



Transcript of Proceedings

Copyright in this transcript is vested in the Crown. Copies thereof must not be made or sold without the written authority of the Director, State Reporting Bureau.

Issued subject to correction upon revision.

SUPREME COURT OF QUEENSLAND

CIVIL JURISDICTION

BYRNE J

No 3772 of 2001

LILY ARTHUR

Plaintiff

and

THE STATE OF QUEENSLAND

Defendant

BRISBANE

..DATE 02/11/2004

..DAY 2

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.

THE COURT RESUMED AT 10.00 A.M.

LILY JOSEPHINE ARTHUR, CONTINUING IN CROSS-EXAMINATION:

HIS HONOUR: Call the part-heard case for trial.

10

ASSOCIATE: Lily Arthur and the State of Queensland.

MR DAUBNEY: Thank you, your Honour. Mrs Arthur, yesterday you told us that you had been made a ward of the State for the first time in September 1962?-- Yes.

And-----?-- I can only go by the information that was given to me by the Department. I didn't know for sure exactly. That was the date that they have set.

20

You remained a ward of the State on that occasion until March of 1964?-- Yes.

Where did you live during that time?-- We lived at Mount Gravatt when we were first made wards of the State, and then my mother moved to Lota.

You were still living with your mother and family, were you?-- Yes.

30

The gentleman that you have described as your stepfather, when did your mother first commence a relationship with him?-- I think it was only a few months before I left home.

And did he move in with your mother?-- He had a shop and a house and it burnt down, the house burnt down and he was migrating backwards and forwards between - I think he was staying at his Aunt's or his sister's or something and he eventually came to live with my mother.

40

Well, how long had your mother been in a relationship with your stepfather when the stabbing incident occurred that we heard about yesterday?-- I don't know. I think it was only a few months.

And in that few months your mother had formed the intention to marry this man, apparently?-- I don't think she had any intention of marrying him.

50

Had she sought a divorce from your father?-- At that time she had to be separated from him for five years, and I think there was divorce proceedings going on. I am not sure.

Did this man that you describe as your stepfather support your family?-- No.

So your family had no support from him?-- No.

1

And you have told us that after the incidents in 1967 when you went to Sydney that at that time your stepfather was abusive towards you. Do you recall giving that evidence yesterday?-- Yes.

Before the stabbing incident in the few months that he was in a relationship with your mother, what was your relationship with him during those few months?-- I didn't have a relationship with him.

10

Well, you were still living at home with your mother?-- Yes.

How did he treat you?-- I never saw much of him. I was at work all day. I worked - I had to walk three miles to work to the station in the morning, and I had to walk all that distance of an afternoon coming home. I didn't see much of my stepfather at all. I was a teenager. I used to go out every weekend.

20

If we then come to the stabbing incident when your father stabbed your stepfather. I just need to get straight, if I could, where you were in relation to your father and your stepfather when this incident actually occurred. Perhaps we can do it this way. You were in the house?-- Yes.

You described yesterday the incident as follows, "My father was banging on the door and when my stepfather opened it he lunged at him with a knife and they pushed the door shut and my - I was behind. I didn't see what was going on". When you say you were behind?-- I was towards the back of the room. I didn't see my father.

30

You saw the back of your stepfather?-- I saw the back of my stepfather and the door open a bit, and that is all. I never saw my father.

Right. In terms of-----?-- They didn't let him - the door wasn't open wide enough for me to see my father.

40

You told us yesterday that you heard what was going on?-- Yes.

In terms of proximity to the back of your stepfather when this incident occurred, you were closer than you and I are now?-- I would have been about halfway. We had a small house and the rooms weren't very big and I was at the edge of the room and my stepfather and my brother, I think, were pushing the door shut.

50

Right. And you saw your stepfather immediately after the door was shut?-- Yes.

You were watching what was going on from behind, weren't you?-- Yes.

And you knew immediately that he had been stabbed, didn't you?-- No, I didn't.

You knew immediately that he had been hurt?-- Well, I think he just yelled out, "I think I have been stabbed", because he didn't - I don't know that he felt anything.

All right. But, in any event, an ambulance was called and he was taken away?-- Yes.

When you went back to - when you went to Sydney after you were released from the Holy Cross home, how long did you then live with your mother and stepfather?-- I lived with them for about five and a half months.

10

You told us yesterday that he was abusive to you?-- He blamed me for my mother being upset about what had happened to me in the home.

And he used to abuse you. He used to verbally abuse you personally?-- He would be constantly nagging me, telling me to get a job and things.

20

You never, as you told us yesterday, you never had any sort of decent relationship with him; that's right, isn't it?-- Well, I didn't like him.

And he used to get drunk and verbally abuse you?-- He used to get drunk and he used to be quite insulting.

You already knew before you were sent to Sydney after your release from Holy Cross that you didn't get on with your stepfather, didn't you?-- Yes.

30

So-----?-- I wasn't asked did I want to go back there. They told me I was going back there.

Sorry, I am just trying to get this straight. You already knew before you were released from Holy Cross that you didn't get on with your stepfather; is that correct?-- Yes.

You knew that because of the period of time that you had had contact with him before you were admitted to Holy Cross?-- I didn't like him.

40

You didn't get on with him?-- I didn't get on with him.

Was he abusive to you before you were sent to Holy Cross?-- On some occasions, yes. I didn't have much of a relationship with him.

So before the stabbing incident - I am sorry. It was the stabbing incident that precipitated your mother and your stepfather moving to Sydney; that's correct, isn't it?-- Yes.

50

For some time before the stabbing incident you had had regular contact with your stepfather?-- I wouldn't say that I had, like, regular contact with my stepfather.

You had enough contact with him to know that you didn't get on

with him?-- Yes.

1

You had enough contact with him for him to abuse you?-- Yes, on occasions. He didn't make a daily habit of it.

Within 12 months of going to Sydney you had married Mr Fuller?-- Yes.

And you told us yesterday about your relationship with him being one in which he was very, very possessive and jealous about you doing anything?-- Yes.

10

And you having a poor relationship with him and his family?-- Yes.

You told us about leaving him to come to Queensland to look for your son and Mr Benko?-- Yes.

And returning to Sydney two to three months later?-- Yes.

20

At which time you met another man with whom you lived for about four months?-- Yes.

You fell pregnant to that other man?-- Yes.

Then you left him. Is that the case, you left the other man?-- We broke up because he was a lot younger than myself. He had lied about his age.

Your husband begged you to go back?-- Yes.

30

You went back and you described how humiliating that was?-- Yes.

How you tried to escape just a week or so after you had gone back?-- Yes.

And you say that during the next 18 years of marriage to Mr Fuller, Mr Fuller treated you badly?-- Yes.

40

With emotional abuse?-- Yes.

Do we take it that the emotional abuse from your husband endured for the entire 18 years that you were married to him?-- I didn't hear that.

Do we take it that the whole time you were married to Fuller - sorry, I will withdraw that and start again. I am talking now about the period of time after you have gone back to your husband and you are pregnant with your daughter?-- Yes.

50

And the emotional abuse started?-- I was conditioned to abuse by the time I married my husband.

You were conditioned to abuse?-- Yes. I had-----

Because you had suffered abuse from an early age, hadn't you?-- Not necessarily. You are trying to paint my life as

being an abusive one. I had actually had a quite happy childhood.

In any event, if we come back to the question that I am asking you that is about the emotional abuse from your husband. Am I right in saying that that emotional abuse continued for the whole period of time that you were married to him?-- Yes.

For 18 years after the birth of your daughter?-- Yes. I went straight out of a home where I was abused for nine months, conditioned to abuse. It was no stranger to me that I ended up in an abusive relationship.

And-----?-- I admit that.

HIS HONOUR: Mr Daubney, please allow her to finish.

MR DAUBNEY: I beg your Honour's pardon. I am sorry. I should let you finish, Mrs Arthur. Did you want to say anything else?-- My life up until recently has been full of abuse. Just sitting here today having it regurgitated is another abuse.

Did you want to say anything else, Mrs Arthur?-- No.

In relation to the emotional abuse from your husband Mr Fuller, that was about every day, wasn't it?-- Just about.

All right?-- If you can call silence abuse as well.

You told us yesterday about the incident which ultimately led to you leaving Mr Fuller. This was after you had come to Queensland and then returned to New South Wales. This was in about 1991?-- Yes.

And he picked you up from the airport?-- Yes.

And his face looked like he was ready to kill you?-- He had a very angry look on his face.

And then in your evidence yesterday you described it being three or four o'clock in the morning and he was going on and on and on about the contact objection business and you said, "I lost the plot and he went like that to me", and when you gave that evidence you made a gesture indicating that he had struck you with his elbow?-- He shoved me with his elbow.

Was that the only occasion of physical abuse from Mr Fuller?-- Yes.

Right. Now, during your marriage to Mr Fuller you also had Mr and Mrs - Mr Fuller's parents living with you?-- We were living in their house.

And was that for the entire period of your marriage to Mr Fuller?-- Just about. Until they died.

When did your father-in-law die? I am sorry, I will withdraw

that and ask it this way. Had your father-in-law died by the time you left the marriage?-- Yes. 1

Had he been dead for long at that stage?-- He died I think about 1998.

1988, perhaps?-- 1988.

So four years or so before you left the marriage?-- No, it wasn't that long. I left the marriage in October 1991. 10

In any event, you described yesterday being continually sexually harassed by your father-in-law?-- Yes.

From the time you went back to live with your husband in his parents' house?-- Yes.

For many years?-- Yes.

On a daily basis?-- I can't recall whether it was a daily basis, but it was constantly. 20

If we can go back then to the Holy Cross home. Do you recall that the sister in charge of the home was known as Mother Lian?-- Yes.

Do you recall Mother Lian?-- Vaguely, yes.

And the other nun with whom you had contact there was a Sister Isabelle?-- Yes. 30

And those were the two nuns with whom you had most contact while you were at the Holy Cross home; is that right?-- They were the ones that ran the place.

I am right to say, aren't I, that your mother never came to get you out of the Holy Cross home, did she?-- No.

Your mother knew you were in the Holy Cross home?-- My mother was told later after I had been admitted that I was in Holy Cross home. 40

And even after she found out, she didn't come and get you?-- I think my mother can answer those questions because I was oblivious to what was going on outside of the home. She had seven children down in Sydney.

I see. We come then to your time in hospital and the adoption of your son. You told Dr Pickering in late 2000 that the whole episode, that is the time around the birth of your baby and being subjected to pressure to adopt him out, is a blur. Does that accurately describe your recollection of the events of that time, a blur? 50

HIS HONOUR: Has she agreed that she told Dr Pickering?.

MR DAUBNEY: Did you tell Dr Pickering that?-- I can't remember.

Doesn't that accurately describe your recollection, or the nature of your recollection?-- My recollection of being in the hospital is reasonably blurred.

Didn't you tell-----?-- I don't remember much about what was happening in the hospital.

So your memories are unclear as to what happened in the hospital?-- My memories of what I remember are clear. Most of the time I was either asleep or in bed.

10

Well, you remember Mr Benko coming in within a day or so of the birth, don't you?-- No, I don't remember him coming in within a day or so of the birth. He came later on during the week. He didn't come early in the week.

So, you see, you were asked yesterday by our learned friend Mr Wilson about this - page 36 line 40, your Honour. In relation to the visit by Mr Benko you were asked, "That was within the days or so after you had given birth?" And you said, "Yes." It was shortly after you had given birth that Mr Benko came to see you, wasn't it?-- I can't recollect that he came immediately after the birth of my son. I was given drugs and kept sedated. I don't know what day was what. My whole hospital experience was one that was blurred by me being under medication, apart from the incidents that I have described.

20

But, in any event, at that time as far as you were concerned it was still a foregone conclusion that you and Mr Benko were going to get married?-- Yes. I hadn't received any news to the contrary.

30

A few days after the birth on 4 September you were seen by a lady by the name of Elsie Robinson; do you recall that?-- Not really.

One of the documents in Exhibit 2, your Honour, is a document entitled "Report of investigation". I have a spare copy to show the witness.

40

HIS HONOUR: Yes.

MR DAUBNEY: Can I show you this document, please, Mrs Arthur?-- Can I make a comment here, that they have put my mother's name as "Felicia", and my mother's name is Lily.

We will come to that shortly. Now, this document records certain information both about yourself and the putative father; that is, both yourself and Mr Benko?-- Yes.

50

And in relation to yourself, if you have a look on the right-hand side it contains personal information?-- Yes.

Your hair colour, your eye colour, your complexion colour, your height, your usual weight, your educational standard, your special interests and your hereditary traits?-- Yes.

Most of those, or at least some of those, are matters of information that only you could have given to whoever was filling out this form?-- Yes.

1

Do you agree with that?-- Yes.

Things like your usual weight?-- Yes.

And your special interests and so on, and you gave the person filling out the form that information, didn't you?-- Well, I must have done.

10

All right. Just as I would suggest to you you gave the person filling out the form the information about the father, his hair colour, his eye colour, his complexion, height, build, educational standard, special interests, hereditary traits?-- Yes, I would have given them that information.

A good example is special interest, "plays guitar"?-- Yes.

20

There is no way the person would have known that Mr Benko played the guitar unless you had told them. That's right, isn't it?-- Well, I must have done. I don't remember it.

On the left-hand side under "putative father" you will see it is recorded his name was Stephan Benko; his address was unknown; his occupation was casual worker spray-painter. There is no record of - or nothing filled in for his employer. There is nothing filled in for his financial standing, and next to the question "Will he support child?", the answer given is "No." That is the answer that you gave when they were asking this information, isn't it, Mrs Arthur?-- Well, why didn't the hospital ask him was he prepared to support the child.

30

Mrs Arthur, that is the answer you gave when asked for information-----?-- I do not recollect.

HIS HONOUR: Now, Mrs Arthur, please, as you have seen, if Mr Daubney tries to speak over you, I ask him not to do it. I will ask the same thing of you. Please listen to the question before attempting to answer it?-- Yes, your Honour.

40

MR DAUBNEY: That answer is the answer that you gave to the person filling out the form, isn't it?-- I don't remember.

50

Prior to this form being filled out on the 4th of September you had met with Mr Benko. He had visited you in the hospital, hadn't he?-- No.

1

When Mr Benko came to see you in the hospital did he tell you that he was going to marry you?-- We thought we were still going to get married.

Sorry, could you please answer my question? When Mr Benko came to see you in the hospital did he tell you that he was going to marry you?-- Nothing had changed. I don't remember the conversation with Steve. He can answer that. My impression was that we were still going to get married.

10

I am right in saying, aren't I, that the occasion on which Mr Benko came to see you in the hospital was the last time you saw Mr Benko until 1990 or thereabouts?-- Yes.

So he wasn't waiting for you when you were released from hospital?-- No, because I was still in Holy Cross.

20

He wasn't waiting for you when you were released from Holy Cross?-- Look, I don't know what he was doing. I had no contact with him.

You know that he wasn't waiting for you when you were released from Holy Cross, he wasn't standing at the front gate waiting for you, was he?-- No-one was standing at the front gate waiting for me when I was released. I didn't even know when I was going to be released until a couple of days before.

30

When you were released from the Holy Cross you didn't try and contact Mr Benko, did you?-- Yes, I did.

And did you find him?-- I don't know.

Well, you know whether you found him?-- I didn't know where he was living. I sent a letter to somewhere where I thought he was working.

40

I see. That was the extent of your attempt to try and find Mr Benko?-- Because we had moved again.

Mr Benko - I am sorry, I will withdraw that and put it this way: you didn't receive any contact from Mr Benko when you were in Sydney?-- No.

