find out about the release of the plaintiff and his son, contact and find his son, inquire as to the whereabouts of the plaintiff and his son, contact the plaintiff's sister for information - try to contact the plaintiff's sister for information, leave a forwarding or contact address, or contact the plaintiff's mother. So this was the only occasion on which Mr Benko saw her and that was two or three days after the birth.

The next event was that on the 4th of September the plaintiff was seen by Miss Robinson who took the information contained in the Report of Investigation. We would submit, your Honour, that that's in Exhibit 2.

HIS HONOUR: Yes.

MR DAUBNEY: The document speaks for itself. It reports, amongst other things, that the child's father would not support the child.

HIS HONOUR: Now, did the plaintiff accept that she must have conveyed to Miss Robinson the idea that Miss Robinson has recorded here? In other words, does she accept that she told Miss Robinson, in effect, that Mr Benko either could not or would not support the child?

MR DAUBNEY: No, your Honour. The relevant part of the cross-examination is page 98 of the transcript starting at the top of the page and in relation to that particular answer her answer at about line 38 was, "I do not recollect.", and further that is, "That answer is the answer that you gave the person filling out the form, isn't it?" "I don't remember."

HIS HONOUR: No other potential source of the information has been identified?

MR DAUBNEY: No. No, not at all, and your Honour will see at the top of the that page she had confirmed that most or at least some of the matters of information on the form are matters that only she could have given to whoever was filling out the form.

So, the form, as your Honour has seen, records the notation, "Baby for adoption?" In Miss Robinson's absence it's not possible to know precisely now what she intended to convey with that notation but in our submission it's a clear and reasonable inference that the notation was intended to signify that the plaintiff was undecided as to whether she was going to give the baby up for adoption as at the 4th of December - 4th of September, I beg your pardon.

HIS HONOUR: Well, at least that was Miss Robinson's understanding.

MR DAUBNEY: Yes.

HIS HONOUR: Now, at this stage on the evidence such as it is what was the position with respect to the administration of drugs?

MR DAUBNEY: We don't know, and I mean that in relation to the evidence there is no particular, as we recall, in the evidence as to what drugs were administered when. The plaintiff spoke about being sedated. We don't have the hospital charts to which we could have reference to ascertain what drugs were administered, what the medication regime was, over what period of time and so on.

HIS HONOUR: Remind me of the evidence with respect to the lactation suppressant. My recollection, although I'm not sure of the detail, is that - was it Mrs Cattanach who indicated that - or perhaps it was Miss Feil, I'm not sure - that before the lactation suppressant would have been administered it would have been necessary for a doctor to prescribe the drug.

MR DAUBNEY: That's right.

HIS HONOUR: And that - it may be no more than supposition on the witness's part - the doctor would not have prescribed such a drug if the mother had been intending to breast feed the child, at least if she'd been physically able to do so.

MR DAUBNEY: Yes. Would your Honour bear with us for a moment? We will see if we can turn that up for you.

HIS HONOUR: I had no view about this. I just wondered whether that evidence would, if it assumed any significance, tend to suggest that the medical practitioner who prescribed it had done so because of the belief that the child was to be adopted. You might have Ms Phillipson Look for the passage, Mr Daubney.

MR DAUBNEY: Yes. She was cross-examined on it. We have got

the passage on which we re-examined, your Honour, on that. That's on page 222 of the transcript. That's where she confirmed that this sort of information would be on the file in the doctor's writing. But your Honour was asking about something a little different. I might have Ms Philipson turn that up.

I'm sorry, I've just found it, your Honour. It is on page 210. "You wouldn't administer it" - the lactation drug - "to the mother until the doctor has given the instruction." "And in the case of a baby who's to be put out for adoption until that decision has been made?" "Well, yes, that decision would have to made. The doctor would be aware of that decision when he prescribed it."

HIS HONOUR: Then the passage also on the following paragraph.

MR DAUBNEY: Yes. Coming back to the chronology, the next event is the attendance of Miss Whalley on the 8th of September 1967 and we make the point in - on page 14 of our outline that the triggering event for Ms Whalley's attendance would have been, according to the system described by Mrs Cattanach and Miss Feil, the notation on the report as to investigation by Miss Robinson of the baby being for adoption or a query as to the baby being for adoption. If the baby was not for adoption, then the child-care officers didn't attend on the mother.

The plaintiff was then transferred back to the Holy Cross home and in October 1967 she was discharged and sent to Sydney to her mother and stepfather and the only contact thereafter between the plaintiff and Mr Benko until she sought him out many years later was one letter from the plaintiff to him which reached him after some months and one letter from him in response which the plaintiff apparently did not receive.

The plaintiff's case against the State turns entirely and solely on her version of the attendance on her by Miss Whalley. Her version is completely uncorroborated.

HIS HONOUR: Why is it? There's evidence before me, isn't there, from Mr Benko?

MR DAUBNEY: No, not of the attendance by Miss Whalley.

HIS HONOUR: That she told him of the Karrala threat?

MR DAUBNEY: She told him of a Karrala threat, not that Miss Whalley had made a Karrala threat to her, and indeed my recollection - I will stand to be corrected - is that at that stage of his cross-examination Mr Benko was talking about Mother Lian. I will check that, your Honour, but I rather thought he was talking about Karrala being raised in the conversation when he attended at the Holy Cross home. I will check that for your Honour.

HIS HONOUR: You may well be right.

MR DAUBNEY: In any event, the plaintiff said in evidence that she remembers very little about the adoption stuff. That's consistent with Dr Pickering's record of her telling him that the whole episode is a blur and that her memories are unclear.

We submit, your Honour, that despite her protestations it is most likely that she had told Miss Robinson that the father would not be supporting the child. Despite Mr Benko's protestations it is most likely that he had told her that when he saw her two or three days after the birth, and him telling her, that is consistent with what can only be described, with respect, as Mr Benko's complete and utter disinterest in the fate of the plaintiff and the baby after his sole visit to the hospital two or three days after the birth.

It is and it assumes some significance apparently in the plaintiff's mind and evidence that she didn't want to give up the baby because she was confident that she and Mr Benko were getting married. We would submit, your Honour, that having seen and heard them your Honour simply should not accept that they had any plans to get married. At best, marriage may have been a romantic notion in her mind but this evidence-----

HIS HONOUR: Neither of them suggests that the topic had been discussed.

MR DAUBNEY: Mr Benko confirmed that he hadn't asked her to marry him.

HIS HONOUR: Yes. But discussing the prospect, that is to say perhaps broaching it, is a different issue from whether the proposal is put. I may be wrong but I rather got the impression that there was no suggestion that the topic had even been discussed however tentatively.

MR DAUBNEY: What emerged is the phrase that the plaintiff used on several occasions in the course of her evidence, "It was a foregone conclusion", and Mr Benko used a similar sort of phrase. But, with respect, that sort of assertion today is completely at odds with the objective evidence of the length of their relationship and Mr Benko's and the plaintiff's conduct, both during her period of time at the Holy Cross home and after her release both from hospital and the Holy Cross home.

I mean, with the greatest respect, it just defies credibility to suggest that two young people so much in love that it was a foregone conclusion that they were going to get married would act in the manner that they did and particularly that Mr Benko would display, as we said, the complete and utter disinterest that he did. With respect, it just strains credibility beyond a reasonable limit to accept that.

We also submit, your Honour, that apart from the unreliability - sorry, the other thing I should say is that we would ask your Honour to note the evidence of Professor Whiteford this morning in terms of the plaintiff's memory. I don't have a precise note of the professor's evidence but your Honour will

see in the transcript that he referred to her now expressing or having unlocked emotion rather than true memory. There is no-----

HIS HONOUR: So far as the reliability of the memory issue is concerned, on the evidence was the first complaint made in 1991 in the letter?

MR DAUBNEY: Yes. There is, on the evidence, simply no reason apart from the plaintiff's evidence to think that Ms Whalley acted in the threatening, bullying, dominating, coercive manner which the plaintiff contends for. That just wasn't in her character. It wasn't any part of her job. It was not the person described in evidence before your Honour, and there was simply no reason for her to act in such a fashion.

HIS HONOUR: But there is no suggestion that she was on commission. But so far as the coercion case is concerned, why isn't the fact that the plaintiff signed as "Lillian" some support for the suggestion that she was doing as she was told?

MR DAUBNEY: The plaintiff's name on all of the documents from that time is "Lillian", your Honour. The mere fact that it's signed in that way doesn't tend one way or the other, with respect.

HIS HONOUR: Do you mean that was the name she was then using or at least thought she should use on formal occasions?

MR DAUBNEY: I can't say that, your Honour. All I can say is the documents from that time all record the name "Lillian". So much is apparent from Exhibit 2. And Exhibit 6, your Honour, on which we note she appears to have used a different signature.

HIS HONOUR: Why is that not some support for her?

MR DAUBNEY: Because immediately above that - when I say "immediately", half-a-dozen lines above that - her name is expressed as "Lillian", your Honour.

HIS HONOUR: But not by her. That's not her handwriting.

MR DAUBNEY: No. Well, she certainly hasn't corrected it on any of the documents, your Honour.

HIS HONOUR: Well, does it not suggest then, comparing Exhibit 6 with the consent that she did sign, that it is likely that it is true that Miss Whalley told her to sign her full name?

MR DAUBNEY: That may be the case, your Honour, and----

HIS HONOUR: Or to sign as "Lillian Josephine"?

MR DAUBNEY: Well, both of those possibilities are open, your Honour.

HIS HONOUR: The birth certificate is, what, three days after the birth and she then certifies that her true name is Lillian.

MR DAUBNEY: Yes. Your Honour, we make the submission in paragraph 26 to remind your Honour that even if despite what we have said about the evidence your Honour were prepared to accept that Ms Whalley did impose some degree of pressure on the plaintiff, your Honour should, of course, be conscious of the fact that the social and economic milieu of 1967 is quite different, quite different, to the contemporary 2004 world in which we live.

HIS HONOUR: If the conduct alleged against Ms Whalley occurred in 1967 it would have been a criminal offence.

MR DAUBNEY: That's why we say if - that's what I we say without - sorry.

HIS HONOUR: It's an allegation of serious misconduct by the standards of any age. It's scarcely to be accepted that I could take the view that that conduct, though it would not be regarded as acceptable now, should be seen as having been acceptable in 1967.

MR DAUBNEY: I'm-----

HIS HONOUR: It's a remarkable notion.

MR DAUBNEY: I'm expressing myself badly, your Honour. That's not the notion that I'm advancing. The notion that I'm advancing is that your Honour would have regard to in considering whether it's possible that in discussing the pros and cons with her, as I think it was Mrs Cattanach said she did, that in the course of that the cons in the social and economic milieu of 1967 took some prominence.

HIS HONOUR: That's not the case you have to meet. You don't have to meet a case that there may have been some lack of balance in a discussion of the advantages and disadvantages. No such case is alleged against you.