For years-----

HIS HONOUR: Now, the no response is equivocal. It might in context mean yes, that is to say that she agrees with the proposition you put to her. What do you mean by your answer "no", Mrs Arthur?-- I didn't have any contact with Steve until 1990 when I found him again.

50

MR DAUBNEY: So there was - correct me if I am wrong - the sum total of your attempts to contact Mr Benko was one letter written to an address that you weren't sure of?-- Yes.

And no contact that you received from Mr Benko?-- I didn't hear back from the letter.

You said a moment ago that you had moved - perhaps I misunderstood you?-- But we moved - we moved shortly after I got down to Sydney. We moved to Guildford. My mother and my stepfather bought a house. I don't know if he wrote back.

But you know that you didn't - you yourself didn't try and contact him again after you moved?-- I had too much going on.

10

I see. Was it the case that when Mr Benko came to visit you in hospital he made it clear that he wasn't going to marry you? Is that what happened?-- I don't remember that at all.

Is it the case that when Mr Benko came to see you in hospital he made it clear that he wasn't going to support your baby?-- I don't remember much at all about the conversation with Steve. I was too out of it.

20

And is it the case that because Mr Benko had told you that he wasn't going to support the baby that you gave the information that's recorded on this report of investigation?-- No, not true at all.

I see?-- This information was taken before I saw Steve, because he was really wanting to see the baby.

At that time he was really wanting to see the baby?-- He wanted to see his son.

30

Was there, do you recall - I am sorry, I will withdraw that and ask again. Do you have any clear recollection of Ms Robinson visiting you and taking the information to complete this form?-- I have very little recollection of this woman taking these details.

Did you discuss with her at least the possibility of your baby being adopted?-- Absolutely not.

40

So you can give no explanation as to why the form records "baby for adoption?" Do you see that on the form?-- Yes, I do. I have got no explanation for why that was written on the form.

I suppose we would have to talk to the person who filled out the form to find out that, wouldn't we?-- Well, I think it stands for itself. She has obviously - the hospital is asking the department is the baby for adoption.

50

That is your interpretation, is it?-- Well, it is from the - it is from the hospital to the Director of Children's Services.

It could also, do you agree with me, reflect the fact that you were in two minds or you were yourself having queries as to whether the baby was going to be adopted; you hadn't made up

your mind as to whether the baby was going to be adopted or not at that stage?-- I had no intention of adopting my child out. 1

You described Ms Whalley yesterday in your evidence as not friendly, demanding - I am sorry, not friendly, dominating you and bombarding you with information or requests or statements?-- Yes.

I suggest to you that that sort of conduct - the sort of conduct that you described - would have been completely out of character for Ms Whalley?-- I disagree with that. 10

I would suggest to you that Ms Whalley would be described as one of the kindest and the gentlest of people, non-aggressive and very caring, and one of the most tender hearted of all child care officers. I take it you disagree with that?-- I met this woman for 10 to 15 minutes. I never saw any of that.

All right. In your evidence yesterday you described, amongst other things, some inquiries that you have made or have caused the ombudsman to make on a suspicion of yours that your son's contact objection was fraudulent?-- Yes. 20

It transpired, of course, that that contact objection wasn't fraudulent; that's so, isn't it?-- I didn't know at the time.

But you now know that it wasn't fraudulent?-- After thorough investigation it was established that it wasn't fraudulent. 30

All right. I call for the original of the plaintiff's statement of loss and damage dated 7 November 2003. I am not sure if the document was filed, your Honour. That is why I am making the call.

MR WILSON: I will have it extracted. I am content for my friend to proceed with a copy until it is produced.

MR DAUBNEY: Perhaps you can have a look at this document, please. You will recall, Mrs Arthur, that one of the orders made by the Court in the course of the interlocutory steps in this case was that you deliver a document known as a statement of loss and damage?-- Yes. 40

Recording the losses that you claimed to have suffered and for which you seek compensation in these proceedings?-- Yes.

And the document that I have handed you is a copy of the statement of loss and damage signed by you and dated 7 November 2003?-- Yes. 50

And that document, amongst other things, makes a claim, does it not, for some two and a half million dollars for past and future economic loss?-- Yes.

I tender that.

HIS HONOUR: Exhibit 23.

ADMITTED AND MARKED "EXHIBIT 23"

MR DAUBNEY: And on last Friday, the 29th of October 2004, your solicitors for the first time gave notice to Crown Law that you weren't pursuing that claim; that's correct, isn't it?-- I presume so.

10

Could you have a look at this document, please? It is a letter from your solicitors, McInnes Wilson, to Crown Law dated the 29th of October stating, "My client will not be pursuing her claims for economic loss at trial"; that's so?-- Yes.

I tender that?-- That's what the letter says, yes.

20

HIS HONOUR: Exhibit 24.

ADMITTED AND MARKED "EXHIBIT 24"

MR DAUBNEY: Thank you, your Honour. Thank you, your Honour.

30

HIS HONOUR: Mr Wilson.

RE-EXAMINATION:

MR WILSON: Mrs Arthur, you were asked some questions about being made a ward of the State between 1962 and 1964; do you recall that?-- Yes.

40

During the whole of the time - the whole of that time, did you remain living with your mother and brothers and sisters?-- Yes, we did.

And during that time your father had returned to England; is that right?-- Yes, he went back there to try and bring us home again.

50

To try and repatriate the family to England?-- Back to England again.

You were asked also by Mr Daubney a number of questions about events that have happened to you since 1967. Can I ask you to describe to his Honour in the period of, say, six to 12 months leading up to the night that you were arrested what sort of life did you have? Were you having a happy life? Were you

going out, things like that?-- Yes.

1

Can you describe the lifestyle that you led?-- I was a normal teenager, and my sister and I used to go out dancing every Friday and Saturday night. I would go to the speedway. I had a boyfriend. I was just a normal, happy teenager. I did all the things that - we had a lovely life, contrary to what people think. We had our own home with a lot of space. We had three acres, and we were very happy, and I was in love with the man that was the father of my child.

10

And since 26 October 1967 would you describe your life as happy?-- We had our own place, we had - it was furnished. We used to play music and go to parties, and we were in love.

And then after you were released from the Holy Cross Home I was asking you, and returned to Sydney, would you describe your life as happy?-- My life was a nightmare.

During the time from when you returned to Sydney until you re-established contact with your son you have been asked about a number of events in your life?-- Yes.

20

You gave evidence yesterday about the continual memories that you had of the birth of your son?-- Yes.

Your preoccupation with where he was?-- Yes.

Comparing those various traumas with the loss of the son, are you able to do that for the Court?-- Comparing what I had been through through loss of my son, there was no comparison. There wasn't a minute from the moment that I gave birth that I wasn't wondering about my son, where he was, what had happened to him. They took him away and hid him from me for 30-odd years. I begged and pleaded with this department and this State, "Please tell me where my child is. Please tell me where my son is. Please tell me what happened to me."

30

Now, you were asked-----?-- They have known everything about my life. They know the misery that I have been suffering because I couldn't find my son, and the letters that they sent me back, as if I was nothing, I didn't even deserve a decent reason for what they did. No explanation, nothing, just lock you up, forget about you, steal your child away from you and then tell you to, "Get lost. We don't care about you any more." I am sorry. There hasn't been a minute of my life over the past 37 years that I haven't wondered and loved and thought about my son and his father.

40

Mrs Arthur, if you need to see the document again, I can arrange that, but do you remember being shown a document headed "Report of Investigation"?-- Yes.

50

You were asked some questions about that?-- Yes.

And you mentioned that there was an error in that regarding the name of your mother; is that right?-- Yes.

What is your mother's correct name?-- Lily Johnson, or Lily McDonald at that time.

Has your mother ever been known as Felicia?-- No.

That is not a nickname or anything like that?-- No, never heard of the name. I never heard of anything until I saw that document. That's how much they cared about me. They couldn't even get our names right.

Do you recall seeing a lady by the name of Robinson?-- No.

Someone coming to you and introducing-----?-- I don't know who they were. I don't know who this woman was.

Do you remember or do you now have any recollection of someone coming to see you to take information other than Ms Whalley?-- I thought that I was giving that information all in one go. I didn't know there was two women.

You were asked some questions also in relation to that form about the answer which appears in it as to whether the father would support the child, and you gave some answers to questions of you about that. As at the 4th of September 1967 or indeed as at the 8th of September 1967, what was your belief as to whether or not - as to what would happen to you and Mr Benko?-- My belief was that we were going to get married and raise our child.

You gave some - you were asked some questions about attempts to contact Mr Benko and you said that you had written him a letter?-- Yes.

When did you do that?-- Must have only been a couple of weeks - wasn't long after I got back to Sydney.

When did you first know that you would be returning to Sydney?-- About three to four days before I was being told - I was put on the plane.

And when you wrote to Mr Benko, you said that you wrote to an address where he was working?-- Yes.

Or you thought he was working?-- Yes.

Did you know he had then moved house?-- No.

That's the re-examination, if your Honour pleases.

HIS HONOUR: Just before Mrs Arthur leaves the witness-box, I am interested in the significance of Exhibit 24 for Exhibit 23.

MR WILSON: I am sorry, I didn't catch the last part.

HIS HONOUR: The significance of Exhibit 24 for Exhibit 23.

MR WILSON: Yes.

1

HIS HONOUR: The reason I ask is this: Exhibit 23 is now before me. One would think therefore that the facts which are asserted in it are evidence of the truth of the assertions made. At least the great bulk of the document, however, relates to the claim for economic loss which has been abandoned and I am anxious to ensure before this - Mrs Arthur leaves the witness-box that there is a consensus concerning the extent to which Exhibit 23 may now be evidence of anything.

10

MR WILSON: Your Honour, for the plaintiff's part I can confirm that there will be no claim advanced for economic loss as evidenced by Exhibit 24. My understanding of the use of Exhibit 23 is as some prior inconsistency or conduct on the plaintiff's behalf which is inconsistent with her evidence in Court.

HIS HONOUR: That's to say you are content that I treat the document as something which can only be relied on, if at all, against the plaintiff.

20

MR WILSON: Your Honour, in so far as it sets out factual matters of what she did, no, but in so far as she claims economic loss - for example, your Honour, it sets out her history of working.

HIS HONOUR: I know it does, and it does it to advance a claim for economic loss. I notice that Mr Daubney did not cross-examine on the document. One possible explanation for that is that the statement in Exhibit 24 has been treated on the other side as an abandonment of the claim for economic loss, including the statements in Exhibit 23 which were relied upon to support the dollar figure claimed.

30

MR WILSON: Your Honour, I am content to do that because the witness has given oral evidence of those matters.

HIS HONOUR: That means, does it, that you accept that Exhibit 23, to the extent to which it may be of any assistance in the case-----

40

MR WILSON: Is against the plaintiff's interest.

HIS HONOUR: -----can only be viewed, if at all, as a matter tending against and not in any respect for the plaintiff's case?

MR WILSON: That's as I understood it was put, yes, your Honour.

50

HIS HONOUR: No doubt you are content with that.

MR DAUBNEY: Thank you, your Honour.

HIS HONOUR: Thank you, Mrs Arthur. You may leave the witness-box.



1

WITNESS EXCUSED

HIS HONOUR: Mr Wilson, my associate tells me that she is still waiting to receive the photocopies that are Exhibits 20 and 21.

10

MR WILSON: They are here. Can I wait till my solicitor comes back, your Honour?

20

30

40

50

STEPHAN BENKO, SWORN AND EXAMINED:

1

MR WILSON: Can I hand up those exhibits, your Honour? Is your name Stephan spelt S-T-E-P-H-A-N Benko?-- That's right.

Mr Benko, what is your present residential address?-- 59 Cairns Road, Camira.

10

And your occupation?-- I am a spray painter.

Were you born on the 1st of December 1947?-- That's right.

In late 1966 and 1967 did you know a lady by the name of Lily McDonald?-- I certainly did.

Do you recall when you met her?-- The first time, you mean?

Yes?-- Earlier in '66.

20

And did you start going out with her?-- Not right away, no.

Do you recall when you started going out with her?-- Basically when she moved in with me.

Do you recall when that was?-- Probably somewhere between late October and probably early November.

Of which year?-- '66.

30

And what were the circumstances in which Lily McDonald came to live with you?-- Well, I got her a little flat down the road. She wasn't happy there so she moved in with me. I asked her to move in because moving into a larger house.

Dealing with that evidence that you have just given, you knew Lily McDonald before you got her the little flat down the road?-- Yeah, only just meeting at the shop.

40

And you found her a place to live?-- Yes. I had lived there as well.

Can you describe-----?-- Previously I had lived there myself in Gladstone Street, Rocklea.

Is that the little place down the road that you have described?-- Yes.

And you said that Lily wasn't happy living there?-- Yes.

50

Did she express that to you?-- Yes.

And as a result of that did she come to live with you?-- Well, actually I was - my brother had moved out of the little flat we had. We had about quarter of a house and the larger side of it become vacant and I took that over.

Yes?-- And asked her to move in with me.

1

And did she do that?-- Yes.

And at that time were you in employment?-- I certainly was.

And how were you employed?-- Spray painter for a furniture company.

10

20

30

40

50

1

You continued to live with Lily until 15 February 1967?--
Correct.

Were you aware as at that date that she was pregnant?-- Yes.

How did you feel about that?-- Great.

Can you expand on that a little? Were you happy that she was
pregnant?-- Yeah. We were looking forward to Shane being
born.

10

I am going to ask you shortly some questions about the night
that she was taken by the police, but if you can place
yourself immediately before that. What were your intentions
so far as yours and Lily's life were concerned?-- Well, we
were pretty much inseparable. We were just probably head over
heels with each other. There is no question we weren't going
to get married.

20

Now, coming then to the night of 15 February 1967. Were you
at home?-- Yes, I was.

Was Lily at home?-- She certainly was.

Was there anyone else at your premises?-- Yes, there was, a
fellow named Alan Shaw, a mate of mine.

Can you just describe to His Honour what happened?-- Well, it
was probably somewhere around ten o'clock, just my mate and I
were playing - actually Lily was in there having a bit of a
singsong with us and we were just working out a song, just
quietly, and Lily just got up and said "I'm going to bed. A
bit tired", and it wasn't long after that the police just
ended up being in front of us.

30

Yes?-- And she had followed probably ten seconds behind them
and then she put her gown on. She was just standing there and
they were there basically five minutes and then just out of my
life.

40

Did they speak to you at all?-- Yes, they spoke to me.

To your knowledge did they also speak to Lily whilst they were
at the place where you were living?-- Yes, well, there wasn't
much that we could say because they were law.

Where were you living at that stage? What was the address?--
80 Lillian Avenue.

50

Lillian Avenue?-- 80 Lillian Avenue at Salisbury.

Salisbury?-- Salisbury, yes.

Now, did Lily leave with the police?-- Yes.

Did you make any enquiries as to where she was going?-- Yes,
well, the police had told me ring up Moorooka police station

the next day, which I did.

Did they say why they were taking her?-- I just don't recall exactly, but I just didn't know what was happening, and she didn't know.

At the time they told you to ring the next day at Moorooka, did you do that?-- Yes.

Did you ascertain where Lily was?-- I asked, yes, and they said she was at the Holy Cross and it is out of our hands.

Yes. Did you do anything as a result of finding out that she was at the Holy Cross?-- I got in touch with her sister somehow and that was my only contact, actually. I thought she had contact with her.

Right. Did you do anything as a result of contacting Lily's sister?-- Well, I think it was the following Friday after work we had met and gone to the Holy Cross.

Do you now recall what day of the week that was?-- That was?

That she was taken away?-- Not really sure.

That is, are you able to say, you said you went the following Friday after work?-- Yes, I just don't recall whether it was the Friday before or the Monday. I just don't remember. I don't know if the-----

So would it be safe to say that within a week you went?-- That I had gone, yes. I was at the Holy Cross at the end of that week. I went with Jenny.