MR DAUBNEY: In which case-----

HIS HONOUR: The case is one of coercion, essentially criminal in nature.

MR DAUBNEY: Yes. Which does two things. Firstly, of course, it raises the question of the degree to which your Honour needs to be satisfied.

HIS HONOUR: No, it doesn't. The case is not one which can now result in any criminal prosecution against anyone.

MR DAUBNEY: But, in any event, we - in view of what's fallen from your Honour we don't need to trouble you any further with what's set out in that paragraph.

HIS HONOUR: It is at least a bold submission. Yes?

MR DAUBNEY: We have already pled the submission that even if your Honour is against us and finds the fact of the meeting with Ms Whalley as contended for by the plaintiff, that's still not a breach of the fiduciary duty. We won't repeat that, your Honour.

Even if a finding of a breach of any fiduciary duty is found, in our submission the plaintiff ought be denied relief in equity on the basis of the doctrine of larches. We have given your Honour our submissions on that.

HIS HONOUR: The case against you here appears to be that if the litigation had been commenced, let us assume within the limitation period, it wouldn't have made - for an action in tort it wouldn't have made any difference. The limitation period in those days would have expired when at age 24. So, six or seven years later the proposition appears to be it's not shown on the material before me that you're actually disadvantaged by the loss of documents. So it would assist me if this could descend from the general to the particular. I know this is a little hard in the sense that the lapse of time makes it difficult to know precisely what might have been there, in particular whether there might have been a case note or diary entry of the attendance by Ms Whalley on the plaintiff, although the probabilities appear to be against that.

MR DAUBNEY: Yes.

HIS HONOUR: So, you have lost what - you have lost the hospital records of - when drugs were administered and what were administered.

MR DAUBNEY: Yes.

HIS HONOUR: You have lost any nursing notes that might have been kept concerning the plaintiff's condition from day to day.

MR DAUBNEY: Yes.

HIS HONOUR: And those things matter because of the suggestion that she was sedated at the time the consent was extended. What else have you lost that has made the defence of the case more difficult than it might have been if brought within the limitation period in tort?

MR DAUBNEY: The F file, your Honour. Perhaps that's incumbent in the documents your Honour's just identified.

HIS HONOUR: I don't know. What might have been on that? What I'm interested in seeing is that this just isn't - isn't just a proposition advanced in the air.

MR DAUBNEY: No.

HIS HONOUR: That there are actually documents or in the case of people people whose - the availability of which and of whom has been affected by the passage of the years.

MR DAUBNEY: Yes. Well, the people are easily identified, with respect, your Honour, and the person is identified.

HIS HONOUR: When did Miss Whalley die?

MR DAUBNEY: Not that long ago, your Honour. It's only in the last six or seven years or so. There's a death certificate.

HIS HONOUR: Before the litigation was foreshadowed?

MR DAUBNEY: Before this litigation was foreshadowed. Not before the plaintiff had made a complaint about the matters the subject of this litigation, however.

HIS HONOUR: Well-----

MR DAUBNEY: The F file-----

HIS HONOUR: Your address won't finish before the luncheon adjournment, Mr Daubney. Might it be possible to reduce to writing a list of the specific documents and people in the matter - which and who matter for this purpose?

MR DAUBNEY: Certainly, your Honour.

HIS HONOUR: With references to the passages in the evidence that relate to this.

MR DAUBNEY: In relation to - your Honour asked me before about Mr Benko having been told about the threat to go to Karrala House and my recollection was that that was something that he got from the Mother Superior. That evidence is on page 128 of the transcript, your Honour, starting at about halfway down the page. "She told me she was threatened to go to Karrala House. I don't know where she was", and then if we can invite your Honour to keep reading.

HIS HONOUR: After all these years it's not surprising that he has a lot of difficulty recalling the context.

MR DAUBNEY: Well, that, with respect, might be a double-edged sword for him, your Honour. Either he recalls the context of all of these discussions or he has a poor recollection of things.

HIS HONOUR: It wasn't put to him though, was it, he's had discussions with the plaintiff over the years which might have tended to-----

MR DAUBNEY: No.

HIS HONOUR: -----substitute for his actual recollection the things which have emerged during the these conversations?

MR DAUBNEY: No.

HIS HONOUR: But it's plain they discussed these things, or some of them. Yes?

MR DAUBNEY: Is that a convenient time, your Honour?

HIS HONOUR: Yes.

THE COURT ADJOURNED AT 12.59 P.M. TILL 2.30 P.M.

THE COURT RESUMED AT 2.28 P.M.

HIS HONOUR: Mr Daubney.

MR DAUBNEY: Your Honour, may we hand your Honour a copy of two lists. The first is headed "List of Documents". The second is headed "Laches - Witnesses".

HIS HONOUR: The list of documents will be Exhibit 36.

ADMITTED AND MARKED "EXHIBIT 36"

HIS HONOUR: The document headed "Witnesses", Exhibit 37.

ADMITTED AND MARKED "EXHIBIT 37"

HIS HONOUR: Doesn't Exhibit 27 suggest it's unlikely that there would have been - highly unlikely that there would have been any case notes or diary entries by Mrs Whalley?

MR DAUBNEY: I will have to have a look at Exhibit 27, your Honour, just bear with me. May we respectfully inquire on what basis your Honour makes that question?

HIS HONOUR: It is a couple of days since I looked at it but I thought there was something said on the second page to suggest that there's - what I'm thinking of is the last sentence in the second-last paragraph, "No procedures."

MR DAUBNEY: Procedures is one thing but whether there were notes made and so on.

HIS HONOUR: Well, was there any provision on any of these forms for information about the personality of the mother? See, I rather have the impression from Mr Wilson's cross-examination that it may well have been, at the end of the day, that the witness who was testifying to bringing into existence documents which would record information beyond the forms I have probably accepted at the end of the day, that the information to which she was referring would have been included on one such form.

MR DAUBNEY: Yes. The closest that we get to is of a "report of investigation", which talks about things like information about educational standard, special interests, hereditary traits.

HIS HONOUR: What has gone that might have mattered? Start

with the list of documents. Adoption file. What on the evidence might possibly have been on the adoption file which could assist in the resolution of this case?

MR DAUBNEY: Any notes kept by Ms Whalley.

HIS HONOUR: But is there anything to suggest she kept notes?

MR DAUBNEY: No. But, with respect, in the absence of Ms Whalley, we don't know. That's one of the problems. We just don't know. Indeed, the evidence of the witness Scott was that they're unable to say what would have been on the adoption file.

HIS HONOUR: Well, did-----

MR DAUBNEY: So your Honour is really not assisted in speculating as to what might or might not have been there. What we can tell you is a file to which we properly should have had recourse for the purposes of preparing to meet this claim is gone.

HIS HONOUR: Now, did Mrs Cattanach keep additional notes? Is there any suggestion she did, in taking consents?

MR DAUBNEY: No, not that I recall.

HIS HONOUR: Now, Ms Feil, is there any suggestion that she took-----

MR DAUBNEY: No, not that I recall, your Honour.

HIS HONOUR: -----notes? Well then, one would think that the chances that Ms Whalley did would be slim.

MR DAUBNEY: Mmm. But that may well be the case, your Honour. We've also heard that Ms Whalley was a thorough and conscientious person. It may be that she was more thorough in her approach. The next file-----

HIS HONOUR: Well, the lawyers didn't frighten people as much in those days.

MR DAUBNEY: I hope lawyers don't frighten people so much even these days, your Honour.

HIS HONOUR: They do. People are much more defensive in the way they - especially in the medical provision and paramedical positions, are much more inclined to bring into existence forms and information these days than then. But-----

MR DAUBNEY: At - I'm sorry.

HIS HONOUR: -----when one comes to the hospital documents, you may be on more substantial ground. What are the baby's records, 3(f)?

MR DAUBNEY: Records about the baby, your Honour. I'm sorry

to sound clever but I don't mean to be clever. That's what's intended to be conveyed by that.

HIS HONOUR: But they're concerned with the baby's health.

MR DAUBNEY: Yes.

HIS HONOUR: There is no suggestion that they are concerned with the baby's future.

MR DAUBNEY: Well, except in so far as, for example, the baby was examined medically for the purposes of adoption.

HIS HONOUR: You may well have lost, I suppose, the note of the doctor who prescribed the lactation suppressant.

MR DAUBNEY: That's so. And why it was prescribed, your Honour.

HIS HONOUR: Well, on the evidence before me, why might it have been prescribed? It would either have had something to do with the mother's health; that is, to say something designed to assist her.

MR DAUBNEY: Yes.

HIS HONOUR: There doesn't seem to be any basis for supposing it's that.

MR DAUBNEY: No.

HIS HONOUR: Or else it's prescribed because, it would seem on the evidence before me at the moment, the doctor had been led to understand that the child was to be adopted out.

MR DAUBNEY: That's so.

HIS HONOUR: Yes.

MR DAUBNEY: Your Honour, I'm sure, read item 2, the F for family file.

HIS HONOUR: Yes.

MR DAUBNEY: We don't want to pass over that.

HIS HONOUR: What might have been in that?

MR DAUBNEY: Well, all contact with a particular child in care, that is with the plaintiff, and any social worker notations in relation to the plaintiff if made, and we have given your Honour the evidence of Mr Prins. Of course that would have assisted in two respects: (1) any notations that were made and, secondly, to identify any social worker who may have had contact with the plaintiff.

HIS HONOUR: While she was in hospital.

MR DAUBNEY: Yes. Or in care.

HIS HONOUR: Why does in care matter? I know she's in Holy Cross for some time before she's taken to the hospital. Why would it matter if she's visited by a social worker at that stage?

MR DAUBNEY: If there had been any discussion of adoption during her time at Holy Cross.

HIS HONOUR: Yes, I see.

MR DAUBNEY: Precisely the sort of thing one would have thought a social worker would speak about with a young pregnancy or mother in care.

HIS HONOUR: The police records in item 4?

MR DAUBNEY: Yes.

HIS HONOUR: Why might they matter?

MR DAUBNEY: To see whether she gave her name as Lillian, your Honour. And similarly the Children's Court records.

HIS HONOUR: Well, I have some of them. What do they show about-----

MR DAUBNEY: Lillian, your Honour. The list of witnesses speaks for itself. Does your Honour wish to hear us on that?

MR DAUBNEY: At the time the police came to see her.

MR DAUBNEY: Yes.

HIS HONOUR: She was staying at a place in Lillian Avenue, wasn't she?

MR DAUBNEY: That's right.

HIS HONOUR: Now, as to the witnesses 3 and 4, what, might have discussed, possibly, what, the prospect of adoption?

MR DAUBNEY: May have. And the issue of the marriage with Mr Benko of course, your Honour.

HIS HONOUR: Dr Donaldson?

MR DAUBNEY: Well, he was apparently the doctor who attended on the plaintiff at the birth. Mr Evans's evidence is they're simply unable to locate any records whatsoever as to the existence of Dr Donaldson. We just don't know who he is.