Were you allowed to see Lily?-- The first time, yes.

For how long were you able to see her for?-- About five minutes.

Was your visit supervised or unsupervised?-- Mother Superior was right in front of us.

At that time how did Lily appear to you?-- Just wanted to get out of there, I think.

Did you make any enquiries as to whether she could be released into your care?-- Well, I just asked her what was going on and I told her we were going to get married and she wouldn't hear of it, really.

When you say "she", who are you referring to?-- The Mother Superior. We were just sitting on the verandah.

And after that first occasion did you go to the Holy Cross home again?-- Well, I told the Mother Superior I was going down to Sydney to get marriage papers and told her I would see her in about a week. Which I did.

Now, had you met Lily's mother before this time?-- Yes.

1

In what circumstances had you met her?-- Went down to Tallebudgera where they were staying at a caravan park.

Yes. So you knew who she was?-- Yes.

What was involved in you getting these papers organised to get married?-- Well, took a train down to Sydney and I think it was in Central or - yes, Central station I think it was I transferred to a Bankstown train. It was a Saturday morning. I got to Bankstown about 11 a.m. and I walked across to the post office, which was probably a couple of hundred metres away on the opposite side of the road and I inquired behind the counter where Mrs McDonald lived. The bloke behind the counter told me that she lived at a caravan park. I think it was something like nearly two miles away or something, so I walked out of the post office and stood on the steps. It was a really hot day. Not looking forward to the trip, the walk - it was a strange town to me - and this voice said something to me and I looked down. It was Lily's stepfather, Johnny Johnson, and I was surprised because I didn't think I knew anybody in that town, and he said - what he said was, "Lil's Mum is inside". I said, "I was just in there". "No, she's inside", he said. I had gone back in and she was at the counter at this stage and then I told her what I was there for, to get the marriage papers and stuff, and the bloke behind the counter had said, "We've got marriage papers here.", so he just handed them to us and we left.

10

20

Did you get Lily's mother to sign those documents?-- Yes, and my father.

30

Where was your father living?-- At Blacktown.

In Sydney?-- Yes.

He signed the papers as well?-- Yes.

And did you return to Brisbane with those papers?-- Certainly did.

40

What did you do?-- I think it was the following Friday again, I think it was, got in touch with Jenny and we went to the Holy Cross again.

Can I ask you this, at that time what was your means of transport in Brisbane?-- Tram.

Did you have your own vehicle?-- No. I had one earlier but I wasn't even licensed.

50

So you relied on public transport or others to take you around?-- Yes.

I am sorry, I interrupted you. You then went back to the Holy Cross, did you say?-- Yes, I did.

What happened?-- Well, Jenny apparently knew she couldn't see Lily. She stayed in the courtyard and I go up and see the Mother Superior and give her the papers.

1

Did you get to see Lily on that occasion?-- No, she wouldn't let me see her.

You asked to see her?-- Yes.

That wasn't permitted?-- Pardon?

10

That wasn't allowed?-- No.

What did you do with the papers that had been signed?-- Give them to the Mother Superior.

Were you ever given those papers back?-- No.

Do you personally know what became of them?-- No, I don't.

20

After you had seen the Mother Superior, what did you do?-- Just went back to Jenny and we caught a tram back, back to Brisbane.

What were your intentions then so far as yours and Lily's life together?-- Well, I thought everything was being taken care of. Lily's mother knew what was happening, I thought, but nothing come of it, so we just waited.

Did you make any further attempts to contact Lily at the Holy Cross home?-- No, I got a message - no, I didn't, no, because it was quite obvious I couldn't see her.

30

Why was that quite obvious?-- Well, the Mother Superior sat twiddling her thumbs and sounded pretty adamant we weren't going to get married. I have just basically said, "The ball's in your Court", because I give her the marriage papers. We were still confident we were going to get married, and when Shane was born I still thought we were going to get married when she got out, but it never happened. I kept on waiting and nothing happened.

40

In the period between when you took the marriage papers to the Mother Superior and when your son was born, did you make any attempt to revisit the Holy Cross home?-- No, well, no point. There was no point.

Now, did you find out that Lily had had a child?-- Yes.

Do you recall how you found out?-- Jenny got in touch with me and said that Lily had the baby.

50

Do you know who Jenny is?-- Yes, Lily's sister.

You had ascertained that Lily had the baby?-- Yes.

What did you do?-- Well, got in touch with a mate of mine and he come out and picked me up in his car. Gary McCabe was his

name.

1

To do what?-- To take me to the hospital and come and see our son and meet Lily.

Do you know the date on which your son was born?-- First of the ninth '67.

And are you able to say when you went to the hospital in relation to that date?-- What was that again?

10

Are you able to say when you went to the hospital - you found out that Lily had had the baby?-- Yes.

You went up to the hospital. Are you able to say when it was after first of September?-- I think it was a couple of days later.

All right. And when you went to the hospital did you know where Lily was?-- Yes, Jenny told me. I think it was the third-floor.

20

Did you go and see her?-- Yes, with Gary.

How did she appear to you?-- Totally different.

In what way?-- Just wasn't the same woman.

Are you talking about in terms of her appearance? Her speech?-- Yeah, appearance.

30

How she behaved?-- Yes, just wasn't the same woman. She wasn't the same bubbly woman I knew in the seven months. She didn't even have an idea of what was happening.

Why do you say that?-- She always laughed and joked, and just wasn't the same woman. Just knocked my socks off, it did. Me and my mate just looked at each other and I said to Gary, "I don't know what's happened, eh?"

40

Were you able to talk with Lily?-- Yes, sort of. We decided we'd go and see the baby. We were all standing around just looking at all the other babies. We didn't know - she couldn't point the baby out.

Were you interested in seeing your son?-- Yes. That's why we went to the nursery.

Just describe what happened when you did that?-- We just stood there, sort of in the background because there was a few people right at the glass front there. Waited our turn and we looked and we didn't know which one we had to look at.

50

Did you make any enquiries to find out which was your son?-- No, I wasn't supposed to be there apparently.

Who told you that?-- Lily told me. She said she would be in trouble if I - they found out I was there.

So the answer to my question as to whether you made any enquiries as to which was your son?-- No. Well, I was surprised she didn't know.

As at the time you went to the hospital after Lily had had the baby what were your intentions regarding yours and her future?-- At that time I still thought we were going to get married. I was just waiting for her to get out. Had I known I would have taken her out of the hospital.

10

Now, after that occasion how many times did you go up to the hospital?-- Just that once.

Why did you only go up the once?-- Well, I wasn't supposed to see her.

And after that occasion?-- Lily I think was worried that the nurses or whoever was there, she was worried about they were going to throw us out or something.

20

After that occasion that you had been up to the hospital, when did you next see Lily?-- About 14 years ago.

About 1990?-- That's about right.

After you left the hospital did you make any attempt to contact her?-- Well, she disappeared.

Did you know where she was?-- No. She had written me a letter and I think it took a lot of months to catch up with me.

30

It took how many months?-- A lot of months. I don't recall how I got the letter.

Do you recall whether you were still living at 80 Lillian Avenue at Salisbury?-- Mmm.

In October 1967?-- No, I wasn't there that long, no. I had moved by then.

40

Do you recall when you moved?-- Probably a couple of months later.

After the police came?-- Yeah, and then I lived across the road from the PA Hospital.

Were you able to give Lillian - Lily your new home address?-- No, well I was sort of in between houses. It wasn't really a permanent address.

50

So you didn't know where Lily was?-- No.

Do you know the - you said a letter that she wrote to you took some months to catch up to you. Do you know the address that was sent to?-- That would have been probably 80 Lillian. I have still got the letter somewhere. I just haven't found it -

partly burnt.

1

What did you do when you got that letter?-- Read it.

What did you do?-- Well, I wrote a letter back but never ever got a reply.

So did you think that the relationship was over?-- Pardon?

Did you think that your relationship was over?-- I actually thought she would probably come back to find me, but it never happened.

10

Did you subsequently marry yourself?-- Yes, I did.

When did that occur?-- I think it was 1970, I think.

Have you only been married the once?-- Yes, I have.

Thank you, your Honour.

20

CROSS-EXAMINATION:

MR DAUBNEY: Mr Benko, you arranged for Miss McDonald, Lily, firstly to live in a flat?-- Yes. Yes.

30

And then a couple of weeks later she moved in with you; is that right?-- Well, could have been a couple of weeks; could have been another week on top of that. I don't really know. It was a little while later.

Prior to you arranging this flat for her?-- I used to live in the flat myself sometime before that.

All right. The extent of your contact with her had been seeing her at the shop; is that right?-- Yes.

40

I see. So for some reason you arrange a flat for her?-- Yes, because her mother was moving away, so I said I know a little flat around the corner just behind the shop where we used to meet.

At that stage you weren't going out?-- No.

You weren't girlfriend or boyfriend?-- No, no.

50

And then whether it is one or two or three weeks later, it doesn't really matter?-- No.

A relatively short time after she moved into the flat she moved into the house where you were living?-- Yes, well, my brother and I - my brother found another place to live and the other half was vacant so I asked Lily if she would move in with me.

That would have been in about November?-- Yes, I think so, yes.

And while she was living in the flat you still weren't her boyfriend then. You hadn't started going out with her, had you?-- Which flat? The first one?

The first one?-- No. No.

10

No. So she moves into your house in November?-- Mmm.

And then sometime between November and the end of December you start having a relationship with her?-- Yes.

I see?-- I had a birthday party around - whatever the Saturday fell, before the first of December, with some friends.

All right. So you were going together, if I can put it that way, for about a month before she fell pregnant to you; is that right?-- That's right.

20

And you found out or it became apparent that she was pregnant to you about a month later?-- Yes.

And with all of two months of a relationship under your belt, you were-----?-- Probably closer to three months.

-----there was no question that you weren't going to get married. Have I quoted your evidence accurately, Mr Benko?-- Well, we just head over heels with each other. Marriage was the next step.

30

Did you ever ask her to marry you?-- I don't recall that, no, but probably mentioned, but I just don't recall it.

You just don't recall it?-- No.

Well, you recall her age at the time, don't you?-- Yes, I do.

40

How old was she?-- Sixteen.

How old were you at the time?-- I'd just had my 18th birthday - 19th birthday, sorry.

I am sorry?-- 19th birthday.

You were 19 and she was 16. Shortly after you found out that Lily was pregnant, the police arrived at your house late one evening?-- Mmm.

50

And took Lily away; is that right?-- That's right.

You say you didn't know what was happening, do you?-- No.

You knew enough to phone the Moorooka police station the next day to find out where she was?-- He told me. The policeman

told me to ring him.

1

And you found out that she was at the Holy Cross home?--
That's right.

And then about a week later with Lily's sister you went to the
Holy Cross home?-- That's right.

And you saw Lily in the presence of the Mother Superior?--
That's right.

10

Do you recall that was Mother Lian?-- Wouldn't remember her
name.

And then you went on this trip to Sydney to get marriage
papers signed; is that right?-- That's right.

And luckily ran into Lily's stepfather and mother at the
Bankstown post office?-- That's right.

20

Otherwise there would have been no chance of you getting those
marriage papers signed?-- Why is that?

Well, is that the case that-----?-- No, no, no. I was
prepared to take a two mile hike.

I beg your pardon, you were going to walk to the caravan
park?-- Yes.

I am right, I suppose, in assuming that when you saw Lily's
mother at the Bankstown post office you told her that Lily was
in the Holy Cross home?-- Yes, and that she was pregnant.

30

And I take it that you told Lily's mother that Lily just
wanted to get out of there - that is, get out of the Holy
Cross home?-- Yeah, that was the idea of getting the marriage
papers.

You came back to Brisbane - I am sorry, just to put this into
context. You made a train trip?-- Yeah.

40

An overnight train trip from Brisbane to Sydney; gone out to
Bankstown on the train. After you have seen Lily's stepfather
and mother you then went to see your father?-- Yes.

And, what, that night did you come back to Brisbane, did
you?-- Yeah, that same weekend, yes.

So another overnight train trip back to Brisbane? Have I got
that right?-- Yes.

50

And then you on the following Friday again went out to the
Holy Cross and saw Mother Superior and gave her the marriage
papers?-- That's correct.

And at that stage you thought everything was taken care of?--
Yes.

And you didn't make any further attempt to contact Lily at the Holy Cross home?-- Well, there was no point. I wasn't going to see her anyway.

1

So this is March or thereabouts, is it, when you have had these marriage papers signed?-- Yeah, end of February perhaps.

End of February. By the end of March were you getting worried because you hadn't heard anything about these marriage papers being signed?-- Yeah, well, I just thought that the law would take its course.

10

By the end of April were you getting worried?-- I was worried the whole time.

You did absolutely nothing?-- What could I do?

No. You did absolutely nothing to chase up these marriage papers that you had given to the Mother Superior, did you?-- Well, we were young and naive and we thought we would leave it in the hands of the law.

20

You weren't that young. You were 19?-- I knew nothing about the law, sir.

And you knew that this woman with whom you were so much in love after a two month relationship, that you were prepared to marry her, was locked in the Holy Cross home and you did nothing after you had taken the marriage papers-----?-- Well, for-----

30

-----to get her out of the Holy Cross home, did you?-- I couldn't understand why she got taken off in the first place. They walked through closed doors.

I take it you are agreeing with me that you did nothing after giving the marriage papers to the Mother Superior to get Lily McDonald out of the Holy Cross home?-- I thought it was left in the hands of Lily's mother.

40

Now-----?-- After all it was Josephine's daughter.

Who had told you that getting Lily out of the Holy Cross home was in the hands of Lily's mother?-- Nobody told me nothing. I had no legal advice. I had nothing.

Well, you just told us that you thought it was in the hands of Lily's mother?-- Yes, well-----

50

What enquiries had you made to give you that impression, Mr Benko?-- Well, Jenny was my contact, the only contact I had. Lily's sister Jenny was my only contact and she told me she wasn't even allowed to see her. I don't know why.

Is Jenny still alive, do you know?-- No, she is not. I only found that out in 1990.

I am sorry?-- I only found that out in 1990.

1

I see. So perhaps if we can fastforward a little bit. We reach the beginning of September 1967; you knowing that Miss McDonald is still in the Holy Cross home; you having delivered marriage papers to the Mother Superior and you having done nothing after delivering those marriage papers, that was the situation at the beginning of September, wasn't it?-- Well, my personal thoughts were that was about as high as I can go. The ball was in her court. I thought she would do something about it, the Mother Superior.

10

I see, it was in the Mother Superior's Court?-- I had faith in the system.

Your son was born on first of September?-- Correct.

You went to see him - I am sorry, you went to the hospital a couple of days later?-- Yes.

20

Two or three days after he was born. That's correct, isn't it?-- Yes.

Lily appeared totally different?-- Yes.

She looked physically different?-- Very physically different.

She acted different?-- Very.

It knocked your socks off?-- Certainly did. Still today.

30

Your mate was there with you?-- Yes, Gary McCabe.

Where is Mr McCabe?-- Haven't seen him for a number of years. I saw him after he got married a couple of times.

He is not dead as far as you are aware?-- No. No, don't think so.

You don't think so. Right. Your evidence was I think that with Lily you sort of talked?-- Pardon?

40

You sort of talked with Lily?-- Yeah.

Did you sort of talk about getting married?-- Well, at that stage we thought we would still get married.

Please answer my question. Did you sort of talk about getting married?-- Yeah, well, we were waiting for somebody to do something about the marriage papers.

50

Please answer my question. Did you-----

HIS HONOUR: Mr Benko, if you have some trouble hearing the question?-- Yes.