HIS HONOUR: If he had been available, why might it have mattered?

MR DAUBNEY: Well, he might have been able to assist us with evidence about the medication regime, for example,

your Honour.

HIS HONOUR: He couldn't be expected to remember it. But he might have been able to say, if, for example, he had prescribed it, then in the circumstances, even if he had no recollection, his habits and practices would suggest that he would only have prescribed it if he'd been told by the patient of an intention to adopt the child out.

MR DAUBNEY: Or assist us with, if he was the attending doctor, what his practice was in relation to the prescription of sedatives and those other sorts of medications, your Honour.

HIS HONOUR: Things that bear on credit?

MR DAUBNEY: Yes.

HIS HONOUR: Yes.

MR DAUBNEY: The police officers, again the name. Ms Markes nee Kerslake we have included on there as an example of a witness we have been able to call who doesn't remember anything.

Otherwise, your Honour, our submissions in laches are as set out in our outline.

HIS HONOUR: Thank you.

MR DAUBNEY: We turn then to an award of equitable compensation. We won't dwell on what we said in our outline, your Honour. May we simply ask your Honour to note, and your Honour has this in your bundle, the reference to Target Holdings Limited and Redferns, the judgment of the House of Lords in 1996, and give your Honour a reference to the judgment of Lord Brown Wilkinson with whom the other Lords agreed. At page 434-----

HIS HONOUR: Is this in your outline?

MR DAUBNEY: Target is referred to in our outline, yes, your Honour. It is case number 14 in your Honour's bundle.

HIS HONOUR: Where in the outline is it mentioned?

MR DAUBNEY: Somewhere earlier in the discussion of equitable compensation that your Honour wasn't attracted to. On page 10 of the outline, your Honour.

HIS HONOUR: I have Target Holdings. Yes.

MR DAUBNEY: And we want to flag for your Honour the passage on page 434 starting with "The equitable rules" at about C on the page. And then over to page - I'm sorry, your Honour.

HIS HONOUR: Yes.

MR DAUBNEY: And then over to page 438.

HIS HONOUR: Yes.

MR DAUBNEY: Starting at about point C on the page, "The majority considered that damages", all the way from there over to point B on the page following, your Honour.

HIS HONOUR: Why does this matter here?

MR DAUBNEY: We give it to your Honour simply to reinforce or as a convenient collection for your Honour of the principles relating to the award of equitable compensation.

HIS HONOUR: Do you mean that those principles inevitably involve the exclusion of any claim for compensation for personal injury?

MR DAUBNEY: Well, perhaps putting it another way, the only damages that are claimed in this case are damages for personal injury, your Honour. That's the only claim sought to be advanced and that's the only claim that we're here to meet. Assuming everything against us-----

HIS HONOUR: Does that mean that if - on your case, if the claim otherwise succeeds in establishing a breach of fiduciary duty, there is no remedy known to equity?

MR DAUBNEY: That's a difficult question to answer, with respect, because of the novelty of the case, your Honour. You're asking - your Honour is, with respect, asking me to postulate a position that simply is presently unknown to law. My answer has to be there is no remedy because there is no cause of action available.

HIS HONOUR: I understand you say this.

MR DAUBNEY: Yes.

HIS HONOUR: But if the plaintiff were to succeed in establishing a good cause of action for breach of fiduciary duty-----

MR DAUBNEY: Then - everything else being against us - perhaps I can answer it quickly this way. Everything else being against us, then it would appear that the appropriate measure of compensation is in an amount equal to what would have been awarded for damages in a common law personal injuries action. Does that assist your Honour, may I ask?

HIS HONOUR: Yes.

MR DAUBNEY: Thank you.

HIS HONOUR: Thank you.

MR DAUBNEY: And on that basis, we would ask your Honour, we don't propose rehearsing it at length, it's fresh in

your Honour's mind, we would ask your Honour to have regard in particular to the evidence of Professor Whiteford and Dr Moore as well. It defies, even absent the assistance of those experts, commonsense to suggest that a woman who has suffered a life of abuse and tragedy as this plaintiff can point to and be compensated principally for a post-traumatic stress disorder condition said to arise solely from one incident in 1967, Dr Moore's evidence, your Honour will recall yesterday, with a multiple potential cause of factors, it is not possible to attribute her post-traumatic stress disorder, if that's what she's suffering from solely to the incident in 1967-----

HIS HONOUR: But that's not necessary. Even Professor Whiteford agrees, doesn't he, that the separation has contributed significantly to her present psychiatric condition?

MR DAUBNEY: We accept that, your Honour, but that simply raises the question as to - and this is assuming against us, your Honour heard Professor Whiteford's contrary diagnosis-----

HIS HONOUR: But what does it matter if it's depression and anxiety on the one hand or post-traumatic stress disorder on the other-----

MR DAUBNEY: Yes.

HIS HONOUR: -----whatever the condition is called, it has certain symptoms and consequences.

MR DAUBNEY: That's right. The difficulty of the task, of course, is that in a life such as hers, which has been marred by repeated incidents of abuse and repeated insults, including nearly 20 years' worth of marital insult-----

HIS HONOUR: But on her case it wasn't going to. But for Ms Whalley's intervention, she would have kept the child, married Mr Benko and the two of them would have lived happily ever after.

MR DAUBNEY: Yes. With respect, for-----

HIS HONOUR: That's the case.

MR DAUBNEY: For the reasons we submitted before, your Honour will find that that's simply not likely to have occurred. In any event, we won't dwell on the point, your Honour has heard the evidence. We make our submission in paragraph 46 as to the appropriate assessments, the appropriate award of general damages in a common law claim which would be awarded here is in the sum of $50,000. We have some comparative judgments which we might hand up to your Honour. We won't dwell on them here. We will let your Honour peruse them. We might simply say that the award of $50,000 is generous in light of the cases that we have given your Honour.

On top of that, there are what we would describe as amounts

equivalent to special damages. Doing the best we can, we have simply allowed two global sums for past and future psychiatric care, having regard to the impossibility to separate out the degree to which the sickness - the current sickness has been caused by the incident in 1967 from the other multiple factors.

But for the reasons - this is stating the obvious, for the reasons we have advanced at length in our written outline and oral submissions before your Honour today, our submission is that the plaintiff's case ought to be dismissed with costs. Unless we can otherwise assist your Honour?

HIS HONOUR: There is only one other matter, which is, I suppose, potentially of some sensitivity. Obviously for the plaintiff's case to succeed, her evidence must be accepted. But for your side to succeed, it would not strictly be necessary for me to consider the question of the reliability of her testimony. You have a number of arrows in the quiver and you need only to succeed on one ground and the claim will be entirely defeated. I therefore wonder whether, were I to conclude that your side should succeed on one of these legal issues, I ought in the circumstances to go on nonetheless to deal with the question of credit. You have available to you potentially a forensic advantage, if I do that and if I find in your client's favour, and it is something you might not wish to surrender. Would you like to reflect on it?

MR DAUBNEY: May I do that. I don't want to - that is something on which I would require specific instructions, your Honour, for the reasons you have just identified.

HIS HONOUR: You would I think, yes.

MR DAUBNEY: Yes.

HIS HONOUR: Mr Wilson.

MR WILSON: Thank you, your Honour.

MR WILSON ADDRESSED HIS HONOUR FROM 2.51 P.M.: Your Honour, can I say at the outset that the plaintiff accepts what your Honour has just said, that she can be accepted entirely and lose completely on a legal basis.

HIS HONOUR: Your side also has an interest in that question I have just raised with Mr Daubney.

MR WILSON: It does and-----

HIS HONOUR: Do you have a preference?

MR WILSON: The plaintiff appreciates that it is a double-edge sword but, I think, would prefer your Honour to determine what happened.

HIS HONOUR: Well, I can't do that. I can simply decide-----

MR WILSON: On the evidence.

HIS HONOUR: -----on the evidence before me-----

MR WILSON: Yes.

HIS HONOUR: -----and applying the appropriate standard of proof what view ought to be taken of her success on her claim.

MR WILSON: Yes. But there are reasons for that. Your Honour, can I start with the facts because it's-----

HIS HONOUR: Well, now, I needn't trouble you any further on that issue, Mr Daubney, in view of what Mr Wilson has said.

MR DAUBNEY: No. Thank you, your Honour.

MR WILSON: Your Honour, can I start with the facts because they form the basis for legal arguments. Your Honour, there are various facts which are, I might say, uncontroverted or even admitted which your Honour can make findings in respect of and they are these: the plaintiff was born on the 19th of March 1950; at the time of these events was aged 17; at the time she was arrested on the 15th of February 1967 she was then living with Stefan Benko and being supported by him. The plaintiff and Mr Benko-----

HIS HONOUR: How was she being supported by him?

MR WILSON: I beg your pardon, your Honour?

HIS HONOUR: How was she being supported by him.

MR WILSON: He was in full-time employment and paying the expenses of the two of them. That wasn't challenged in any way.

Thirdly, the two of them, and I think your Honour averted to this a few moments ago, were living at premises at 80 Lillian Avenue, Salisbury. Next, that orders were made by the Children's Court on the 16th and 20th February 1967 placing the plaintiff into the care and control of the Director of Children Services. That the plaintiff was kept at the Holy Cross Home at Wooloowin for the whole of the period 16 February 1967 to 26 October 1967, save and except for the period 1 September to 8 September 1967 when she was at the Brisbane Women's Hospital. The consent to adoption was signed on the 8th of September 1967 and, for the purpose of completeness, it appears from Exhibit 25 that the custody of the adopted child was handed over on the 16th of September 1967, the fee having been paid on the 13th of September 1967.

From there, as my learned friend has said, your Honour has the testimony of the plaintiff and to some extent the testimony of Mr Benko to fill in the facts of what occurred on some occasions prior to the 8th of September 1967 and the evidence

of Mr Benko - I'm sorry, and the evidence of the plaintiff herself as to what happened on the 8th of September itself.

So far as the defendant's submissions criticise the evidence of the plaintiff and Mr Benko regarding their intentions to marry, can I suggest that it wasn't ever put to either of them that that was untrue or fabricated. Mr Benko was asked and not challenged about his evidence that he travelled to Sydney by overnight train, there and back, and obtained the signature of the plaintiff's mother to the relevant documentation and obtained the signature of his father and took that to the Holy Cross Home. What became of the documents, no-one knows, but one knows that the plaintiff and Mr Benko weren't given custody of the documents.

But so far as your Honour is able to make-----

HIS HONOUR: Mr Wilson, Mr Daubney doesn't accept that this is reliable. He characterises these things as allegations.

MR WILSON: Yes, but not challenging them in terms of saying, "That didn't happen."

HIS HONOUR: It was 37 years ago.

MR WILSON: Yes.

HIS HONOUR: An aspect of his case is that the inability to investigate these things is a reason why the claim ought not to be allowed to succeed.

MR WILSON: I accept that, your Honour.

HIS HONOUR: He was in, surely, no position to suggest the contrary. He might have explored it further, but how can he be criticised for not suggesting that the account was not true?

MR WILSON: Well, one might at least challenge it in terms of just leaving it on the basis that both the plaintiff and Mr Benko gave sworn evidence that this was their intention and this is what happened, this is what they did.

HIS HONOUR: Well, he points to what in fact the evidence discloses they did and to a greater extent he relies upon what they did not do after the birth of the child as tending to suggest that it isn't right to say that they were intending marry.

MR WILSON: I was going to come to that, your Honour. In terms of what happened to Mr Benko's visits to the Holy Cross Home other than the two that he gave evidence about, your Honour will recall his evidence that there was no point because he was told he was not allowed to see the plaintiff.

As to the evidence of what occurred after the birth, your Honour will recall his evidence that when he went to the hospital to see the plaintiff, not the actions of a man who

has abandoned the plaintiff, he has been there to see his son and the plaintiff, he is told that the plaintiff will get into serious trouble if he's found visiting her at the hospital. After the plaintiff is discharged from hospital, she's taken straight back to the Holy Cross Home where the same situation prevails regarding visitation. She is then herself-----

HIS HONOUR: Visits.

MR WILSON: Visits.

HIS HONOUR: Visits.

MR WILSON: Yes.

HIS HONOUR: I have been corrected on this myself by Mr Justice McPherson, who has pointed out that visitation is a term that involves ghosts.

MR WILSON: Thank you, your Honour, visits. That the plaintiff herself was given a couple of days' notice that she was being sent to Sydney. She attempted to write - well, she did write to Mr Benko.

HIS HONOUR: She didn't know where he lived. He hadn't told her and she didn't ask.

MR WILSON: But she wrote a letter to his work address, which he says he received some many months later. He wrote to her. These aren't the actions of a couple who have simply abandoned each other, and are supportive of their assertions that they intended to have life together.

HIS HONOUR: No doubt it would be said against that the correspondence is less than what you would expect from pen pals.

MR WILSON: But in terms of-----

HIS HONOUR: Nothing seems to have been done towards a marriage after the child was born, does it? There is no suggestion the topic was broached. Your client didn't know where Mr Benko lived. He hadn't told her and she didn't ask; isn't that so?

MR WILSON: No. But she was packed off to Sydney, where she immediately is put into a domestic relationship which is less than satisfactory. She said, her evidence was, she was then wandering the street and her head felt like it was splitting and she was in a world of unreality, had difficulty coping.

Mr Benko's evidence is that he did move from the place at Salisbury to a place opposite the Princess Alexandra Hospital.

Yes, your Honour, there could have been the exchange of daily letters but these two people both gave sworn evidence that this is what they intended. The fact that they got the documents signed to enable them to be married, the fact that Mr Benko did go to the hospital to see the plaintiff, did go

to see his friend, but he had no transportation, he had to get a friend to take him to the hospital, did correspond with each other can't be dismissed as being two people who never intended of having anything to do with each other.

Then you have the evidence of the plaintiff that in 1970 or '71 she came to Queensland to try and find Mr Benko and on the last day she was here she was told he'd been married to a friend of mechanic who was servicing her car, and then in 1990 or 1991 she came to Queensland and again sought out Mr Benko.

When she came to Queensland in 1970 she was seeking out Mr Benko, not the actions of a young woman who has been callously abandoned by the man who has made her pregnant and has told her that he would abandon her and the child. So, in the plaintiff's submissions, your Honour, your Honour would accept the evidence of the plaintiff and Mr Benko that that was their intentions.

In that regard that's important when one comes to consider the events that occurred on the 8th of September, but before I turn to that could I direct your Honour's attention to the first document we have in the chronology, which is the Report of Investigation dated the 4th of September 1967, and, your Honour, the point I want to make in respect of that is this, that the finding that your Honour can make is that as at the time that document was completed, and it bears a date 4 September 1967, the plaintiff had not decided to adopt her child. There is no other explanation for the question mark in brackets.

HIS HONOUR: Well, what it seems to signify is that Miss Robinson understood that the plaintiff was unsure concerning the adoption proposal.

MR WILSON: Your Honour, it could mean a number of things, but the one thing it can't mean is that the plaintiff had by then made a decision to adopt her child.

HIS HONOUR: By then does the evidence enable me to decide was she - had she been administered the lactation suppressant?

MR WILSON: Your Honour, the plaintiff's evidence in that regard is at transcript 35 and can I take your Honour to that. Your Honour will see at about line 20 - line 30 where the plaintiff was asked why she didn't see the baby. She said:

> "I was in such a state that I just accepted it.
>
> Why were you in such a state?-- Because I was in a stupor.
>
> Why?-- Because I couldn't hardly walk and everything was just going around. It felt like my head was in another place."

She said:

> "That was most of the time that I was in hospital.
>
> Do you recall or - sorry, do you know or do you recall being administered any drugs while you were in hospital?-- Yes."

She describes those. Then:

> "Do you recall what injections you were given?-- They said it was to dry up the milk. That's all I know. That is to stop me lactating."

The plaintiff herself doesn't put that being either the 1st, 2nd, the 3rd or the 4th, but one's common experience would accept that certainly before the 8th.

HIS HONOUR: Well, does not the evidence such as it is suggest that the explanation for the administration of the lactation suppressant is that she had told a medical practitioner of an intention to have the child adopted out?

MR WILSON: No. We say in that respect-----

HIS HONOUR: What other explanation is there for it?

MR WILSON: It's equivocal that somebody at the hospital had decided that the baby was for adoption.

HIS HONOUR: What in the evidence would justify an inference that the lactation suppressant would be administered in the absence of a communication from the patient of an intention that the child be adopted out?

MR WILSON: There is nothing in the evidence but the plaintiff's clear evidence. She was asked this on a couple of occasions by my learned friend, is that she never gave her consent - sorry, never agreed to adopt out the baby and as I have taken your Honour to that document that's certainly the case, we say, as at the 4th of September 1967. What your Honour has put to me is one explanation but it's not the only explanation, and to choose between them would be a matter of guessing which one is correct.

HIS HONOUR: Because the hospital records don't exist.

MR WILSON: I am going to come the that. That is an element of prejudice and we have to face that. But, on the other hand, no evidence was led either way as to - from an obstetrician or gynaecologist as to when it would ordinarily be administered. I have to accept that. But one would accept - one would suppose if one is breast feeding one's child from birth-----

HIS HONOUR: But there's nothing to suggest that there was any physical impairment to breast feeding.

MR WILSON: No.

HIS HONOUR: Nothing to suggest that the plaintiff had an aversion to breast feeding.

MR WILSON: No.

HIS HONOUR: In those days, I suspect, there were quite a few women who did. And so on such evidence as there is is not the inference inevitable that there had been a communication by the plaintiff to a medical practitioner at least to the effect that she was giving serious consideration to adopting the child out?

MR WILSON: We say not, your Honour. We can't accept that is the only or indeed the most probable inference.

HIS HONOUR: What tends against it?

MR WILSON: The fact that the plaintiff is strident in her denials of adopting - of agreeing to adopt; secondly, the fact that as at the 4th of September she's at best indecisive, which would militate against the fact that she wasn't breast feeding her baby up until that time; and, thirdly, the baby was removed from her, on her evidence - removed from her immediately at birth despite her asking to see the baby. She was denied that by persons at the hospital who said, "You can't see the baby till you have seen someone from child services." She named the baby. She asked to see it and was denied access to it. So we can't accept that that's the inference that your Honour should draw.

Your Honour, that then brings me to-----

HIS HONOUR: Before you leave that, what of the "no" answer to the question, "Will he support the child?" Mr Daubney attaches some significance to that. Is there anything you wish to say about it?

MR WILSON: Your Honour, we cannot say the circumstances in which that was written by Miss Robinson. What we can say is that Mr Benko's evidence was that he would, and the plaintiff's evidence was that she and Mr Benko were to be married. If your Honour accepts that evidence it doesn't explain how that got there, but it's not from the plaintiff which is what was suggested to her.

Now, another thing that that - another curiosity that that raises is if Mr Benko has abandoned the plaintiff, as our learned friends would have it, and has no intention of supporting the child and the plaintiff is being left in the lurch, why is she then indecisive of the 4th of September? There might be a number of explanations for that. But if, as the defendant's case seems to be, that on the 8th of September she voluntarily agreed to adopt out the child, what's changed between the 4th and the 8th? Even with this document nothing has changed. It's not as if Mr Benko's come up and been very happy on the 2nd or the 3rd or the 4th of September and everything's fine and they go down and try and see the baby and then he drops the bombshell and says, "I'm not going to stay with you. I'm not going to support you.", and that leads to her making the decision on the 8th. The evidence was that he went there once. No-one could be precise about which day it was, it was within days of the birth, and the intention was that they would be married and he would support the family,

and he was looking forward to that.

Your Honour, could I come to the 8th of September, and we accept, as our learned friends advance, that this requires weighing up the acceptability or the reliability of the plaintiff's evidence about what occurred in the discussion with Ms Whalley on the 8th of September. Ms Whalley isn't here to give her version.

As I will come to when dealing with the question of laches, that cuts a bit both ways, though, because the plaintiff doesn't have the opportunity to cross-examine Ms Whalley, and really the submission is founded on the premise that she would have given evidence that the plaintiff voluntarily consented to adopt her child.

Assuming that that premise is correct, one comes to what happened on the 8th. The plaintiff says, and it's no huge surprise, that she was very frightened when she was in hospital. She said she spent most of the time in bed, perhaps under the sheets. She didn't know what was going on. A lady, an experienced nurse, a child-care officer arrives. The evidence of Mrs Cattanach, and my recollection is also Miss Feil, is that it was certainly not their practice and they accepted that it was improper that if the mother was undecided when they attended they shouldn't then try and talk the mother around, they'd come back on a day when she had made the decision.

There's nothing to suggest that between the 4th and the 8th the plaintiff had changed her mind. No event is pointed to as having occurred in that period which caused her to change her mind and it's unlikely that it occurred. One has Mrs or Miss Whalley attending. The plaintiff says that she'd said certain things to her in an endeavour to persuade her to give up her child. They are set out in the Court documents.

Something has been made in some evidence from witnesses by the defendant that Ms Whalley had no power to send the plaintiff to challenge that. The plaintiff didn't know that. The plaintiff knew the reputation of Karrala but she didn't know that Ms Whalley didn't have the power to send her there. The plaintiff says that Ms Whalley threatened that she would be kept incarcerated until she was 18. That was a possibility. She was in the care and control of the Director of Children's Services. Again, she didn't know what Ms Whalley's authority was. She knows this is a lady who's come representing the department, who's come to find out what she's going to do with the baby.

In those circumstances, in our submission, the position of vulnerability that the plaintiff found herself in vis-à-vis Miss Whalley makes it likely that any statements made by Miss Whalley would have been perceived as threatening, intimidating and bombarding her with requests for information. A girl of 17, a lady from the department asking her what she's going to do with this child.