Or some trouble and difficulty understanding it, please say so?-- Okay.



1

MR DAUBNEY: Thank you, your Honour. When you went with your mate to visit Lily in the hospital and you talked with her, your evidence was that you sort of talked with her?-- Well-----

10

20

30

40

50

Did - let me finish my question, please. Did you talk with her about getting married?-- Yes, we mentioned it.

1

What discussion did you have with her about getting married?-- Well, I told her - I left the marriage papers with the Mother Superior and she told me that she had signed them.

Lily told you that she had signed the marriage papers?-- Yes.

All right. That would have been good news for you, Mr Benko?-- That's right.

10

It means you could marry Lily straight away?-- That's right.

So with that news what steps did you take after seeing Lily on that day to arrange your wedding?-- Well, I was just waiting for somebody to get in touch with me.

Who?-- Well, anybody from the department, or Lily, anybody, Jenny, to let me know. That was my only contact, was Jenny. There was no point in me going back to the Holy Cross to walk around in circles, sir, because it was obvious I wasn't going to see her again.

20

You were just waiting for her to get out was your evidence before?-- Yes, that's it. I still thought we were going to get married and we were just waiting - I was just waiting for her to get out.

Get out of hospital or get out of the Holy Cross?-- Out of the Holy Cross.

30

So I am correct then in assuming that you made inquiries as to when Ms McDonald was released from hospital and returned to the Holy Cross?-- Could you repeat that, please?

All right. I will put it another way. I assume that as a caring father wanting to inquire about the woman that you are intent on marrying you made inquiries at the hospital as to when she was going to be released from hospital?-- I didn't make inquiries about when she would be released, no. I wasn't supposed to talk to anybody - I wasn't supposed to be there.

40

HIS HONOUR: You will be some little time, I take it.

MR DAUBNEY: I will, your Honour.

HIS HONOUR: The Court will adjourn till 10 to 12.

50

THE COURT ADJOURNED AT 11.31 A.M.

THE COURT RESUMED AT 11.51 A.M.

STEPHAN BENKO, CONTINUING CROSS-EXAMINATION:

MR DAUBNEY: Mr Benko, I think you were just about to tell us about the wedding plans that you had made for you and Miss McDonald for when she was released from the Holy Cross Home?-- Yes.

10

What wedding plans had you made?-- We had the marriage papers, that's all we needed. I was just waiting for her to get out and get in contact with me.

So there was no actual wedding arranged?-- We were going to get married, simple as that.

I see?-- We were just waiting for somebody to release her and it would have been on.

20

You are quite certain about that?-- Oh, yes.

And this is now September 1967 and you were immediately ready to marry her and take her and your son into your home; that's right?-- We were established originally, yes.

You had moved out of the house or the half house that you had been living in in Lillian Street, hadn't you?-- Lillian Avenue, yes.

30

Lillian Avenue. That was a couple of months, I think, after Miss McDonald was taken to the Holy Cross Home; that's right?-- Yes.

Where did you move to?-- Opposite the PA Hospital.

And what was your accommodation opposite the PA Hospital?-- Just a room in a house with an old friend.

Just a room in a house with an old friend?-- Yeah. I used to live with Maria Brassell.

40

And that's where you were living when you went up to see Miss McDonald after the baby was born?-- Think there. Yes, I was.

Okay. And is that where you were proposing to take Miss McDonald and the baby back to live, in a room in a house with a friend?-- No, I didn't say that.

Well, what plans had you made to accommodate Miss McDonald and the baby after she was released?-- Well, if she had been released we would have got a house together again.

50

Sorry, perhaps we are talking at cross-purposes. I was under the impression - and please correct me if I am wrong - that you were expecting Miss McDonald and the baby to be released to you almost immediately?-- I didn't know when. I was just waiting on a word, somebody to get in contact with me.

So do I take it from that that you had made no plans about where you and Miss McDonald and the baby were going to live?-- Well, had to keep in contact with her to make the plans. You can't make plans if you got no contact.

Whether you were in contact with her or not, I am talking about your plans, you hadn't made any plans?-- Plans are quite easy to make, sir.

Right. In any event, after you saw her at the hospital weeks went by; that's so?-- Yes.

And months went by?-- Yes.

That's so?-- That's right.

And years went by; that's so?-- Yes, that's right.

And the extent of your attempt to contact Miss McDonald was after you received a letter that she had written to you that took some months to catch up with you, you say?-- Yeah.

You didn't make any inquiries at the hospital about when she was being released?-- Well, I presume she was being released straight away after the baby and gone back to the Holy Cross. See, I didn't know the circumstances of why she was even in there.

Do I take it from that that you didn't make any inquiries at the hospital about when she was being released?-- I had no right being there, they told me.

I am sorry?-- I had no right being there. I wasn't supposed to be there, I was told.

Well, you didn't telephone the hospital?-- No, I went and saw Lily straight. I knew where she was.

I am sorry, this is to make inquiries about when she was being released, you didn't phone the hospital and find out when-----?-- No, no, Lily told me she was going back to the Holy Cross.

I see. And did you contact the Holy Cross to find out when she was being released from there?-- No, I was just waiting on Jenny to tell me.

I see?-- Jenny was my only contact.

You didn't write to the Holy Cross Home?-- I am not a letter writer, sir.

You didn't telephone the Holy Cross Home?-- What was the point? They wouldn't let me talk to her.

You didn't telephone the Holy Cross Home to find out if and when she was being released?-- No, Jenny was providing me

with all the information. The whole time I thought her mother knew.

The room in the house opposite the PA Hospital-----?-- Yes.

-----you moved away from there sometime later, did you?-- Yeah, I moved next door actually.

So you moved all of - to the house next door?-- Mmm.

You had given Miss McDonald, I assume, the address of the house opposite the PA Hospital?-- Pardon?

You had given Miss McDonald the address of the house next to the PA Hospital, had you?-- No, I hadn't seen her at that stage.

You had given her sister that address, I suppose?-- Jenny had the contact with me, just - she always got in contact with me.

Well, did Jenny get in contact with you after the baby was born?-- No. Because she couldn't see - I didn't know at the time that she couldn't see Lily at all.

Jenny had contact with you before the baby was born; that's right?-- That's right.

You knew how to contact Jenny, didn't you?-- No, she always got in contact with me.

You had no idea how to get in touch with Miss McDonald's sister?-- Well, no, I don't even know where she lived. She always got in contact with me.

You just - you went to the Holy Cross Home with her a couple of times?-- Mmm.

How did that come about?-- Well, I told her we are going to get married and-----

No, no, no, physically, how did you meet up with Jenny to go to the Holy Cross Home?-- Well, I think she used to work at Arnotts and we just met down near the Gabba there somewhere. That was the first time.

I am sorry?-- That was the first time.

I see. So you knew where she worked?-- Pardon?

You knew where she worked?-- Yeah.

You didn't try and contact her there at her workplace after the baby was born?-- Well, I am not sure she was working there then.

Well, you didn't even make the phone call to find out, "Do you have a Jenny McDonald working there?"?-- At Arnotts?

Arnotts?-- No, she got in touch with me and told me the baby was born.

1

All right?-- Every time she needed to get in contact with me, it wasn't a problem.

So your only source of contact or your only means of contact to Lily as far as you were aware was through her sister?-- That's right.

10

And you didn't make any attempt to contact her sister after the baby was born?-- No.

Didn't even attempt to find out where her sister was or worked?-- Well, I didn't have that information.

Yes, you did. You knew she worked at Arnotts?-- Yes.

And you didn't phone Arnotts to try and get in touch with her, did you?-- No.

20

No?-- She was always in contact with me.

Yes. When you saw Miss McDonald at the hospital you didn't tell her what your address was of the house opposite the PA, did you?-- Lily?

Yes?-- No point in talking to Lily. She was just like - she was just a different woman. Just - I didn't know what happened.

30

Do I take it from that-----?-- She was pretty like sedated or something.

Do I take it from that that you didn't give Lily your address?-- I don't remember it, no, because, I mean, my contact was Jenny and I knew she would get in touch with me if she needed me, which she did.

Not after the baby was born?-- Pardon?

40

Not after the baby was born she didn't, did she?-- Yes, she did.

Jenny did?-- Yes, that's how I got to go to the hospital, to tell me the baby was born, and I went there.

After you had been to the hospital Jenny didn't get in touch with you again?-- No.

50

No. So-----?-- So we thought we were just going to get married. I was just waiting for her release.

When you saw Lily up in the hospital within a couple of days after the baby was born, you were - you say she appeared totally different?-- Mmm.

She wasn't the same woman?-- Definitely not.

You were shocked by her appearance; is that so?-- That's right.

What was it about her appearance that shocked you?-- Well, she was just - I have seen pregnant women before but in all my years I have never seen a woman get that big, because she was a petite lady, very petite.

And that shocked you?-- Certainly, and the fact that she wasn't her bubbly self. She was always happy, happy-go-lucky.

10

Did you have a discussion with Lily on that occasion about whether you were going to support her and the baby?-- Well, she was just totally different, you couldn't talk to her. She was just standing there like this all the time, you know. Like she didn't know where she was, and I said, "Well, we'll just go and see the baby", and I looked at Gary, so we turned around, walked over to the nursery, and she was still like that, just - just stood there, and couldn't even point out my baby.

20

And what discussion did you have with her when you and she and Gary were standing at the window of the nursery?-- We were waiting for the larger crowd to move away so we could get closer to the window, and then just couldn't see our baby. So we just watched this blond haired little baby in the crib. Dark haired I thought was mine, but obviously wasn't.

You didn't have any discussion about marrying Lily?-- Yeah, as a matter of fact we were just - we were going to get married. That's why we had the marriage papers and she told me she had signed them that day.

30

She had signed them that day?-- No, not that day, no, she told me - that was the day she told me that she signed them.

And I think you have already told us-----?-- That was the second time I had seen her in seven months or something.

40

And I think you have already told us that after that you didn't do anything to follow up about the fact that these marriage papers had been signed?-- I left them in the hands of the State. I left them in the hands of the State and Lily's mother.

You left it in the hands of the State and Lily's mother?-- I had no idea why she was incarcerated. I still none the wiser.

When you went up to see Lily at the hospital did you tell Lily that you weren't in a position to support the baby?-- I was always in a position to support the baby. Baby's don't eat much, you know.

50

Well, what plans had you made to accommodate the baby when the baby was released from hospital?-- Well, it would have been just a matter of getting a house and living on like we always did. I probably would have got the same house back. I knew

the bloke who owned it.

1

What plans had you made to get baby furniture or borrow baby furniture or borrow a cot?-- That wasn't very much a problem really.

You had done nothing, had you?-- With what?

You had done - I am sorry, you had done nothing to prepare?-- Doesn't take long to prepare, sir. It is just a matter of going to an op shop or a shop for a pram, a crib. --It is nothing. We had family and friends, and we were both quite intelligent.

10

I see?-- We were happy one minute. The next minute it was just gone. We were looking forward to a life together, and when the police came in, they told her to get out of bed, she was pregnant. Now, how did they know she was pregnant? "Get out of bed. You are pregnant." How do they know? It was a dark room. Walked in through a closed door.

20

Which led to a series of events that involved you catching an overnight train to Sydney and another overnight train back from Sydney?-- That's right.

In order to get marriage papers signed?-- That's right.

And then after the baby was born you didn't even try to find Lily, did you?-- I thought she was still in Brisbane.

30

After the baby was born you didn't even try to find Lily, did you?-- Where do you start? Where could I start?

40

50

You could have started with her mother. You knew where her mother was?-- Well, I thought it was all taken care of. I was just waiting. I didn't know how long she was going to be in there for.

What enquiries did you make of her mother? You knew where her mother was. What enquiries did you make of her mother about Lily?-- Like I said, my contact point was Jenny. That was the only contact point I had.

10

Do I take it from that you made no enquiries after the baby was born with Lily's mother to try and find Lily?-- Apart from writing that letter. She wrote me a letter which finally caught up with me.

You expected Lily to get in touch with you after she was released from the Holy Cross; is that the case?-- Well, I thought Jenny would.

20

Jenny didn't, did she?-- Nobody did.

Lily didn't?-- I didn't know what happened. I thought she was still in the Holy Cross.

Well, you-----?-- She told me she was threatened to go to Karrala House. I didn't know where she was.

Mind you, you hadn't given Lily any address at which to contact you, had you?-- Well, Jenny had that, so I just thought - I mean, being her sister, I thought she had some sort of contact.

30

I see?-- There was other women that had contact with her.

You just mentioned that Lily had told you that she had been threatened that she was going to be sent to Karrala House?-- Yes.

She told you that when you went up to see her at the hospital, I take it?-- Yeah.

40

And did she tell you who had threatened to send her to Karrala house?-- Well, the powers that be, I assumed.

Well, perhaps let's not concern ourselves with your assumptions. The question I asked was did she tell you who had threatened to send her to Karrala house?-- The people who were in charge.

50

I see. You are quite sure about that, are you?-- Well, I suppose the body language of the Mother Superior told it all. She was pretty adamant we weren't going to get married.

The Mother Superior wasn't up at the hospital?-- No, I am talking about when I saw the Mother Superior. So I figured if that's the kind of woman that is in charge, I probably had Buckley's so I never went back to the Holy Cross. There was no

point. I wasn't going to see her.

At the moment I am not asking you about the reasons why you didn't bother to get in touch with Lily?-- It wasn't that I didn't bother. It was that I couldn't do anything.

At the moment I am asking about your evidence about Karrala House and Lily telling you that she had been threatened with being sent to Karrala House, and correct me if I am wrong but your evidence was that she told you that when you went to visit her in hospital?-- As I remember it, yeah.

And I asked you are you quite sure that she told you that?-- Well, from memory, yeah.

Or is that something that you have become aware of in the years since 1990 when Lily re-established contact with you?-- She said she was going to a place west of where she is now, and I couldn't understand that. Like I said, she was very, very, very vague and just said it was awful in there, and the last thing she said to me was "We'll find our baby one day". She'll find our baby, and I thought that was strange because she knew more than I do.

This is two or three days after the baby has been born?-- It is.

MR WILSON: We had arranged for Dr Pickering to ring at 12.15. We will tell him to ring back.

MR DAUBNEY: She said "I'll find the baby one day"?-- Like she must have known something, so I thought it was strange for her to comment like that.

You had no discussion with her on that day about Lily and the baby coming home to you, did you?-- Well, we thought she was coming home. She was going to bring the baby.

Please don't tell me what you thought. Please tell me about whether you had a discussion with her on that day about the baby and Lily coming home to live with you?-- Sir, we were still in love and I thought she was going to come home with the baby soon. That was what the arrangement would have been.

Do I take it from that that you didn't have a discussion?-- We thought she was coming home very soon. She thought that too, but she said "If things go wrong" - I didn't know what she meant by it then - "I'll find our baby one day". That's the last words she said before I left.

She said "If things go wrong I'll find the baby one day"?-- Well, she knew more than I did. I wasn't in a position.

Do you really have a good recollection of all of this, Mr Benko?-- Of?

Going up to see Lily at the hospital?-- Yes, fairly good one.

Fairly good one. In which case do you recall there being no discussion with Lily about how you were going to support the baby?-- Supporting wasn't the problem, sir. I mean, we were no different to any other couple.

1

Sorry?-- No different to any other couple at the time.

I am sorry to come at it like this, but the question I actually asked you was, was there no discussion?-- About?

10

With Lily about you supporting the baby?-- We knew we could live together and support the baby. Babies don't eat that much, sir. First six months they are breastfed.

And in 1990 or thereabouts you and Lily were reunited?-- Yes, she found me.

She tracked you down?-- Yes.

You had made no effort to track her down?-- I had no idea where she was.