The plaintiff says that she has a memory of that conversation and she wasn't asked one question about it. It's not suggested that the practice that Mrs Cattanach or Miss Feil followed was followed in the case of Mrs Whalley's interview with her.

HIS HONOUR: I don't understand why it's suggested there ought to have been such a suggestion. The death of Ms Whalley means that Mr Daubney wasn't in a position to suggest such things.

MR WILSON: But there was no impediment to exploring the circumstances of the giving of the consent.

HIS HONOUR: But he would not have been in a position to put things to her consistently with instructions of the kind that would be expected to be obtained before a cross-examiner would embark on such a course.

MR WILSON: They could have obtained concessions about things.

HIS HONOUR: Do you mean he ought to have adopted the forensic technique of plunging into a cross-examination without instructions concerning what happened and use the opportunity of the cross-examination generally to investigate and test things?

MR WILSON: No, but he had the evidence of two other - I think the evidence was there four of these ex-nurses who are the child-care consent takers of what their practice was.

HIS HONOUR: What ought he have done, do you say, asked your client - put things to your client concerning the practices of others?

MR WILSON: Put that she voluntarily gave her consent to give up her child.

HIS HONOUR: But that's the entire case she's here to meet. If it's a Browne and Dunn point that you're advancing, she could not have been in any doubt at all but that the defendant's case was that she consented in a free and informed way to the adoption of the child.

MR WILSON: And your Honour is entitled to see her reaction when that was put to her in forming a view as to her - in forming an assessment of her as a witness. Your Honour, we invite you to accept the plaintiff's account of what occurred on the 8th of September 1967.

The other document that I should take your Honour to in Exhibit 2, I suppose is as good as any, your Honour, is there is a report from the Director of Children's Services of 1958 which formed part of the records of the Department of Children's Services. This is document number 6, your Honour, and, your Honour, I would simply refer you to the second new paragraph in the right-hand column.

HIS HONOUR: What can I draw from this?

MR WILSON: That - this is really coming to something I am going to address you shortly, but it's not in the best interests of the plaintiff for a departmental child-care officer to approach her and persuade her to adopt her baby, which is what the plaintiff said occurred. I just thought I'd finish the factual matters with reference to that.

HIS HONOUR: Well, if Ms Whalley did the things she's alleged to have done it would then have been contrary to what the author of this document-----

MR WILSON: That's the Director of Children's Services.

HIS HONOUR: -----regarded in 19-----

MR WILSON: '58.

HIS HONOUR: As established departmental practice.

MR WILSON: Yes.

HIS HONOUR: Well, I have heard, which I do not think was tested by cross-examination, Mr Wilson, the suggestion that Ms Whalley was not the kind of person to have departed from sound departmental practice.

MR WILSON: Your Honour, that evidence was given by - sorry, I will rephrase that. No-one who gave that evidence ever saw Ms Whalley take a consent. They were all work colleagues. One was a very close friend of Ms Whalley for 30 years. Mr Zerk gave evidence this morning he worked in a different section to Ms Whalley and knew her perhaps as a coworker.

HIS HONOUR: But I gathered from something you told me about five minutes ago that you attach significance to an absence of cross-examination when it comes to things like this. There was no cross-examination directed to any of these witnesses to suggest that their description of Ms Whalley was not accurate.

MR WILSON: None of these witnesses could say what Ms Whalley did when she took a consent. None of them were ever there. She may very well have been a very nice person socially or at work, but that doesn't mean that if you're nice in one environment you are also nice in another.

HIS HONOUR: That's true.

MR WILSON: Your Honour, can I hand up the bundle of cases. There's some duplication, I'm sorry.

HIS HONOUR: Do you have an index?

MR WILSON: Your Honour, I am not going to dwell on the fiduciary relationship because it didn't loom large in my learned friend's submissions. Could I simply draw your attention to the decision of the High Court in Clay which I think is the most recent commentary where at paragraph 40 the

members of the majority accepted that the relationship of guardian and ward is a fiduciary relationship with particular characteristics.

HIS HONOUR: What, relevantly, are they?

MR WILSON: Their Honours don't say that.

HIS HONOUR: What do you say?

MR WILSON: Well, in the circumstances of this case we say that the fiduciary relationship carries with it the obligation to act in the plaintiff's best interests. We could put that at a lower level and say if we had to that that meant that the guardian couldn't act where there was a conflict between his fiduciary duty and personal interest.

HIS HONOUR: Why not for the moment at least until you feel you cannot any longer try to support the case that is pleaded?

MR WILSON: Yes.

HIS HONOUR: Unless that's a difficulty for you.

MR WILSON: No, your Honour. I have said in answer to your questions before lunch that that was the case we were advancing. But I said there was also the flip side. One can always dress up a postcriptive duty as a prescriptive duty. One has a duty to do something and also a duty not to do something, but we advance the case that it was the duty of the department - of the director to act in the best interests of the plaintiff.

Can I take your Honour through - sorry, before I do that could I just complete this first area quickly by saying that in Bennett and the Minister for Community Welfare, which is an example of a case your Honour debated with my learned friend where there could be concurrent fiduciary and tortious obligations. That was such a case. At first instance in Bennett Justice Nicholson discussed the fiduciary duty which was owed by the Minister in this case as the guardian of the injured person. The case on appeal and in the High Court went off on the negligence issue, but Justice McHugh in the High Court at pages 426 to 427 implicitly agreed that there was perhaps a claim for breach of fiduciary duty, but noted it wasn't being pursued in the appellate arena. There is no reason in principle, we submit, as to why one can't have concurrent obligations of a fiduciary nature and a duty of care or indeed a contractive duty, which can run side by side.

I will come to the cases which causes some difficulty in terms of if the claim is one that should be properly characterised as a claim in tort and I think I was going to come to your Honour's example that I think both you put to me and my learned friend. If it's a claim that can be properly characterised as to one in tort whether even a fiduciary relationship exists and a fiduciary duty is owed whether equity would intervene in circumstances where tort provides

the remedy. Your Honour gave the example, I think, of the ward being taken to hospital in an ambulance and there being a car accident. The cases that I will come to of Cubillo and Paramasivam and Breen and Williams seem to say that where tort provides a clear equity then equity ought not intervene, and that's why in answer to your Honour's questions to me this morning I disavowed the notion that the director had a duty to take reasonable care because that's really casting it in the language of tort and for the----

HIS HONOUR: Your contention is that he had a duty to bring about a particular result, namely the best interests of the plaintiff.

MR WILSON: Yes.

HIS HONOUR: Which is a challenging proposition. I know you are going to come to it, but I must say I am trying to come to grips with the notion that the misconduct of Ms Whalley, assuming that in your favour for the moment, can be sheeted home to the State Government.

MR WILSON: Because it's the director who owes the duty and the director sends Ms Whalley to the plaintiff. That's a breach of the director's duty - and there's - we have-----

HIS HONOUR: Because on your case it didn't work out well, even though on the evidence before me there would have been no reason to suppose that she was not a suitable person to undertake the task?

MR WILSON: Yes, because the duty was breached. Your Honour's dressed it up as the director having almost a duty of reasonable care to select child-care workers. We rather put it on the basis that the director has the duty to ensure the best interests of the plaintiff and if Ms Whalley acts in the way we say she did that's personal liability of the fiduciary.

HIS HONOUR: This is something which I am struggling to understand, I should tell you.

MR WILSON: Your Honour-----

HIS HONOUR: What more could the director have been expected to do than to so arrange things that an apparently suitable, experienced child-care worker about whom there was no reason to be apprehensive was delegated with the task of taking the consent?

MR WILSON: Provide the plaintiff with independent advice. A very simple answer to your Honour's question. That is the same person - I am going to come to the statues in a minute - but the same person who is charged with the best interests of the plaintiff. The director is also responsible for making the adoption orders.

HIS HONOUR: Well, now, where will I see it pleaded?

MR WILSON: Your Honour won't see that in the pleading. I'm just answering your Honour's question about the personal liability of the fiduciary and I'm saying that - sorry, your Honour.

HIS HONOUR: But I'm only concerned with the case that has been conducted, not with one that might have been. The pleading doesn't allege, does it, that the basis upon which the director is said to be liable is because the director did not see to it that the plaintiff obtained advice from someone other than Ms Whalley?

MR WILSON: Your Honour, in the particulars at paragraph 4(a), that is set out.

HIS HONOUR: 4(a). But these are particulars of 13(f). This is an allegation that the Director - no, it is an allegation of conduct on the part of Ms Whalley.

MR WILSON: Your Honour started by asking me what more could the Director have done.

HIS HONOUR: Well, relevantly. I'm not inquiring about another case that might have been conducted.

MR WILSON: No.

HIS HONOUR: I mean, on the pleadings and the evidence that relates to them-----

MR WILSON: One of the things that's pleaded is that Ms Whalley denied her access to and free communication with those who could have provided her with honest advice and comfort.

HIS HONOUR: Ms Whalley denied her access?

MR WILSON: Yes.

HIS HONOUR: But there is no suggestion in the evidence she did that, is there?

MR WILSON: Well, the plaintiff's evidence was that she wasn't allowed to see - she was told she wasn't allowed to see Mr Benko. If she did, she'd be sent to Karrala.

HIS HONOUR: Well, I think it would be useful for me, Mr Wilson, to relate the evidence and the case you wish to base upon it to the pleading.

MR WILSON: Your Honour asked me and I was endeavouring to answer your Honour's question. Your Honour asked me what more could the Director have done other than sending, apparently a well qualified, capable child-care worker to the plaintiff.

HIS HONOUR: And I thought your answer was-----

MR WILSON: Provide independent advice.

HIS HONOUR: The Director could have seen to it that independent advice was-----

MR WILSON: Yes.

HIS HONOUR: But that's an irrelevant consideration because there is no allegation of that sort here. The allegation is not against the Director; it's an allegation against Ms Whalley.

MR WILSON: I'm sorry, your Honour, I thought that the

allegation in paragraph 4(a) picked up that it was an allegation of a failure to provide honest advice and comfort generally.

HIS HONOUR: No, 14(a) picks up 14(e), which is an allegation concerning Ms Whalley, not the Director. That's part of the area which, as you know, is interesting me very considerably: on what legal basis is the Director said to be liable for the conduct of Ms Whalley?

MR WILSON: Because the Director has the personal fiduciary duty, has entrusted part of the performance of that duty to an employee or officer of the department. He cannot delegate the fiduciary duty. He remains personally liable if Ms Whalley behaved in a manner in which it is alleged.

HIS HONOUR: Now, what case decides that?

MR WILSON: I'm sorry, I can't give your Honour a case off the top of my head.

HIS HONOUR: But it is critical to your client's prospects of success, isn't it, to show that as a matter of law or, if you prefer, of equity that the misconduct alleged against Ms Whalley can be sheeted home to the Director as a breach of the Director's fiduciary duty. If that connection is not established in law, then whatever success the plaintiff might otherwise have, the case must fail, musn't it?

MR WILSON: That's right. And I'm not aware of any authorities I have said which states it in the terms that I have just put it to your Honour.

HIS HONOUR: Well, any case from any jurisdiction or the author of any commentary which would tend to support the notion that the case as pleaded, if proved, gives rise to a cause of action.

MR WILSON: All I can say is, your Honour, if I locate one, can I send it to you? I haven't been able to locate one which says it in those terms.

HIS HONOUR: Yes.

MR WILSON: And, your Honour, the case has to be put in that way, in the way that I have endeavoured to, for the plaintiff to succeed because of the authorities that my learned friend can point to, which say that if we try and dress it up as an equitable claim but it is really a tortious claim, equity won't intervene, and if we try and plead a tortious claim, it is plainly stature barred. So the only relief that's available to the plaintiff is relief in equity if - and I will come to the problem with delay and prejudice shortly - but if the plaintiff is to have a remedy and it's in equity, the equitable remedy is for breach of fiduciary duty. The person who owes the duty is the Director because of the obligations he has as the guardian of the plaintiff.

HIS HONOUR: Well, even-----

MR WILSON: If that's fundamentally wrong-----

HIS HONOUR: No. Even assuming all that in your favour, you still confront the difficulty that you need to demonstrate, that the misconduct of the Crown employee, assuming that in your favour-----

MR WILSON: Can be sheeted home to the Director.

HIS HONOUR: Yes.

MR WILSON: Yes. And, your Honour, I can do no more than reformulate or put again the proposition that I put to your Honour that the Director cannot delegate his fiduciary duty to an employee and remains personally liable for her acts or omissions.

HIS HONOUR: Well, the first part of that proposition is something which your plaintiff can comfortably live with, if there is such a duty, that it must be discharged, it cannot be entirely delegated. But the idea that it is a breach of it to send someone with the characteristics and training of Ms Whalley, as they were apparently known to departmental officers, to undertake this task is at least a large step.

MR WILSON: I appreciate that, your Honour. But it is the only way to get the plaintiff home. That I can think of.

HIS HONOUR: Well, Mr Wilson, as you'll have gathered, I would be most interested to see even the work of an academic. I hope I don't sound disparaging in saying that.

MR WILSON: No, your Honour.

HIS HONOUR: To support it.

MR WILSON: Your Honour, could I take you quickly to the legislation?

HIS HONOUR: Yes.

MR WILSON: Which should be in the bundle. I think it is in my learned friend's bundle as well. Does your Honour have the Children's Services Act of 1965?

HIS HONOUR: Someone has given it to me. No doubt you both have.

MR WILSON: Your Honour, it should be the first piece of legislation in the bundle that I-----

HIS HONOUR: Yes, I have it.

MR WILSON: All right. Could I just take your Honour quickly through some provisions of that Act. Your Honour will see in section 8 the definition of the Director and the definition of

"Child in Care".

HIS HONOUR: Bear with me a moment, Mr Wilson, I was looking at the wrong statute. Where is it in your bundle?

MR WILSON: It should be the first piece of legislation. There's about four or five cases on top and then it should be the first Act.

HIS HONOUR: Yes.

MR WILSON: Your Honour, we have only provided extracts of Act number 42 of 1965. Does your Honour have that?

HIS HONOUR: The first Act seems to be - oh, yes, I now have it. Yes. Section 8?

MR WILSON: Yes, that's relevantly the definition section, your Honour. Your Honour will see the definition of "Child in Care" and "Director". Section 18, your Honour, constitutes the Children's Court. Section 31 relevantly allows the Minister to licence institutions, and further, approve licensing institutions and for the Director to issue licences to them.

Section 34 imposes an obligation on the Director "to supervise the standard obtained by each licensed institution in achieving the purposes", et cetera.

Then, relevantly to this case, your Honour, you will see in section 60 the three circumstances in which a child shall be deemed to be in need of care and control. Your Honour will recall from the documents that subparagraph (b) was the basis in this case.

Your Honour will see that under section 61 the procedure by which a person is committed to the care and control of the Director.

Then can I take your Honour to section 64. Your Honour will see that subsection 1 constitutes the Director as the guardian of the person committed to care and control. Your Honour will see in section 65 the duty of the Director to a child committed to the care and control. Your Honour will see it's the duty of the Director to utilise his powers and the resources of the department so as to "further the best interests of such child in care", and then the Director can avail himself of those adumbrated matters.

HIS HONOUR: What, for present purposes, is the significance of that statutory duty?

MR WILSON: Three. One is that the fiduciary duty that we propound doesn't conflict with the statute. Two, the fiduciary duty it propounds is in accordance with the Director's obligations under the statute, and we say that when one considers the Act, that it properly construe, it doesn't confer a private right of action for breach of statutory duty.

Your Honour asked me this morning whether we were advancing such a claim, and we're not. But I suppose the first two of those are the important aspects.

Your Honour, I was then going to take you to section 69(1).

HIS HONOUR: Yes.

MR WILSON: And section - oh, this is just to clarify the procedures which were followed in this case. Your Honour will see from section 85 there was an obligation on the occupier of the Brisbane Women's Hospital to notify the birth of an illegitimate child to the department. And section 85(b), your Honour will see that the Director upon learning of such birth shall take all steps to ensure that the well being of such child and of its mother are adequately provided for.

Then finally, your Honour, I just draw your attention to section 143, which, perhaps, expands on that provision that I took your Honour to earlier.

So the duty that we propound doesn't conflict with the statute and really is in - in accordance with the statute. If what the plaintiff says occurred did occur, then we contend that there was a breach of the fiduciary duty. I should say, your Honour, that we have included in the bundle the amendments to the legislation. Your Honour would have heard in the evidence some reference to changes that took place in 1990 and 1991. I don't propose to take your Honour to them now, but the secrecy provisions in the Act were progressively amended.

HIS HONOUR: In the Adoption of Children Act.

MR WILSON: And in the Children Services Act, particularly in the Adoption of Children Act. And in the Adoption of Children Act there were progressive amendments regarding the provision of information. I don't propose to take your Honour to those now. I pointed out the Director is the responsible entity under both pieces of legislation.

Your Honour, the cases which are put against us deal with one of two factual situations, I think it's fair to say. One is sexual abuse cases either by a relative or in a foster home, or the removal of a child such that it can't enjoy its cultural heritage and is brought up in an environment which deprives it of that. I can say to your Honour that I'm not aware of any case where a Court has had to consider the position of the adopting mother being asked to relinquish a child. All the cases I found seem to focus on the suits by the child for damages that have been caused to them.

One can see why, in those cases, we say the Courts have taken the view that they have because they are clear examples in the sexual abuse cases of an assault, a particularly tortious claim. The case of KLB in Canada was the infliction of psychiatric injury as a result of abuse by a foster parent. The case of Paramasivam was the case of sexual abuse by a

relative. The case of Williams was a case where the Aboriginal child was taken and placed in a whites' institution and was deprived of his cultural heritage. And the case of Cubillo, to which our learned friends have referred, is of the same genre of case.

Those cases all, as I have read them, have claimed, both in tort and in equity and often there was an application to extend the limitation period, and in Williams, in the Court of Appeal in New South Wales, particularly President Kirby, as his Honour then was, took the view that it would be appropriate to extend the limitation period for the tortious claim because there was an equitable claim there as well.

But in all of the cases the Court was confronted with a situation where the plaintiff was suing in tort for an obvious tortious event and was then being asked, "Well, if we can't succeed in tort, can we dress up the equitable claim to try and circumvent the problems that we have in pursuing the tortious claim?" This isn't, we say, this case. This case attacks one transaction and the transaction which is attacked is the giving of the consent to agree to adopt out the baby. There is no allegation that is being pursued before your Honour of abuse, false imprisonment, matters of that sort. So there is no allied, if I can use that expression, tort claim being pressed.

HIS HONOUR: Do you mean that if this action had been brought within the limitation period for claims for compensation for personal injury in tort, there would not have been any arguable - there would not have been an available cause of action in tort?

MR WILSON: Your Honour, in respect of attacking the transaction that we attack in this case, we say that's properly attacked by reason of the equitable claim. What I'm saying is there may have been actions in respect of the arrest, detention - matters of that sort - false imprisonment.

HIS HONOUR: But on this case, it would have been knowingly false of Ms Whalley to have represented to your client that she was in a position to send your client to Karrala.

MR WILSON: What your Honour says is quite right, yes.

HIS HONOUR: So you'd have had an available cause of action in tort for fraud. You can sue for damages for personal injuries in fraud, can't you? I'm not sure anybody has ever done it.

MR WILSON: Misrepresentation, perhaps. It might be a bit more difficult to frame a claim for personal injuries there.

HIS HONOUR: But she would have been deprived of the child by duress, intimidation and fraudulent misrepresentation. That sounds like an available cause of action in tort. It's scary to imagine that the law of civil wrongs doesn't apply a remedy to a woman who would suffer psychiatric injury, obviously foreseeable, and as the consequence of misrepresentations by

an employee of her guardian.

MR WILSON: Your Honour, I would accept that a claim in tort could have been framed. My answer to your Honour's question is that having regard to the relationship between the Director and the plaintiff, being a fiduciary one, equity wouldn't in those circumstances shut its eyes to the plaintiff's claim and say, "You must try as best you can, dress it up in tort." But I accept your Honour's proposition that had one tried, within time, one could have formulated a claim in that way.

HIS HONOUR: I may be quite wrong about this but as you'll have gathered, my instinct - it may be an untutored reaction to Mr Daubney's proposition - in this respect is that it just must be wrong. As the guardianship arrangement inevitably carries additional responsibilities and the High Court says they are a fiduciary nature, if his proposition is correct, the additional liability or burdens which the guardian assumes can never sound in a form of equitable compensation if the duties are not discharged.

MR WILSON: We wholeheartedly embrace that, your Honour, but we recognise the statements that have been pointed to by the full Federal Court in Cubillo and by the High Court in Breen.

HIS HONOUR: Well, one would need, I suppose, to look very carefully at what Breen says in context. In recent years, the enthusiasm that once existed for several bases for concurrent liability has waned. By the mid-1980s, either the House of Lords or the Privy Council, I forget which, was discouraging the superimposition of tortious actions by parties with a contractual relationship after Hadley, I suppose we all recall, for a while, and it has continued in Australia for a long time when people sought to suggest that you could ignore the contract if it produced unfortunate consequences for the plaintiff and simply serve in tort.

A classic illustration was where there was a limitation bar in counteract because the cause of action arose in breach where the limitation bar did not exist in tort where the cause of action arose in damage. And there were quite a few cases that found their way through the system in the early '80s in Queensland, what was it, Alluminum Products-----

MR WILSON: Yes.