20

And you had never tried to find your son either, had you?-- No, I didn't.

I have nothing further, thank you.

HIS HONOUR: Mr Benko, when did you first learn of the adoption?-- Well, I never knew until 1990.

30

MR WILSON: There is no re-examination. We are making arrangements for Dr Pickering to ring in again. May Mr Benko stand down?

HIS HONOUR: Do you want him excused? I will assume there is no objection to an application for excusal unless an objection is voiced.

MR DAUBNEY: Thank you, your Honour.

40

HIS HONOUR: Thank you, Mr Benko. You are excused from further attendance.

WITNESS EXCUSED

50

JOHN DARRYL PICKERING, SWORN AND EXAMINED VIA TELEPHONE LINK:

1

MR WILSON: Dr Pickering, can you hear me?-- Yes, I can.

It is Keith Wilson, counsel for the plaintiff speaking?-- Right.

Can you please state to the Court your full name?-- John Darryl Pickering.

10

Doctor, you are a qualified psychiatrist?-- Yes, I am.

You carry on your practice from rooms at 151-155 Hawkesbury Road at Westmead in the State of New South Wales?-- Yes.

You have treated a lady by the name of Lily Arthur?-- Yes.

And initially that was on referral from her general practitioner, Dr Dioro?-- Yes.

20

As a consequence of that you sent a report or a letter to Dr Dioro dated first of December 2000?-- Yes.

That was the first time that you saw Mrs Arthur?-- It was.

Since that time you have seen her on 129 occasions?-- Yes.

And you prepared a report dated 30 September 2004 addressed to McInnes Wilson Lawyers?-- Yes.

30

In that report you have set out the history given to you by Mrs Arthur?-- Yes.

And your opinion as to the diagnosis that you offer in respect of her condition?-- That's correct.

In respect of the diagnosis and opinion, are they your opinions honestly held?-- Yes, they are.

40

Doctor, that's all the questions I have of you. Would you stand by, please.

CROSS-EXAMINATION:

MR DAUBNEY: Doctor, it is Martin Daubney. I am counsel for the defendant. Can you hear me?-- I am sorry, I didn't catch your name.

50

Martin Daubney?-- Yes.

Do you have your letter of first of December to Dr Dioro handy?-- I will leaf through my file to find it.

Exhibit 8, your honour.

WITNESS: First of December 2000, is that the one?

MR DAUBNEY: Yes, the one that starts, "This lady has a very complex psychological problem" etc?-- Yes.

I am correct in assuming, am I, that the facts that you set out in that letter are as gathered from Mrs Arthur?-- Yes, these are the facts I obtained in the initial interview. I have obtained a lot more data since that time.

10

Of course. In the initial interview at least she referred to the whole episode being a blur?-- Yes.

That's the episode of the time surrounding the birth of her baby and the adoption?-- Yes, that's right.

All right. And in the second paragraph of that letter about halfway down you said, "The memories however are unclear and this is the key to the whole thing." By that you are referring to her memory of her time in hospital and the adoption away of the baby?-- Yes, there was some patchiness of her memories.

20

All right. In your report of 30 September now, that is - I am sorry, perhaps I should formally ask you, otherwise are the facts set out in your letter of first of December 2000 accurate or do those - does your letter of first of December 2000 accurately record matters that you were told by Mrs Arthur?-- I would have to go to my original notes of that time to - it was an attempt to provide a general impression to the referring general practitioner.

30

All right?-- Rather than to have been an exhaustive account.

Well then we come to your letter or your report of 30 September?-- Yes.

40

That is Exhibit 7, your Honour. And that is clearly a much more comprehensive report?-- Yes.

In which you recount facts and matters accurately as relayed to you by Mrs Arthur?-- Yes.

And one in which you reach a diagnosis of post traumatic stress disorder?-- Yes.

Having been brought about by the events that occurred when she was 17 years old?-- Yes.

50

You say that 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 the post traumatic stress disorder?-- Yes, that's right.

Now, let's review as briefly as we can perhaps the evidence

that the Court has heard, some of which you may and some of which you may not be aware of in relation to Mrs Arthur's history. You were aware that she had a childhood that was marked by her, amongst other things, being rendered a ward of the State for a couple of years?-- Yes.

1

After her father had left?-- Yes.

Left the family with no money and no support?-- Yes.

10

Her father before he left the family had been or gone on drinking binges?-- Yes.

And she recalls two occasions when her father had physically abused her mother?-- Yes.

Were you aware of that?-- I knew there was a lot of tension in the family. I don't specifically recall that she told me that, but certainly that was - I have a vague impression that at some stage she did mention those to me, but I haven't recorded that in the report.

20

All right. Obviously a child witnessing parental abuse, parental physical abuse is a significant matter for you to take note of, isn't it?-- Yes. As I said, I have a memory of it, but it wasn't - I think I assumed that under the general history of the family.

All right?-- I know there was a lot of family turmoil and that her father certainly had episodes of drunkenness and violence.

30

40

50

After her father left she continued living with her mother and siblings but was a ward of the State for about 18 months from September 1962?-- Right. 1

Were you aware of that?-- No, I - I don't recall that. She may have told me, but I knew that was a time of upheaval in the family.

She left school after grade 7. Grade 7, just to inform you, is the final year of primary school in Queensland?-- Right. 10

So she left school after her primary school, initially to help her mother care for her family?-- Yes.

And then at the age of 14 she started work as a machinist?-- Right, yes.

Were you aware of that?-- I was - yes, I was aware that she - that she had to stay home with her mother and I wasn't - I couldn't recall what she actually worked as but certainly I was aware that she went to work early. 20

The next and last time that she had contact with her natural father was on an occasion when her natural father stabbed her stepfather?-- Yes.

And Miss Arthur or Mrs Arthur was in the room standing behind her stepfather when the altercation occurred?-- Yes.

You were aware of that?-- Yes, I was. 30

She was a witness to the incident?-- Yes.

And her stepfather was then taken away by ambulance?-- Yes.

And that was the - she saw her natural father in the back of a police car?-- Yes.

He asked her words to the effect of, "Which one are you?", and she identified herself as Lily?-- Yes. 40

And then he asked her for a cigarette?-- Yes.

And they had a discussion and that's the last occasion on which she saw her natural father?-- Yes.

Her mother after that incident sold the house in Brisbane and moved to Sydney because she was scared. The mother didn't want the father coming after them again?-- Yes. 50

By that time her mother had formed a relationship with the gentleman that we have described as her stepfather?-- Yes.

Lily didn't like her stepfather?-- Yes.

Were you aware of that?-- Yes.

And when the mother and the stepfather moved to Sydney Lily

stayed in Brisbane?-- Yes.

1

Right. She moved into initially a flat for a couple of weeks and then into a house that she shared with a Mr Benko?-- Yes.

That's the gentleman who was the father of the child that she was ultimately to bear in 1967?-- Yes.

Right. And then in your report you recount her version of - or her relating to you of the - being taken into the Holy Cross Home?-- Yes.

10

And then being taken to hospital for confinement and delivery?-- Yes.

And the - her version of the adoption of her child?-- Yes.

All right. Has her memory of the circumstances surrounding the confinement period, the delivery period and the adoption of her child improved over the few years that you have been treating her?-- There is some - the emergence of a little bit of detail has come forward. If I might explain that. When people are overwhelmed they often deal with memory rather differently, and it is - there has been some retrieval of such memories, but essentially the - the history that she gave initially has been elaborated upon with return of some - of some of these details, but in essence the memory remains the same.

20

All right?-- But there has been an improvement, in other words, in detail, but not in terms of getting a different - a different story.

30

After the birth of the child she was returned initially to the Holy Cross Home for some period of time and then released to be sent to Sydney?-- Yes.

Back to her mother and stepfather?-- Yes.

And her stepfather was abusive to her?-- He didn't accept her, yes.

40

He used to get drunk, call her names, blame her for placing her mother under stress?-- Yes.

You are aware of all this?-- Yes, again I didn't document that in the history that I gave, but certainly she did mention that at times during the time I treated her.

She hated her stepfather?-- Right. I don't recall that, but I know she disliked him.

50

All right. In 1968, within about 12 months of leaving the Holy Cross Home, she had married a gentleman by the name of Fuller?-- Yes.

You are aware of that?-- Yes.

And - just bear with me. She described her relationship with her husband as he was very, very possessive "and used to get quite jealous about me doing anything". Did she tell you that?-- Yes. 1

And she was treated badly by her husband and his family?-- Yes.

And indeed when she finally got a job with the public service and started working in town, he was very jealous about that. He used to get upset that she used to go into town looking nice and working in an office?-- Yes. 10

Because until that point she had been working in factories, and she said that she would come home every night "and he would keep me awake nearly every night going on about, "You think you're too good for me now you've got this job in an office'"?-- Yes.

"You are getting yourself all dressed up. What, are you hoping to meet somebody to have an affair with?" That's the sort of abuse that-----?-- Yes. 20

-----she was subjected to?-- Yes, I recall her talking about that particular part of the history.

Just before - I beg your pardon, just after her 21st birthday she decided to leave her husband. She just packed her bags to go?-- Yes. 30

She came back to Queensland to look for her son and for the father of her son, but returned to Sydney two to three months later. Do you recall being told that?-- Yes, I don't know how long she was - I can't recall exactly how long she was up there, but it was around about that time.

When she went back to Sydney she met another man with whom she lived for four months, then fell pregnant to him?-- Yes.

Then she separated from him, contacted her husband to inquire about a divorce and her husband begged her to come back?-- Yes. 40

Her husband said to her, "If you come back I'll raise your baby as my own"?-- Yes.

You are aware of that?-- Yes.

She did go back to him which she described in Court as "the most humiliating experience to have to go back to my in-laws after I had snuck away"?-- Yes. 50

You are aware of all of this history?-- Yes.

Right. You are aware that after only a week or two back with her husband she tried to escape from him?-- Yes.

But she was thwarted in that attempt?-- Yes.

You are aware of that?-- Yes.

You are aware that the birth of her daughter caused her distress?-- Yes.

You are aware that she spent the next 18 years married to this gentleman Fuller-----?-- Yes.

-----who emotionally abused her almost every day of their married life?-- Yes.

10

You are aware of that?-- Yes.

Are you also aware of the years of sexual harassment from her father-in-law?-- I wasn't aware it was years. I was aware that it occurred.

Well, from before the time that the baby was born until the time she eventually left the marriage with Fuller, she lived with Fuller in his parents' home. Were you aware of that?-- Yes.

20

And for years, almost every day, her father-in-law sexually molested her - I beg your pardon, sexually harassed her?-- Right, yes.

You weren't aware of that?-- I wasn't aware that it went on quite that amount of time, but-----

30

All right?-- I wasn't aware of - it was almost daily.

I am sorry?-- I wasn't aware that it was almost daily for a period of years. I knew it occurred.

Because that's a significant abuse, isn't it?-- It is, but there are other things that also come into consideration. I think that I would - I guess I conceptualise abuse as falling into two categories, that which overwhelms and that which doesn't. This was certainly ongoing. With all the abuses that took place in that setting, it was certainly constant abuse as you have outlined in your recounting of the story over a very long period of time. I was unaware that at any stage this was actually overwhelming.

40

Well, the emotional abuse for the husband went on for 18 years or so?-- Yes.

And the sexual harassment by the father-in-law went on for many years?-- Yes.

50

That is significant, isn't it, in anybody's terms?-- Depends what you mean by "significant". It certainly is a significant item of history and certainly it was a significantly difficult time for her.

All right. She had correspondence with the Department of Family Services in 1991 as a result of which she found out

that her son had lodged a contact objection. She found that out in about October 1991?-- Yes. 1

Are you aware of that?-- Yes.

She came back to Queensland for a week and then went back to her abusive husband in Sydney?-- Yes.

She finally left him after she couldn't take any more of his abuse?-- Yes. 10

You are aware of that?-- Yes.

And she moved to Queensland for a couple of years and worked in Queensland as a cleaner at one of the schools up here?-- Yes.

And during that time she shared a home with a dysfunctional drugged out bokie-----?-- Yes. 20

-----with psychiatric problems who eventually threatened to kill her?-- Yes.

You are aware of that?-- I am aware of that.

She then returned to Sydney and worked as a carer?-- Yes.

She had during the mid 90s some ongoing gynaecological problems that led to her undergoing a hysterectomy in about 1996?-- Yes. 30

1996 she remarried. In April of 1997 she suffered a workplace injury to her shoulder?-- Yes.

Are you aware of that?-- Yes.

In 1997 she commenced TAFE studies in community welfare?-- Yes.

In May of 1998 she located her son?-- Yes. 40

In 2000 she started studying for a Bachelor of Laws Degree at Macquarie University?-- Yes.

During her marriage to Fuller she had been prevented from undertaking studies or education courses by Fuller; you are aware of that?-- Yes, yes.

And in 2001 she instituted these proceedings and the first occasion on which you saw her was in late 2000?-- Yes. 50

Okay. Do I assume that you have made your diagnosis of post-traumatic stress disorder by reference to DSM 4, doctor?-- Yes, yes. I just - yes. On page - I am not sure which page it is. Page 7, I think it is, of my report, I have outlined how the diagnosis was made. The letters in these categories do refer to DSM 4 diagnostic criteria.

The first of the DSM IV diagnostic criteria for post-traumatic stress disorder - correct me if I am wrong - is as follows: "The person has been exposed to a traumatic event"-----?-- Yes.

1

-----"in which both of the following have been present: (1) The person experienced, witnessed or was confronted with an event or events that involved actual or threatened death or serious injury or a threat to the physical integrity to the self or others; and (2) the person's response involved intense fear, helplessness or horror"?-- Yes.

10

This woman has experienced a number of traumatic events in her life which could respond to that criteria; that's so, isn't it, doctor?-- Yes, that criterion A is - could have been met on a number of occasions.

Yes. And this woman unfortunately has suffered a life of psychological and psychiatric assault and trauma of various descriptions; that's so, isn't it?-- Yes, it is.

20

And it is simply not possible, I would suggest to you, to isolate one event as you have purported to do to account for this woman's current psychiatric condition?-- Right. Well, I disagree with that. I believe that it is - it is likely that the - the - first of all, there are pointers to whether a traumatic event was actually an overwhelming event or not. An overwhelming event there may be markers such as the presence of patchy memory, amnesias, altered states of consciousness which indicate the individual is overwhelmed. Where that kind of overwhelming occurs it is certainly a marker of the incident being overwhelming. Secondly, whether those markers are present, then the incident with which they are associated is more likely to be the substantial cause of post-traumatic stress disorder. Thirdly, there is the issue of the themes, the manic content of the symptoms, particularly those symptoms in criterion B of recurrent distressing thoughts, and when there are those symptoms in criterion B of recurrent thoughts and they are thematically related to one stress rather than another, then that tends to be very likely to be the substantial cause. While other incidents may prime an individual, may predispose an individual to some extent or may exacerbate the situation by - either by being traumatic themselves or simply being reminders, such as the birth of the daughter, I think that one can isolate what is the most important or the most substantial of all the potentially causative factors.

30

40

All right. I suggest to you that in a case such as the present in which Mrs Arthur has suffered multiple events which would be alone and in aggregate sufficient to cause PTSD, it is simply not possible to single out and attribute the PTSD to one event as you have purported to do?-- Well, I disagree with that. I believe that it is possible to - to form a reasonable conclusion about probable substantial causation.