HIS HONOUR: And a number of others. But as the '80s wore on, Courts became very weary of this, treating the additional liability as often having unfortunate consequences, and you can see it in a number of areas of the law. Some Judges enthusiastically welcomed equity into commercial transactions. Others thought that the superimposition of equitable obligations in conjunction with contractually assumed tore at the fabric of the consensual relationship and were much less enthusiastic.

And so, in a range of areas this question of the superimposition of rights and liabilities of one area of the

law into another has proved problematic but I can't myself imagine that there can be a rule to the effect that if the general law provides some limit for a - for misconduct, that a consequence is that equity abandons the field, especially where, as in this case, the whole purpose of the guardianship or relationship that's established is to impose additional burdens beyond those which the general law would impose on someone such as the Director.

In any event, these difficulties are not going to be resolved finally in the least by me.

MR WILSON: That may be. That may be, your Honour. Can I turn, then, to laches. As Justice McPherson said in a case, people can't even agree on how to pronounce the doctrine.

HIS HONOUR: True, but it is laches.

MR WILSON: Laches, thank you, Honour. The principles are well settled. It is really an application of those principles to the facts of this case. Not enough to be a delay with prejudice giving rise to a balancing consideration as to whether equity should disallow the plaintiff from pursuing her claim.

HIS HONOUR: Just pausing there, is it pleaded against you that the limitation statute should be applied by analogy?

MR WILSON: No.

HIS HONOUR: It is not.

MR WILSON: It is pleaded that we should have brought the claim at common law and it would be statute barred, but they don't go that next step in equity by analogy you're statute barred.

HIS HONOUR: So you don't have to worry about that possible ground of defence?

MR WILSON: No.

HIS HONOUR: Cases - a case depends upon the defendants proving laches. Well, the delay is there, so the question then is-----

MR WILSON: Can I address-----?-- Prejudice.

MR WILSON: -----delay, very briefly, your Honour, because some of the cases have said that it's delay with knowledge or when one ought reasonably to become aware of one's rights, and just to put it in the context of this case, the plaintiff's position. Her evidence, your Honour will recall that it wasn't until she spoke to a convener of a support group in 1997 that the light went on and she thought that something wrong had been done to her.

HIS HONOUR: Yes, but she was also in possession of knowledge

of the material facts.

MR WILSON: Yes.

HIS HONOUR: Wasn't she?

MR WILSON: Correct. Secondly, whether having regard to her personal circumstances during that intervening period there is an explanation as to why she doesn't pursue those rights.

She couldn't access documents pertaining to her son until at least 1991 and more probably 1997.

In terms of her family relationship, she was in a difficult marital relationship. Although she was preoccupied with the loss of her son, your Honour heard evidence about how she was treated when she went to get a job in the public service. If she was going to pursue a Court action against the department one might imagine what would have happened.

Can I turn then to the prejudice, which is set up. Clearly the death of Ms Whalley is prejudicial to the defendant on the assumption, as I articulated earlier, that she would have come along and said, "I did everything according to good practice." But we say in relation to her that the plaintiff also lost the opportunity of cross-examining her, but I accept on balance most of it's with the defendant's side.

Miss Robinson, we say, is not prejudicial for the defendant other than on really a subsidiary issue because her document is in evidence. She may have been asked some questions about the father supporting the child and what the question mark in the brackets meant but it's not critical to the events which happened on the 8th of September 1967.

HIS HONOUR: Well, the significance of her absence might depend upon the extent to which the document may be thought to prove the things which if she were here she would have said concerning the interview. If, for example, you accept that I ought to find that your client told Miss Robinson that Mr Benko either would not or could not support the child, that's one thing. Also if you accept that your client told Miss Robinson to the effect that your client was uncertain whether she wished to adopt the child out, again that might bear upon the extent to which her absence might have mattered. But I gather you resist both of those findings, at least expressed in the way I have put them.

MR WILSON: Yes.

HIS HONOUR: Well, that - you're entitled to do that, but that then leaves the door open to your opponents to say-----

MR WILSON: That Ms Robinson is missing.

HIS HONOUR: Yes.

MR WILSON: But the point - the only point I'm making in respect of that is that so far as the critical central allegation in the case is concerned she's not as material as Ms Whalley.

HIS HONOUR: That's true.

MR WILSON: She wasn't a party to that conversation.

HIS HONOUR: She is not. On the other hand, if her evidence would have demonstrated that your client had indicated a

preference for adoption but was uncertain about it, then that might have put a different complexion on it if, for example, she is able to say, "I don't believe she used that question mark in circumstances where I was told by the mother that her" - to the effect that her present inclination was to adopt but she wasn't sure-----

MR WILSON: That's certainly the way that I think Mrs Cattanach took the question mark as being, the mother was uncertain whether to adopt or not.

HIS HONOUR: Yes.

MR WILSON: That may have been Miss Robinson's impression and we will never know whether it was or it wasn't, but in terms of the prejudice to the defendant in defending the claim which has been brought against him we say that Mrs Robinson doesn't loom large in that.

We say even more remote are the two sisters at the Holy Cross.

HIS HONOUR: That is very difficult. There's no evidence as to whether those at the institution had a practice of advising girls in their charge who were pregnant on the topic one way ore the other, is there?

MR WILSON: Well, the plaintiff's evidence, on which I stand to be corrected but I don't think was challenged, is that she was the only pregnant girl there and was the oldest. But in terms of the evidence which might be thought to have been led from them on the issue of the bringing in of the marriage papers, if they would remember such a thing, and they might, might have, depending on which when the action is brought, really is a collateral matter in the case.

HIS HONOUR: That is that the possibility that counselling might been given in relation to adoption is another-----

MR WILSON: I don't think, your Honour, there's any suggestion that the Holy Cross - no suggestion by anyone that the Holy Cross gave counselling. There was a suggestion that somebody from the department may have visited the home.

HIS HONOUR: Yes.

MR WILSON: But I think in fairness the best that Mrs Cattanach would say in relation to that was it really depended on the person and how much time they had, whether they went there or not. It wasn't every Friday afternoon they went to see the girls to see how they were going.

HIS HONOUR: How do I go about forming a view of the extent of the risk that the defendant may be prejudiced by the absence of these two women?

MR WILSON: Well, your Honour-----

HIS HONOUR: I have Mr Daubney saying perhaps they spoke to

her about adoption.

MR WILSON: That's pure speculation. What your Honour has to look at is the evidence which is pointed to which is said to have been lost. I think Justices Wilson and Toohey in Orr v. Forde says one has to ask not just what has been lost but how is what has been lost relevant to the matters in issue. There's no suggestion in this case that people of the Holy Cross provided counselling or gave advice or any matters of that sort. Their introduction to the cases is in two respects: the marriage papers issue and the plaintiff's general evidence about being locked up and not being allowed to see people from the outside world.

HIS HONOUR: I suppose another way of approaching it is that if these nuns might have counselled in relation to adoption, presumably there would be some people still alive in the order, if it exists, who could say what function generally nuns in institutions like this in Southeast Queensland in those days discharged. If their function was - involved nothing in the range of their responsibilities that suggested they might have spoken to a young woman, as in your plaintiff, in the circumstances at the time on the topic, then presumably nothing has been lost by their absence now.

MR WILSON: Yes.

HIS HONOUR: You may be right about this, that there has to be something in the evidence to suggest that an absent witness might have mattered.

MR WILSON: We say, your Honour, that the three - that is items 5, 6 and 7 are even more remote. What the police have done finished on the 16th of February 1967 or perhaps on the 20th of February when the final order was made, and the nurse and doctor who were present at the birth, if they had any memory a year or so after they had deliver add child in September 1967 can't take the matter of what happened on the 8th of September any further.

HIS HONOUR: Well, Mr Daubney says the police matter to the Lillian issue.

MR WILSON: I think there's perhaps an obvious explanation as to how that's happened. The error has just be carried through from the start.

HIS HONOUR: It looks to be so.

MR WILSON: Whose fault that is, whether it's a transcription error from name and address or somebody thinks that it's short for that name, who knows? But the significance might be your Honour's point that you made a little earlier today that where the plaintiff has been asked to sign that name may provide some support for her position.

Your Honour, just dealing quickly with the documents-----

HIS HONOUR: It's the hospital records that interest me most.

MR WILSON: Yes. Mr Evans' evidence shows that those types of documents may have existed and your Honour's, I think, focused on the medication forms. Yes, they are no longer available. They would provide some evidence as to when one would expect when drugs were administered, when and how often, what date they ceased. Yes, that's not available.

HIS HONOUR: Then the question is what significance might they have had had they been available, and I know I have mentioned this more than once. I don't wish to be seen to be harping on it lest people think I am attaching too much significance on it.

MR WILSON: The significance is that if the plaintiff says that she was given drugs during the whole eight days of her stay in hospital and that accounts for her what she's described as a stupor and the record shows she was given two Panadol on one day, clearly she's got some credit problems. If the records show that the plaintiff was administered Stilboestrol from the moment after birth that can mean one of two things: the plaintiff had decided to put her child up for adoption or somebody at the hospital had decided that that baby was for adoption, and that's where we say that Report of Investigation becomes important because it shows that four days later she was still undecided. But certainly the record as to the administration of Stilboestrol again in addition to that may affect the plaintiff's credibility, but we say that beyond that they mightn't have much significance.

I'm not sure whether much was made of items 4 and 5, the police records and the Childrens Court records.

HIS HONOUR: No. They both went I think, only to the Lillian issue.

MR WILSON: Yes, and very early in the piece. Your Honour, can I then at the end of the day make this submission, that where you have one or two or three items of prejudice pointed to by the defendant, however many your Honour is satisfied are real items in this case, your Honour then has to weigh up whether that prejudice to the defendant is sufficient to defeat this lady's claim, and we submit that having regard to the serious allegations which she makes, having regard to the serious consequences that this has had for her, that the balancing exercise should be in favour of permitting the plaintiff's claim to proceed. It's not sufficient to make a finding, we say, that this is prejudicial, therefore you lose. There must be the balancing exercise carried out.

We have included in the bundle, your Honour, not only Orr v. Forde but the two decisions in Queensland of Barbu both at first instance and then in the Full Court.

HIS HONOUR: I don't know that case.

MR WILSON: It's a case dealing with laches. That was a case

where - laches where the material witness had died and Justice Kelly at first instance dismissed the plaintiff's claim and that was affirmed on appeal.

Your Honour, can I start the discussion about damages by drawing your Honour's attention to Mr Justice Gummo's contribution to Equity Fiduciaries and Trusts at chapter 2.

HIS HONOUR: Do you have a copy of it?

MR WILSON: I can make a photocopy of the chapter available for your Honour.

HIS HONOUR: I would be grateful for that.

MR WILSON: Where his Honour goes through how one assesses compensation for breach of fiduciary duty. Your Honour wouldn't be surprised to know most of the discussion relates to loss of profit cases and unauthorised transaction cases in the typical case in that regard, but interestingly his Honour says at page 81, "The measure of compensation for breach of fiduciary duty has primarily been concerned with economic loss. Pain and suffering have not entered in to the matter. That, however, appears to be changing.", and then his Honour refers to a decision of the Ontario Court in Szarfer v. Chodos - I will give Your Honour a copy of this - and a decision of the Supreme Court of Canada in Frame v. Smith where damages were allowed under that head. There seems to be no reason in principle why they shouldn't.