50

Right. I suggest to you indeed that the events of 1967 as recounted to you do not even fall within the first DSM IV

criterion for establishing post-traumatic stress disorder?--
A part of that problem is the interpretation of that. If you
interpret it in that way, then being raped would also not fall
within that particular narrow definition. In fact the
interpretation of criterion A does include this and includes
things such as abduction, abduction of one's children and
forced removal and separation from an infant is essentially no
different to a threat to the self. I mean, one could argue as
I said, that being raped without physical violence might not
constitute an event which satisfies, if you strictly examine
it in a very literal way, these criteria and yet it is
accepted by psychiatrists that rape is indeed a cause of
post-traumatic stress disorder.

1
10

That is if you say that rape isn't a threat to the physical
integrity of one's self?-- Yes, but, I mean, the thing is
that a mother-----.

I am sorry to interrupt, I am just reading from DSM IV?--
Yes.

20

And I suppose I was asking you to explain why it is-----?--
Right.

You have fixed on the example of rape-----?-- Yes.

-----as your example. Why, with respect, DS - why rape
doesn't expressly fall within DSM - within that criteria of
DSM IV?-- No, I think if one narrowly - takes a narrower view
of interpreting the wording in DSM IV then it would seem to
exclude rape, unless you used the word "integrity". When a
woman has a baby there is a bond with that baby which is
biological that essentially the baby is virtually a part of
the self, and therefore if you are going to talk about the
integrity of the individual, then separation from a newborn
infant is, in my opinion, a very clear example of a threat to
that integrity.

30

All right. So you disagree with me that these events or the
events of 1967 surrounding the adoption of the child don't or
may not fall within the first criterion of DSM IV
post-traumatic stress disorder?-- I believe the forcible
separation of a mother from a newborn infant does fit that
definition.

40

Having seen this lady now on over 129 occasions, because since
your report of the - I will just look for the date - 30th of
September - have you seen her since then?-- Yes, I have.

All right. Is it fair to say that it is your view that if
Mrs Arthur was somehow to get recompensed that would be
therapeutic for her condition?-- I don't think that money as
such will be therapeutic. I think that some kind of closure
is more likely to be therapeutic than cash.

50

The Court process may be cathartic for her?-- In some ways,
in the sense of closure. In the sense of the perceived
injustice being acknowledged would be more helpful than actual

cash in terms of - in terms of therapeutic benefit.

1

You have seen her on about 130 occasions?-- Yes.

That, with respect, is a lot of treatment, isn't it?-- It is, yes.

And in the course of that you have been using hypnotherapy?-- Yes, not every session, but certainly a number of times we use hypnosis.

10

Hypnotherapy is infrequently used these days, isn't it?-- Depends on - on where and who, but hypnosis is - it is not a skill that most psychiatrists have.

It is not even taught these days, is it?-- It is certainly taught by the Australian Society of Hypnosis. It is certainly used by people who specialise in the treatment of trauma in the United States. People who are basically trauma specialists in America, some of them do use hypnosis and some of the very prominent ones use hypnosis.

20

Sorry, when I say taught, I meant by the college?-- Well, the college is not a teaching body. It is not something that examines specifically, nor other psychotherapies. Generally the training of psychiatrists places much more emphasis on other psychotherapy.

One would have expected that with about 130 treatments or attendances for treatment over the last few years that the plaintiff would have been showing signs of improvement, Dr Pickering?-- Yes, I must say that the progress has been - has been fairly slow but there are still areas of the traumatic events that she hasn't adequately addressed and a lot of the time given that there are issues with emotional responses to events that do relate to this that in some way are triggered by present events, it is kind of - you can't fight the main configuration because you have to keep putting out spot fires, I suppose is the best analogy to use.

30

Have you considered treating her with cognitive behaviour therapy?-- Yes, I have, but I don't believe that cognitive behaviour therapy is going to be any different to what I am actually doing. I mean, therapy is essentially a process whereby there are many different things actually going on. Hypnotherapy is not of itself an entity. It is what one does with hypnosis. Hypnosis is a - an abreactive therapy and is best - the most comparable thing to it that would be used by a person who would define himself as a cognitive behaviour therapist would be either desensitisation or reprocessing. They are both age regressive abreactive types of therapy which basically constitute the exposure element of what state of the art - in the state of the art is regarded as an essential element to the treatment of post-traumatic stress disorder.

40

50

And reasonable minds, that is reasonable minds of psychiatrists - sorry, I will rephrase that. The minds of different reasonable psychiatrists could differ as to whether hypnotherapy or cognitive behaviour therapy was the appropriate form of therapy for this lady?-- Well, hypnotherapy if it was just confined entirely to hypnosis would not be entirely appropriate, and nor would a pure cognitive behaviour therapy. The state of the art requires that there is a working through process, whether that is cognitive, behavioural or interpersonal therapy, or a more eclectic approach and that there also must be some exposure to the trauma that caused the problem. Now trauma - the exposure most usually these days would be (indistinct) desensitisation processing, but only because that is much more easily taught, much more easily acquired by cognitive behaviour therapists.

1
10

But the extent of application of those different therapies is something on which the minds of different reasonable psychiatrists could differ?-- Well, yes, but most psychiatrists aren't expert in hypnosis.

20

I am sorry, are?-- Most psychiatrists don't know a great deal about hypnosis.

I see?-- They have been given basic teachings they have probably forgotten, and they have not developed skills. In fact, appropriately used hypnosis is in my opinion at least the equal of (indistinct) desensitisation; certainly a more flexible tool.

30

Thank you, doctor. That's all the questions I have for you. Stay on the line for a moment. Thank you, your Honour.

HIS HONOUR: Dr Pickering, I am the trial Judge. Could I ask you, please, to look at page 9 of your report?-- Yes, your Honour.

In particular, to the first complete paragraph, the one that begins "The nature of the therapy"?-- Yes.

40

What is the point of that therapy? What are you trying to achieve by undertaking it?-- Right. When people are overwhelmed, your Honour, they undergo a process called disassociation, if they can do that. When individuals do that then the emotionally laden information is stored differently to other information. When that happens, then if that information, those memories are not in some way retrieved, it is extremely difficulty for an individual to work through what happened, to be able to process it, to leave it in the past so that they can then think about it without being overwhelmed by emotions. When one uses (indistinct) desensitisation reprocessing or age-regression hypnotherapy or any other process that really exposes an individual to the events which caused the trauma, they are not going to be able to work through them. It also is a way of - I guess disassociation is a form of avoidance and this is a form of avoidance prevention. They have to confront what happened.

50

0

In this case have you sought to do that by encouraging her to make enquiries of others concerning the circumstances at the time?-- No, I have not done that. I don't think that the - the input of others is going to necessarily be all that helpful. I mean, it is possible that it may, but I think that using hypnosis or EMDR is more likely to be productive, particularly as it involves not just a reexposure, but also an opportunity to rework at the same time.

1

10

20

30

40

50

MR DAUBNEY: Just one question, if I may, arising out of that, your Honour, thank you. I don't know if you can hear me again, doctor?-- Yes, Mr Wilson, is it? 1

No, it is Daubney?-- Right, yes.

Still with me. Just arising out of the question his Honour has just asked you-----?-- Yes.

-----I am right in saying, aren't I, that really one of the objects, if not the object, of hypnotherapy is to assist in removing a repression of memory?-- Yes, except I would prefer the concept of dissociation because I believe it happens at the time of the trauma. It is not done retrospectively. 10

Whether one uses the word "disassociate" or "repress", the object of the exercise is to extract something that is in there but the will of the patient is suppressing, if I can use that word?-- It is not the question of the will suppressing, it is just that one cannot use one's will alone to consciously access the memory or that fragment of memory which is causing the problem. 20

All right. And-----?-- It may just be a fragment.

All right. And isn't that one of the difficulties that has been encountered with hypnotherapy where rather than unlocking even that fragment of memory, patients who are susceptible to suggestibility will give a false memory?-- That is an objection that has been raised. I am very careful in the way that I do this therapy that I don't actually suggest anything, and, secondly, I am careful to compare the information I get in hypnosis with what is consciously remembered, and I am - in something like this, I am more interested in retrieving fragments than in retrieving total memories. 30

All right. A danger, I would suggest to you, is that the patient may simply give the therapist the answer that the patient thinks the therapist wants to hear?-- Yes, that is a danger. But again it is - we are talking now about the - that danger that you are raising is a danger that happens with whole memories where there is a total memory from early childhood that has never been remembered. Here we are dealing with something that is remembered in a general sense but it is fragments of that experience that are, as you would put it, repressed or were in some way stored in a different way so they can't be accessed easily. 40

Yes?-- So that the danger that you are proposing in fact is not really a significant danger in these circumstances. 50

All right. Thank you, doctor. That's all that I have. Perhaps if you stay on the line for the moment?-- Certainly.



RE-EXAMINATION:

1

MR WILSON: Doctor, can you hear me?-- Yes.

Two questions. You mentioned comparing what the patient remembered outside of hypnotherapy and then what you discovered through the process to see whether they were consistent?-- Yes.

10

20

30

40

50

Did you do that in Mrs Arthur's case?-- Well, it wasn't really necessary. In this case we were only dealing with fragments which simply enabled the memory to be better processed. At least that is what we were aiming for. It wasn't as if we were retrieving new memories, but rather simply trying to fill in the missing bits of memories which were already substantially present.

1

And the second question is this, Mr Daubney has taken you through a number of events which took place in Mrs Arthur's life after she gave birth to her son?-- Yes.

10

Have you formed any opinion as to her ability to cope with life's subsequent events given the trauma of what occurred to her with the forced separation from her son?-- I think that I raised the issue in my report that she was very concerned about becoming pregnant, about having another child to replace the one she had lost, and between the traumatisation in general and the specific need for her to become pregnant again, I believe that the shape that her life took following the loss of her son was markedly influenced by that loss.

20

Thank you, doctor. May the doctor be excused, your Honour?

HIS HONOUR: Thank you, Dr Pickering?-- Thank you.

WITNESS EXCUSED

30

HIS HONOUR: 2.30.

THE COURT ADJOURNED AT 1.11 P.M. TILL 2.30 P.M.

40

50

THE COURT RESUMED AT 2.30 P.M.

1

HIS HONOUR: Yes, Mr Wilson?

MR WILSON: Your Honour, we have some short witnesses that I outlined yesterday morning about the non-retention of documents. The first of those is Kathie Scott from the Department of Family Services. I call her.

10

KATHERINE ELIZABETH SCOTT, SWORN AND EXAMINED:

MR WILSON: Miss Scott, could you tell the Court, please, your full name?-- My full name is Katherine Elizabeth Scott.

20

Are you the manager of Local and Post Adoption Services with the Department of Families in the Queensland government?-- Yes, now the Department of Child Safety.

Do you attend the Court in answer to a subpoena addressed to the Director-general of that Department?-- Yes, I do.

Are you familiar with a lady by the name of Lily Arthur?-- I am familiar with records held in the office in relation to Mrs Arthur.

30

Have you made a search to determine whether any file is still maintained in respect of Mrs Arthur or in her maiden name, Lily McDonald?-- Yes, I have.

What has been the result of that search?-- The result of that search has been the only records from the period of time in 1967 are those on reels of microfilm and there are eight documents on the adoption child register reel. Four of those documents relate solely to the adoptive parents of Miss Arthur's son and there are two documents, two pieces of paper on the infant life protection microfilm reel.

40

Are you able to identify by title what those documents are?-- Yes, I believe so. The four documents relating to the adoption of Mrs Arthur's son are the adoption memorandum to the registrar general, the schedule that accompanied that memorandum, the consent document, and the expected child for adoption report, and the infant life protection records were the investigation into the birth of the child, a proforma page, and a small slip of paper being the notification of a child born.

50

Can I ask you to have a look, please, at Exhibit 2. You will see appended to that document a number of photostat documents. Do you see those?-- Yes, I do.

Do the report of investigation, form of general consent,

0

birth/death of illegitimate child, correspond to three of those four documents that you have just spoken about in your evidence?-- The first two documents relate to the adoption record that I was referring to, and the third document relates to the infant life protection record.

1

Yes. The fourth document you said was a questionnaire?-- Yes.

About an expected child for adoption?-- Yes.

10

I might call for that document. I call for the expected child for adoption pertaining to Lily McDonald.

MR DAUBNEY: The best we can do is produce a copy from microfilm, your Honour.

MR WILSON: Thank you. Miss Scott, would you have a look at this document? Does that appear to be a copy of a microfiche of the questionnaire that you were speaking about?-- Yes, it does.

20

I tender that document.

HIS HONOUR: Exhibit 25.

ADMITTED AND MARKED "EXHIBIT 25"

30

MR WILSON: Miss Scott, are you familiar in your position with the Department with the process of destruction of departmental files?-- I have some knowledge. I am not aware of all details.

Are you aware of the process that is gone through in determining what documents - sorry, I will rephrase that, whether all documents that were on the file are put on microfiche, or is there a selection process?-- There was a selection process in past decades.

40

Who was the person who made the selection?-- I am really not able to say. I have seen a document, a memorandum prepared explaining what happened to documents and the destruction of documents in past years. I have no personal knowledge of the officers who made those decisions, but I believe from that memorandum that it was the operator of the microfiche at the time was instructed to keep all legal documents and to use discretion about retaining other documents that looked as they may have some importance.

50

Do you have any knowledge from your employment with the Department - I should have asked you how long have you been employed there?-- I have been employed by the Department for 18 years and in the adoption area in different capacities for five years.

Are you familiar with contents of files from the late 1960s?--
Yes, I am.

Apart from those documents which have been produced which were microfiched, are you able to say what other documents ordinarily formed part of the Departmental file, if any?-- I am not able to say ordinarily, because I am not aware of any existing intact files. I am aware that other files that have been microfilmed from the 1960s and early 1970s sometimes have additional documents on the microfilm that were retained. Those documents are usually relating to the child's health. If there were any health issues at the time of the child's birth there would be copies on the microfilm of information about that. If a father's consent, in the case of married parents, was required there would be his consent. If the child was born outside of Brisbane there would often be some correspondence from our Rockhampton or Townsville district office. If a birth parent had written to the Department after the birth of the child seeking to revoke consent, for example, then those documents - I have seen copies of those documents on other ACR records on the microfilm.

So in terms of the evidence you have just given, if the child was born healthy, to a single mother in Brisbane and the single mother hadn't written to the Department in an effort to revoke consent, those documents that have been produced are likely to comprise the totality of the Departmental file?-- They are routinely the documents that I see on the microfilm.

In terms of any file notes or notes by Departmental workers who might interview or speak to birth mothers?-- I have never seen on the microfilm any records, any instances where a Departmental officer who attested a consent in the 1960s to the early 1970s having case notes. There certainly - I have not seen any instances where such case notes were on - copied on the microfilm and retained, if they existed.

Thank you, Miss Scott. That's the evidence in chief.

MR DAUBNEY: Miss Philipson will take this witness, your Honour.

CROSS-EXAMINATION:

MS PHILIPSON: Miss Scott, are you familiar with any Departmental files relating to Miss Arthur in relation to her contact with the Department while she was in the care and control of the Department?-- No, I am not familiar with any files or records from that time.

So do you know of anything called a family file or an F file?-- I know from other circumstances what a family or an F file is, yes.

You have no personal knowledge of them, is that correct?-- I have no personal knowledge of Miss Arthur's. I have previous employment in child protection at other times of my working life, I have knowledge of F files.

And did you undertake any searches in relation to Miss Arthur in relation to an F file or a family file?-- No, I would not have access to the Department's F file collection or records.

10

What part of the Department has that?-- I believe it would be our Freedom of Information branch would conduct such searches.

In relation to the adoption files, there were very strict confidentiality and secrecy requirements under the Adoption of Children Act, weren't there?-- Yes.

And there was information on there that it was because of that that it was considered unlikely that it would ever be needed to be referred to?-- Yes. It is accepted that in previous decades people had little insight into the possibility that in the future people may wish to access information about their birth history and the adoption. The records that have been retained and the indexing of information seems to have been geared towards ensuring that the parties to an adoption could always be identified accurately, but there appears to be little regard to retaining information for any other purpose.

20

So if there had been, for example, case notes from a social worker contained within an adoption file, it is quite likely they wouldn't have made it onto the microfilm; is that correct?-- I am unable to answer that. I have seen in other microfilmed records that there have been case notes about events that occurred after an adoption retained on the microfilm. I have seen that. I am unable - I have not seen case notes about the taking of the adoption consent ever retained on microfilm.

30

It would be the case that the notations that are on microfilm the paper copies of those documents are no longer retained; that's correct?-- They are no longer retained, no.

40

HIS HONOUR: Ms Scott, do you know whether there are in existence now standard forms of departmental instructions to, for example, social workers interviewing mothers who might consider adopting out their children?-- From that period?

Yes?-- I am aware of some old, what we would call policy files now, that had, it would appear, incomplete records about - the Department used to have standing instructions.

50

That's the kind of thing I am thinking of, standing instructions, that would say, for example, to a social worker "When you are interviewing the mother, take these steps." Is there such a document available?-- I am not aware of standing instructions in relation to the taking of adoption consents, but I have not done a complete search of the Department's archives or records in to that. I am aware that there have

been, I think from the early 70s some such instructions about the timing of making an adoption order. When the Department's practice changed from making adoption orders prior to the 30 day revocation period the parents had to revoke their consent, there were instructions to cease that practice. I personally haven't seen specific standard instructions about the attesting of adoption consents from the 1960s.

1

They may have existed; they may not; you just don't know?-- I just don't know.

10

MS PHILIPSON: Thank you, your Honour. So prior to the early 70s it was common for adoption orders to be made before the 30 day revocation?-- It was usual practice, yes.

Thank you. I have no further questions, your Honour.

MR WILSON: May Miss Scott be excused?

20

WITNESS EXCUSED

MR WILSON: I call Mr Bill Evans, your Honour.

30

40

50

WILLIAM JAMES EVANS, SWORN AND EXAMINED:

1

MR WILSON: Mr Evans, could you state to the Court, please, your Honour?-- William James Evans.

Are you presently the manager of information access in the Queensland Department of Health?-- Royal Brisbane and Women's hospital, yes.

10

You are formerly the manager of legal services at that hospital?-- Yes.

Do you attend the Court in answer to a subpoena addressed to the medical superintendent of the hospital to produce records in respect of a patient, Lily McDonald?-- That's correct.

Who was admitted to the hospital in September of 1967?-- Yes.

20

Have you produced any documents in response to that subpoena?-- No. Two documents were produced to Ms Arthur in 1997. That is a copy of the birth register and a card which shows the birth having occurred in the Royal Women's hospital.

Apart from those two documents are there any existing records held by the hospital relating to Mrs Arthur or Miss McDonald?-- No.

In terms of your familiarity with the policy of destruction of hospital records, are you familiar with that?-- Yes, I am.

30

What is that process?-- Basically, and again we have to take two periods of time. In 1996 it was increased. Prior to 1996 birth records were kept for a period of 25 years and could be destroyed thereafter. After 1996 that was increased to 28 years. Adult records were kept for ten years from the last known attendance. It was seven years prior to 1996.

In terms of a lady who attended the hospital to give birth to an infant?-- Yes.

40

Is that classified as an adult record, an infant's record, or both?-- It is both. The actual birth itself is for a period of 25 years, but if the mother continues to attend the hospital then a ten year period will continue after that 25 year period or 28 year period.

In terms of your position as manager of information access at the hospital, are you familiar with the types of records which were ordinarily kept on hospital files pertaining to births in the late 1960s?-- Yes, I am.

50

Are you able to say what records were ordinarily kept on hospital files?-- Yes. I haven't seen that many from that period, but I have seen some, yes.

What ordinarily is kept on the file?-- Basically in a case

such as this there would be an admission form or something. There may be a referral letter from a GP if a GP was involved. Then there would be progress notes, as we call them. That is, notes made by medical officers, allied health professionals, physiotherapists etc, in the thing. Nurses would have separate notes in those days. There would be medication forms, observation sheets, and later on but maybe not in '67 an ultrasound of some form or a number of ultrasounds and other radiology reports, and possibly pathology reports for - they did though sometimes in those days take some blood as well just to see what blood type the mother and the baby were.

1

10

Yes?-- The baby's record would be kept at the back of the mother's chart in a separate area and would remain there until destruction.

Do you know whether or not if there was the involvement of the Department of Children's Services any documents relating to communications between the hospital and that Department were kept on the file?-- There may have been. I can't guarantee. I have seen on some of those old files a letter from whichever Department is responsible advising that a particular person was authorised to pick up the baby, and it would be only a one-page letter which would be brought by that particular person. There was rarely any actual other correspondence. However, there may have been social work notes. There was a social worker from 1962 onwards in the Royal Women's hospital and they would have had an entry because the mother would have been referred to the social work Department. There would be entry in the progress notes. There would be separate notes kept by the social work department in relation to whatever attendance they had on that particular person.

20

30

When you are there referring to a social worker, are you referring to someone employed by the hospital?-- Yes.

Not somebody from the Department of Children's Services?-- No, no, it was a hospital employee?--

That's the evidence in chief.

40

HIS HONOUR: Is there evidence before me concerning the status of Ms Robinson?

MR WILSON: There is not, your Honour, no.

MR DAUBNEY: There will be, your Honour.

HIS HONOUR: Yes, Ms Philipson?

50

CROSS-EXAMINATION:

MS PHILIPSON: Thank you, your Honour. Mr Evans did you undertake or cause to be undertaken any searches or

investigations in relation to a Dr Donaldson at the Royal Brisbane hospital or Royal Women's hospital?-- Yes, we did undertake to see if we had any old records whatsoever in relation to that person. We were unable to locate any records whatsoever. I also asked some staff who had been in the hospital a fairly long period of time, including the medical superintendent's secretary who now works for me, and she started work there in the early 80s and she did not recall that name whatsoever. The name has not shown up on any of our records.

1

10

What about in relation to an E Robinson?-- We understand she would have been a Midwife. Again, we don't have any records of any nurses. We only hold personnel records for a period of two years from the time a person leaves. Any records in relation to that person would have been destroyed. Again, unfortunately, most of our nurses, our current nurses have not worked in the hospital for any length of time and we were unable to locate any nurse who actually remembered that person, though it is possible. It is not - but she would have been a Midwife, almost certainly.

20

Thank you, Mr Evans. Thank you, your Honour.

HIS HONOUR: What did "Midwife" mean in the hospital context? I have always understood the expression as relating to the kind of person who would attend a birth away from a medical facility?-- In a hospital nurses have certain qualifications and you can get what we call midwifery nursing qualification, so you are a nurse, then you get the midwifery qualifications. You could practice in the community as well if you wished. They practice exactly the same. They attend the birth and if there is no doctor present they would actually attend and look after the mother for whatever period of time. We actually have a birth centre in the hospital now mainly run by midwives and not by doctors.

30

Thank you.

MS PHILIPSON: Thank you, your Honour.

40

MR WILSON: May Mr Evans be excused, your Honour?

HIS HONOUR: Yes.

WITNESS EXCUSED

50

MR WILSON: I call Mr Micola, who is the Registrar of the Children's Court, your Honour.

RONALD MICOLA, SWORN AND EXAMINED:

1

MR WILSON: Mr Micola, could you state to the Court, please, your full name?-- My name is Ronald Micola - M-i-c-o-l-a.

Are you the Registrar of the Magistrates and Children's Courts?-- I am.

10

Do you attend Court in answer to a subpoena addressed to yourself to produce the records of the Children's Court relating to a lady by the name of Lily McDonald?-- I do.

Do you produce any records relating to Lily McDonald?-- The only record I have got, the original file was destroyed in accordance with the State Archives Act in 1997, but I have got a copy of an index card-----

Yes?-- That is to do with this matter, and I have a copy here with me.

20

Could you show me that document, please? Thank you. Apart from that document there are no extant records?-- There are no.

Of the Children's Court?-- There are no other records.

Can you say from your experience the records which would ordinarily have comprised a Children's Court file in 1967 where a minor was taken into custody and an application was sought that that person be placed into the care and control of the Director of Children's Services?-- You want to know what it would consist of?

30

What the file would ordinarily have on it before it was destroyed?-- There would have been an application on the file. I would say there would be an affidavit of service of the application on the parties, like say the parents of the child. There could be one or two other affidavits that may be supplied, might have been furnished by, say, Family Services whichever Department was involved with the matter at that time. There would be also - once the Court makes an order there would have been a copy of that order on the file and also there would be a covering sheet where the Magistrate would have written the order, his or her order on it.

40

HIS HONOUR: Would you not have expected also a transcript of the proceedings?-- Your Honour, yes. There would have been - if it had gone to hearing there would have been a transcript. It just depends. That's right, if it had gone to hearing there would have been a copy of the transcript on the file too.

50

MR WILSON: What do you mean by a hearing?-- Well, if it had been disputed. I mean, if an order is made by consent of the parties, if a person is committed, it would not have had - there would not have been transcripts taken. There would have

been - the Magistrate would have written on the file his or her order, but if it had been disputed or there was, you know, further information that they required, it would have been transcribed. There would have been transcription documents on the file.

And are documents which show the institution to which the child is taken also kept on the file, or is that a matter for the Department of Children's Services?-- I am thinking now. I am guessing. It could - yes, I can't say that one hundred per cent. I am not a hundred per cent sure about that. It may have been committed to the Department for them to put that child in certain institutions, but I couldn't say exactly whether the name of that particular facility would have been on the document on the order.

Can I ask you, please, to have a look at Exhibit 2 and could I see, your Honour, Exhibit 5? Can I ask you, Mr Micola, to turn to the third page or the third document which is appended, which is headed "Authority to receive a child in care"?-- Yes.

And you will see towards the bottom of that page beside a heading "Other particulars" there is a reference to the child appearing before two named people, Justices of the Peace and being remanded to 20 February 1967?-- Correct.

Is that ordinarily part of the Children's Court documentation or-----?-- That would have been part of the Children's Court documentation, yes.

And could you have a look, please, at Exhibit 5?-- Yes, I have got that.

Would you have a look, please, at the bottom entry of Exhibit 5?-- Is that this one?

Yes. And is that a record of the order which was made on 20 February 1967?-- Yes, it appears to be that, that's right. That seems to be.

Is that a record of the Children's Court or of the Department, do you know? Sorry, I should ask you, do you know whether that is a record of the Children's Court?-- See, I am not sure. I am not familiar with these documents because this document - I mean, those years were before I even started work and it certainly has changed a lot. What I do question, it has "date admitted". It has the name of the person, religion, date of birth, and "date admitted", and I am - yes, I question that, that that would be the Court.

That causes you to question whether that is a Court document?-- Yes, that causes me to question whether that is a Court document. That is the only reason because I just wonder why that would be on there. It makes me - although, the way that it is written here about before so-and-so, that could have been done by the Court; discharged, I mean that is the kind of thing that a Court index would have, but I just

question this part that it is admitted. I wonder why that would be on a Court document.

1

In terms of documents that are ordinarily on the Court file there is the application for care and control?-- Yes.

The affidavit of service?-- Yes.

Perhaps an affidavit in support of the application?-- That's right.

10

And the order of the Magistrate or Justices of the Peace?-- Yes, that's right.

If it is a contested hearing, a transcript?-- A transcript, and then the bench charge sheet - I should say, the cover sheet where the order would have been made on it.

20

30

40

50

Yes. Your Honour, I tender that one document that Mr Micola has produced.

1

HIS HONOUR: Exhibit 26.

ADMITTED AND MARKED "EXHIBIT 26"

10

MR WILSON: Your Honour, otherwise that is the evidence-in-chief.

MS PHILIPSON: No cross-examination, your Honour.

HIS HONOUR: You want him excused, Mr Wilson?

MR WILSON: Yes.

20

HIS HONOUR: Thank you, Mr Micola, you are excused from further attendance.

WITNESS EXCUSED

MR WILSON: Your Honour, we have Dr Moore arranged for half past 10 in the morning.

30

The other outstanding matter relates to the evidence which I sought to lead about other ladies who are in a similar position. I do seek to lead that evidence. I understand that my learned friends do object to it. Perhaps if I can address its admissibility first.

HIS HONOUR: What are the grounds of objection, Mr Daubney?

40

MR DAUBNEY: It is - well, subject to the opening-----

HIS HONOUR: Don't you have a statement yet?

MR DAUBNEY: Yes. We were given yesterday a - a statement by - sorry, an unsigned statement by one of the ladies. I was sent after Court yesterday afternoon some notes of a conference with the other lady. The reason why I said subject to an opening because one of the statements - sorry, the unsigned statement contains a raft of material that we would object to, in any event, as completely irrelevant. As to the balance of it, it is nothing more than, in our submission, inadmissible similar fact evidence. We should also say that we have been provided with yesterday what documents we understand our learned friends have in relation to one of the ladies. We received some documents in relation to the other lady this morning. We haven't otherwise been able to carry out our investigations further in relation to these proposed

50

witnesses, your Honour, for obvious reasons.

HIS HONOUR: Mr Wilson, it sounds as though the best way to give this some focus is if you open the evidence that you propose to adduce from them. That then should enable Mr Daubney to more closely clearly focus on his objections to the reception of the evidence.

MR WILSON: Certainly, your Honour. There are, as I indicated yesterday, your Honour, two ladies.

The first is Patricia Large. Ms Large gave birth to her son on the 17th of October 1968 in the Royal Women's Hospital. She was then 20 years of age. She was unmarried. She wished to keep her child. She attended at the Royal Women's Hospital when she was about four months' pregnant for a prenatal visit. She met a social worker at the hospital, a person who she says was not Jay Whalley. That social worker told her that her only option was to put her baby up for adoption. She informed that person that she wanted to keep her baby and she then left the hospital.

She will then say that she attended the hospital on the morning of the 16th of October 1968 when she went into labour. She gave birth to her child. She will say that the baby was taken away from her at birth. She asked to see her baby but wasn't permitted to. She will say that she was given medication to dry up her milk. She will say that she was taken to the unmarried mothers' ward and she was placed on a bed.

She will say that on the 17th of October 1968, which is the next day after the birth, she was visited by a lady who she subsequently found out was named Jay Whalley. She will say that the lady introduced herself as Margaret, that she asked her who was the father of the child and-----

HIS HONOUR: How does she know the woman was Jay Whalley?

MR WILSON: She signed the forms in front of her with the names on it.

HIS HONOUR: This woman introduced herself as Margaret.

MR WILSON: As Margaret.

HIS HONOUR: Yes.

MR WILSON: She then - and said that she was from the Department of Family Services, I should add, or Department of Children's Services. She asked who was the father. Ms Large wouldn't tell her who the father was. Her doctor, Dr Lee, came into the ward. There was a discussion between this lady, Margaret, and Dr Lee, and this - this lady left.

The next day she returned and said, "Are you going to tell me who your father is now - who the father is now?", and Ms Large said, "No, I'm not", and Ms - this lady said to her words

which were offensive including, "You don't know who the father is", to which she responded, "I do know who the father is." She then put a consent adoption paper in front of her and asked her to sign it. This lady said, "No, I am not signing anything until I see my baby. I have not seen my baby. I want to see my baby." This lady told her to stop wasting her time and left.

1

Then on the following Monday, which was the 21st of October, this lady came back again, told her that she had three families who had seen her son and they wanted to adopt him. This - Ms Large will say that she told this lady that she wouldn't tell her who the father was, and she asked to again see her baby but wasn't permitted to.