We have included in the bundle the decision of the Queensland Court of Appeal in Ferrari Investments v. Ferrari where Justice Pincus said that the remedy of equitable compensation really has to be moulded according to the circumstances of the case. That was a more traditional case. It was a stealing of business case but his Honour said one shouldn't be constrained by comparing the value of the business before and after and traditional methodology.

Your Honour, there are, we say, three aspects of the plaintiff's claim, being those set out this the statement of claim. One of those is for personal injuries; that is, the illness that the plaintiff has. Your Honour's made this point, whether one describes it as an anxiety disorder or a post-traumatic stress disorder, a number of the psychiatrists do agree that she's got a problem and none of them disagree that her primary focus is on the loss of her son.

In Justice Gummo's article there's a decision of Justice Street in re Dawson in New South Wales where his Honour said words to the effect that issues of causation foreseeability and remoteness don't enter into assessments of damages for breach of fiduciary duty but even if they did - even if they did - we have Professor Whiteford's comment that your Honour referred to that this event was a significant contributing factor to the illness which the plaintiff suffers.

We agree with the assessment propounded by Mr Daubney of $50,000 for that damage, but your Honour will have seen from the statement of claim that a claim is also made in respect of the loss of plaintiff's son; that is, she was deprived of that relationship for 30-odd years.

HIS HONOUR: How can I value it?

MR WILSON: Well, that's what I said on Monday, your Honour, one must do the best one can and we suggest a sizable figure for that but there are no comparative awards.

HIS HONOUR: I don't know anything about - I don't wish to sound flippant when I say this, but how can I know that he was not a very naughty boy? There is just no evidence with respect to him. On what basis can I form a view about the joy that he may have brought your client, for example?

MR WILSON: Your Honour, we say that the focus there, and this to some extent overlaps with what your Honour just said, is on the loss to the plaintiff. She has been deprived of any relationship, the trials and tribulations of parenthood, and one may in a theoretical context argue that expenses should be - expenses of raising the child perhaps should be taken into account.

HIS HONOUR: These are very difficult questions. They are the kind that in cases like Cattanach and Melaior have provoked differences with the House of Lords on whether even a sophisticated system for the resolution of civil strife such as we have can accommodate claims of this sort and whether the loss of some questions just have to be regarded immeasurable.

MR WILSON: Well, your Honour, we submit that if you find that did breach one of the consequences was the loss of the relationship.

HIS HONOUR: That is true.

MR WILSON: And compensation should be given for that.

HIS HONOUR: In principle that may be right but attempting to form a view about it in monetary terms on the evidence before me is not something I can do, is it? I don't know anything about-----

MR WILSON: In a philosophical point of view how does one ever value the loss of a relationship with one's child? But if one starts from the proposition that compensation should be awarded, however difficult the exercise might be, one has to perform it.

HIS HONOUR: But there has to be an evidentiary foundation, otherwise it becomes mere speculation. No evidence has been adduced concerning her son.

MR WILSON: None so far as the son's concerned but you have Mrs Arthur's evidence that for 30 years she was constantly

preoccupied with what had happened to her son and which caused her considerable concern.

HIS HONOUR: Well, that loss has manifested itself in a recognisable psychiatric disorder-----

MR WILSON: Which was-----

HIS HONOUR: -----however tagged.

MR WILSON: Which was diagnosed in 2000.

HIS HONOUR: But the other-----

MR WILSON: Could I tell your Honour that in Cubillo - your Honour will pick this up in the judgments - that an assessment was made in that case, I think, in respect of one plaintiff that was 100,000 and in the other it was 110 or 115.

HIS HONOUR: How did the Judge do it?

MR WILSON: Just arrived at a figure and then discounted it for - to reflect the fact that the plaintiffs had suffered some disadvantages due to their own behaviour, such as becoming alcoholics or engaged in criminal behaviour.

Your Honour, the third head of damages, the psychiatric treatment, that's set out in Dr Pickering's report. Can I tell your Honour in that regard that the play is for 130 treatments to date which I have quantified at $26,000 and for 85 treatments into the future which I have discounted to $20,000 and medication over two years at $560.

HIS HONOUR: Is this contentious, Mr Daubney?

MR DAUBNEY: The numbers that our learned friend has just given your Honour - the maths that our learned friend has just given your Honour is not contentious, no.

HIS HONOUR: Thank you.

MR WILSON: That's all I propose to say, your Honour. Unless there's anything further?

HIS HONOUR: Let me just have another look at Mr Daubney's outline to see if there was anything else I wished to raise. Thank you, Mr Wilson.

MR WILSON CONCLUDED ADDRESSING HIS HONOUR AT 4.22 P.M.

HIS HONOUR: Yes, Mr Daubney?

MR DAUBNEY: Just a few matters in relation to the laches point. Your Honour shouldn't be confused on the that. We

would remind your Honour that in Exhibit 11, the plaintiff's first letter written in 1991, she was already referring to the circumstances of coercion surrounding the adoption. As to the-----

HIS HONOUR: What significance should be attached to that?

MR DAUBNEY: That as long ago as 1991 she was aware of the essential elements of the claim that she could have brought and has now brought and ventilated in these proceedings.

HIS HONOUR: She was always in the possession of the facts which mattered if her recollection was reliable.

MR DAUBNEY: As to the proposition that fell from your Honour that if the common law provides a remedy then equity abandons the field, that, with respect, is not in those terms the proposition that we advance. The proposition that we advance is that as stated by the full Federal Court in Cubillo at page 576 where their Honours in paragraph 463 of the judgment said, "Australian law has its face firmly against the notion that fiduciary duties can be imposed on relationships in a manner that conflicts with established tortious and contractual principles." Their Honours thereafter by reference to amongst other things Pilmer and Duke Group and Breen and Williams-----

HIS HONOUR: There is no conflict here, is there?

MR DAUBNEY: No.

HIS HONOUR: Mr Wilson, in fact, says the fiduciary duty for which he contends is the statutory duty that was imposed on the director in any event.

MR DAUBNEY: As to the attempt by our learned friend to distinguish this case away from the sorts of cases that have been dealt with and put before your Honour, may we simply say this: this is a case and this is brought as a case of a minor ward alleging breach of a fiduciary obligation owed by a guardian. It happens to be that the particular of the insult which is said to have constituted the breach of the fiduciary obligation is the forced or coercion of removal of the baby. But in principle and the principle on which the case is brought, it is one of the fiduciary obligation owed by a guardian to a ward. So to that extent the principles are as set out in the authorities that we have given your Honour.

HIS HONOUR: What significance does the statutory duty have for the suggestion that there is a corresponding fiduciary duty?

MR DAUBNEY: Not every duty that a fiduciary owes to the beneficiary is a fiduciary obligation.

HIS HONOUR: That is true.

MR DAUBNEY: It may be, and not only may be, it is the case, that fiduciaries offer duties - sorry, different duties which fall under different characteristics, common law duty, statutory duties and fiduciary duties. The only case that's brought against us is for fiduciary obligation, hence the necessity to be quite clear in our identification of the content of the fiduciary, not just any old duty, not a statutory duty, but the fiduciary duty, fiduciary obligation that's said to be owed, and we addressed your Honour as best we could on the important things there.

That, at the risk of repeating ourselves, highlights again what was said in the Supreme Court of Canada in the KLB case. When one remembers that in cases like this we're looking to identify the nature of a fiduciary obligation, it is not good enough, and contrary to principle, to dress that up as simply being a duty to act in the best interests of somebody. It needs to be done consistent with and consonant with the accepted notions of the fiduciary relationship.

HIS HONOUR: Well, the Supreme Court of Canada gives reasons for thinking that it will be unwise to impose as an incident of a fiduciary relationship the duty for which the plaintiff contends.

MR DAUBNEY: Mmm.

HIS HONOUR: But as it happens, the duty for which the plaintiff contends expressed as a fiduciary duty is indistinguishable from the duty which the Director had by statute; isn't that so?

MR DAUBNEY: As it happens. But that does not, with respect, convert the statutory duty into a fiduciary duty.

HIS HONOUR: It does not of itself but it suggests that the

reason why the general law would be reluctant to impose a fiduciary duty in such terms may have less application in these circumstances. I say that because it involves, at least as a matter of duty, nothing more. That being so, why would the Court of equity shrink from following the law and imposing in equity a fiduciary duty which is bound in any event by statute to do?

MR DAUBNEY: Because to do so would be to create a fiduciary duty or superimpose a fiduciary duty on an existing statutory duty. That, with respect, is eschewed by the Courts in Australia, that sort of approach.

HIS HONOUR: Is it common ground that a statutory duty does not give rise to a private course of action?

MR DAUBNEY: I haven't considered that, your Honour.

HIS HONOUR: It wouldn't trouble you to accept it I imagine.

MR DAUBNEY: No.

HIS HONOUR: Mr Wilson says that that's so. It may well be right.

MR DAUBNEY: It may well be. But it doesn't matter, with respect, because had they brought a common law claim in negligence, it would have been undoubtedly pleaded as one of the particulars of negligence.

HIS HONOUR: If it had been pleaded in negligence, it would have been necessary to establish either vicarious liability for what Ms Whalley did or is alleged to have done, or else set about establishing that to let her near the plaintiff to take the consent involved a breach of the Director's personal duty. Yes?

MR DAUBNEY: Your Honour, our learned friend, with the greatest respect, oversimplified the notion of the distinction between proscriptive and prescriptive, referring to it as in terms of flip side and so on. With respect, that is not the basis - or to express it in that way, with respect, demonstrates a failure to appreciate the reason why the High Court has expressed the nature of fiduciary obligations in that way.

HIS HONOUR: By why does it now matter, Mr Daubney? As it happens, he isn't seeking to amend the pleading, the duty he contends for is prescriptive, and that creates a hurdle which Mr Wilson has set out about attempting to deal with.

MR DAUBNEY: Very good, your Honour. The only other thing that I wanted to say was this: your Honour, in so far as a Browne and Dunn point is being taken against me in relation to the events of the 8th of September, true it is that I didn't put a contrary version of the specific contents of the discussion to the plaintiff; I was hardly in a position to do so. What I did do - your Honour will find this on page 101 -

is put the character of Ms Whalley to the plaintiff and challenge her on that and subsequently led evidence in support of that. Unless we can otherwise assist your Honour, those are our submissions in reply.

HIS HONOUR: Mr Wilson, you can take your time looking for the case.

MR WILSON: Thank you, your Honour.

HIS HONOUR: I will consider the matter and I shall attempt to deliver a judgment before Christmas. The Court will adjourn.

THE COURT ADJOURNED AT 4.36 P.M.