10

She will say the lady returned again on the next day, the 22nd of October. This time she attended with a clipboard in her hand. She sat down beside Ms Large and said to her, "If you don't give this baby up for adoption I am going to have you criminally charged for seduction." The man who was the father of the child was a minor at that time. She said that she would be criminally charged because she was older than the man at the time the baby was conceived. Ms Large will say that this terrified her. She didn't know what the law was but she expected to be arrested and taken away. She said - she will say that Ms Whalley said, "If you don't give your baby up for adoption you will be deported to England" - she had been born in England and emigrated to Australia - "and you won't see your family again." She said, "If you sign the adoption form you will be able to stay in Australia without any worries." Ms Large maintained that she didn't want to adopt her son out. She again asked to see her child and wasn't permitted to.

20

30

She returned again on the Thursday, the 24th of October, at which time Ms Whalley - I am sorry, this lady said to her, "Okay" - Ms Large said she wanted to go home with her baby. This lady said, "If you sign these consent forms the doctor will take you to see your baby. You will be able to hold him in your arms and you will be able to claim him back within 30 days of today if you want him back." She still refused to sign the adoption forms and on the 25th of July this lady came back in again with a clipboard and said to her, "You and the baby are ready to go home. Sign the forms and you can both go home." She will say that the clipboard had a form on it which was partially covered at the top. She will say that she simply indicated to Ms Large where to sign and then took the form herself and signed the details of the person from the department. She thought - Ms Large thought that these were the release forms allowing her to leave the hospital but it was in fact, she subsequently discovered, a consent for adoption form. She found that out later in the day when she went down to the nurses' desk in order to leave the hospital and the nurse said, "You signed adoption papers earlier this morning. Your baby has already gone with his new family."

40

50

She will say the following Monday she telephoned the department and they denied knowledge of anyone by the name of Margaret. She will say that they had no record of a Patricia

Large ever having a baby and "was I sure that I had a baby." She went to see some solicitors in the city and they advised her that she should get a copy of the forms that she had signed. She went back to the department who wouldn't give her a copy of any forms. She went to the hospital, they wouldn't give her any forms, and she went to the police and they wouldn't assist her. She didn't find out anything further about the matter until she made a freedom of information application at which time she obtained copies of the consents and like documents that your Honour has seen, the consent form being completed by Jay Whalley.

She will say that - she can produce a copy of the consent form. Next to her initials "PJL" are the letters "JW" and Ms Whalley has signed the document, and she has obtained copies of her son's medical records from the Royal Brisbane Hospital which revealed to her that at the time she left the hospital her son was in fact still there and wasn't discharged until the 7th of November 1968.

The other lady's name is Janette Lord.

HIS HONOUR: Well, we can take these one at a time, I suppose. They might perhaps raise different considerations. What are the grounds of objection to the reception of this evidence?

MR DAUBNEY: It is, in general terms, not apparent what factor in the plaintiff's case it is sought to prove by reference to this completely different evidence.

HIS HONOUR: Ms Whalley is in the habit of applying threats and forms of coercion to obtain the consent of unmarried mothers to the adoption of their children.

MR DAUBNEY: And that is where the probative value of the evidence falls down, your Honour, because Ms Whalley is not here to answer any of this.

HIS HONOUR: That goes, no doubt, to other considerations, but that doesn't of itself go to the question of admissibility. Why is it not admissible?

MR DAUBNEY: The highest that it can be said this evidence goes to is to demonstrate or seek to demonstrate that Ms Whalley was a kind of person who would do something, who would act in a particular way, and the authorities, in our submission, make it clear that that is not the sort of matter on which similar fact evidence can be called.

HIS HONOUR: But this isn't a criminal case. The question is - or at least a question is does the evidence proposed to be adduced from Ms Large tend logically to prove that the account given by the plaintiff of her conversations with Ms Whalley is true?

MR DAUBNEY: Yes.

HIS HONOUR: Well, it does that, doesn't it?

MR DAUBNEY: The highest it goes is - as your Honour said before, the highest it could be said to go is to tend to show that - tend to prove that Ms Whalley was a person who placed pressure on unmarried mothers.

HIS HONOUR: But that makes it relevant in a case where the question whether that kind of conduct occurred in relation to this plaintiff is established.

MR DAUBNEY: Yes, as your Honour pleases.

HIS HONOUR: Now, there is quite a different question - I overrule the objection. The only ground of objection taken is that the evidence proposed to be adduced is irrelevant. However, it has a tendency logically to prove the - that the plaintiff's account is reliable offering some material support for that version. There being no other ground of objection, the evidence is admissible.

Now, what is to happen? You want an opportunity presumably to investigate this question.

MR DAUBNEY: Of course.

HIS HONOUR: When do you want to do that, before or after you hear the evidence itself?

MR DAUBNEY: It will be difficult - I am not sure if this lady is immediately available. I am not sure if it is proposed to call her immediately. At this stage I wouldn't be in a position to cross-examine her, your Honour, for obvious reasons.

HIS HONOUR: Yes. Now, what do you want to do, call her to give her evidence-in-chief? And then presumably the defendant is to be afforded an opportunity to investigate, and that will happen no doubt before the cross-examination begins. Apart from anything else, it might be difficult for Mr Daubney to speak to the lady in conference once the cross-examination had commenced.

MR WILSON: Yes.

HIS HONOUR: So do - does the evidence proposed to be adduced from the other witness differ in principle from that?

MR WILSON: In principle, no.

HIS HONOUR: You may as well open it, and we will hear if Mr Daubney does have another ground for objection. If not then that evidence will be permitted to be adduced and the consequences for the future of the trial can be addressed after the evidence-in-chief of those two witnesses is taken, if you succeed in relation to adducing this evidence from the second witness at all.

MR WILSON: Yes, your Honour. As I said, your Honour, the

second lady is Janette Lord. Her maiden name is Binney - B-I-N-N-E-Y. She was a lady who gave birth at the Boothville Hospital at Wilston also in 1968. On the 3rd of October 1968 she gave birth to her son. She will say that she had been a resident of the Boothville Girls Home. She had been there for approximately seven months. Her family was Salvation Army and the Boothville Home and Hospital was run by the Salvation Army.

She will say that she was aged about 15 years when she was pregnant to a man who was aged 21. She will say that she had discussed the birth with her parents, and the parents were prepared to support her. She will say that she did not want to put her child up for adoption.

She will say that on the 3rd of October 1968 she gave birth. She recalls that being a Thursday. On the following Monday, which is the 7th of October, a lady attended another person in the same ward. This lady she subsequently discovered was Jay Whalley and she was speaking to this other lady. She came over and spoke to Ms Lord and asked her, "What is your situation? Are you signing adoption papers?" She informed Ms Whalley that she was not putting her baby up for adoption to which Ms Whalley said, "We will see about that. I'm going to tell your mother what's happened to you." Ms Lord said that she didn't care about that and she was keeping her baby.

Now, a couple of days later on the 9th of October 1968 Jay Whalley came back and over a period of about two hours browbeat her into eventually signing the consent for adoption forms telling her that because of her age she wasn't permitted to take the child home anyway because she had no means of support, that her child would be placed into foster care, that it was only if she could then prove that she could look after him that she would be able to get her child back, and that her mother had said that she should give up the baby. She will say that she wanted to see her mother but Ms Whalley said that she couldn't. She said, "You can see your mother after you sign the papers." Ms Whalley said that if she signed the papers there was a 30 day period in which if she changed her mind she could get her son back. She signed the papers.

She was discharged home. She contacted the hospital within the 30 days to get her baby back but was told that an adoption order had already been made and it was too late.

She will say that she and her mother fell out because she believed that her mother had sided with Ms Whalley and didn't speak about it for many years, but she subsequently did speak to her mother who told her that she had no such conversation with Ms Whalley about her wanting her daughter to give the baby up.

She will say that she has also obtained copies of documents from the department. She has a copy - full copy of her hospital file and she can produce the report of investigation and the form of consent both of which have been completed by Jay Whalley.

HIS HONOUR: Mr Daubney?

MR DAUBNEY: We object on the same grounds as before, your Honour.

HIS HONOUR: Same ruling. When do you propose to call them, Mr Wilson?

MR WILSON: I am in a position to do that now, if that is convenient to your Honour. They are the only two witnesses we have left for this afternoon.

HIS HONOUR: Now, you will then need to give attention to the future of the case. My associate tells me that I am listed to sit again in civil for one week later this year. I will need to look into that and see when it is and to see whether cases have already been assigned to me for that week. I suppose you gentlemen will also need to look at your calendars, but it may be a little difficult, Mr Daubney, because for all I know you may require some time before you are in a position to cross-examine these witnesses.

MR DAUBNEY: There is certainly that and certainly in respect of the diary I can assure your Honour that I would have a difficulty resuming the matter this year.

HIS HONOUR: I could understand that.

MR DAUBNEY: Thank you.

MR WILSON: Your Honour, before I actually call the witnesses, could we have an opportunity to stand it down for a few minutes so that I cannot only take some instructions but also speak to my learned friend in terms of what these investigations might be because, as I indicated to your Honour, these two ladies have a large volume of documents which we have provided and there may not be any more.

HIS HONOUR: For all I know he may wish to go and-----

MR WILSON: Ascertain that.

HIS HONOUR: -----not only conduct investigations that pertain to their testimony but now that you have succeeded in adducing this evidence conduct investigations relating to other ways in which he might seek to support Ms Whalley in the way in which he has foreshadowed.

MR WILSON: Well, we observed that in cross-examining the plaintiff it was suggested to her that this conduct was completely out of character for Ms Whalley, that she was one of the kindest and gentlest of people and most tender hearted of child care workers. So presumably to make those suggestions there is some evidence that is available.

HIS HONOUR: That may be right, but it could be one thing to conduct the defence case with a level of preparation with

which the defendant was content when not confronting these additional witnesses-----

MR WILSON: I appreciate that, your Honour.

HIS HONOUR: -----which may alter now that the case has taken this unexpected and unforeshadowed turn, but I will adjourn certainly to enable you to have these discussions and you might arrange for the bailiff to be informed when you are ready to resume.

MR WILSON: Thank you, your Honour.

THE COURT ADJOURNED AT 3.25 P.M.

1

10

20

30

40

50

THE COURT RESUMED AT 3.47 P.M.

1

HIS HONOUR: Yes, Mr Wilson?

MR WILSON: Your Honour, the position is I have instructions that my client would like the trial concluded sooner rather than later. I therefore don't propose to call those two witnesses, because I had discussions with my learned friend in terms of types of investigations that they would want to carry out which will, I am satisfied, take some time. My learned friend and I have had some discussions about how we should proceed. I am content if your Honour was to treat that evidence as not having been opened. That way there would be no Jones and Dunkel Jones-type problems.

10

HIS HONOUR: You are content with that course, I take it, Mr Daubney?

20

MR DAUBNEY: We are, your Honour. The only other point that we would seek is, and I frankly don't know if there are any reporters or if there were any reporters in the back of the courtroom when the evidence was opened, but given the nature of the evidence that was opened we are content for your Honour to proceed as if that evidence hadn't been opened, but we would seek a direction from your Honour to the effect that no part of that recital by our learned friend may be reported.

HIS HONOUR: You will have to make the application on notice. I don't see any journalists here at the moment. Given the time of day, that is not surprising that they are not here.

30

MR DAUBNEY: Yes.

HIS HONOUR: But if you want a restraining order you are going to have to give them notice that you want it.

MR DAUBNEY: As your Honour pleases.

40

HIS HONOUR: What purpose would be served by doing that?

MR DAUBNEY: Again, harking back to the submissions we made before, it was evidence that sought to impugn the character of or the person of Miss Whalley deceased, and serious statements were made in Court, in open Court about it. As I say, we are content for the matter to proceed as if that hadn't been said. That is, for the trial to proceed as if none of that had been said, but with respect to those that Miss Whalley has left behind we wouldn't want to see any of that reported in tomorrow's news or tonight's news.

50

HIS HONOUR: Then you should make the application on notice. If you want to do that I will, if you wish, adjourn briefly to enable notice to be given to the journalists or media outlets concerned.

MR DAUBNEY: Yes.

HIS HONOUR: I don't want to be seen to be prejudging it, but I start from the position that the press ought to be able to report these things which are said in open Court, and as you correctly point out Miss Whalley is, in any event, dead.

MR DAUBNEY: In any event, we will consider our position so far as that is concerned, but otherwise so far as further evidence is concerned we understand our learned friend still has Dr Moore to call tomorrow, your Honour.

MR WILSON: Doctor Moore has been arranged for 10.00 a.m. tomorrow, your Honour.

HIS HONOUR: Will that then conclude your case?

MR WILSON: Yes.

HIS HONOUR: Do you want to take advantage of the time available this afternoon, Mr Daubney, to call anyone?

MR DAUBNEY: To call anyone?

HIS HONOUR: Yes.

MR DAUBNEY: We don't have anyone available to call, your Honour. I can supplement the record with some more exhibits, but I was conveniently going to do that as part of the narrative in our opening tomorrow.

HIS HONOUR: Yes, very well. The only thing I was musing about was whether I should ask you at this stage, Mr Wilson, if you would be good enough to give me a list of the cases and any journal articles which might assist. If I have understood correctly, the case is confined to a claim for compensation on the footing and only on the footing that there has been a breach of a fiduciary duty.

MR WILSON: That is so.

HIS HONOUR: Do you mind? You may get to the stage of addresses tomorrow at any rate, I suppose. Will the evidence conclude tomorrow, Mr Daubney?

MR DAUBNEY: No, unfortunately it won't. Professor Whiteford and one of our other witnesses are arranged for Thursday morning.

HIS HONOUR: I see.

MR DAUBNEY: But we expect to be addressing on Thursday immediately following Professor Whiteford's evidence.

MR WILSON: I can give your Honour the names of some cases if you want them now, or would you prefer a list in the morning?

HIS HONOUR: Why not now give me a reference for the one that most supports the case of the plaintiff.

MR WILSON: There is a case of Williams and I think it is the Director of Aboriginal Affairs. There is one reported in 35 NSWLR, a decision of the New South Wales Court of Appeal. That was an application to extend the limitation period. There is then the unreported trial judgment of Justice Aberdeen, and then the judgment of the Court of Appeal. Both the first instance judgment and the judgment of the Court of Appeal are both unreported. It is Joy Williams, and I think it is the Director of Aboriginal Affairs. The full title, your Honour, would be in the 35 NSWLR citations. I just can't pick it up in my notes at the moment. There are then the two decisions of the Federal Court at first instance Cubillo, C-u-b-i-l-l-o, 103 FCR and 112 FCR which discuss the nature of the fiduciary duties which are owed, and then that other issue that I outlined at the start, whether that type of claim can be used to supplant tortious claim, what might otherwise be described as a tortious claim.

HIS HONOUR: What's the difficulty with that?

MR WILSON: The Court in Cubillo and the High Court in Breen and Williams have used language to suggest that - although it is not part of the ratio of the case - to suggest that a claim for breach of fiduciary duty, or equity shouldn't intrude where the claim is truly one at Common Law for a tortious event. We say that when one looks at it that can be distinguished on the facts of this case having regard to the relationship between the parties, which was plainly one of guardian and ward.

HIS HONOUR: What incident of the relationship contended for - I will rephrase it. What incident or aspect of the duty contended for has been contravened, do you say?

MR WILSON: The duty to protect the best interests of the plaintiff. I can tell your Honour that so far as my researches have revealed there are no cases dealing with the exact facts like this case; that is, a mother who has had a child taken. There are a number of cases, the case of Williams is one, where the child sues alleging improper upbringing in Departmental care. Cubillo - your Honour, is familiar with those cases. Breen and Williams was the case where the lady was seeking the medical records and alleged a fiduciary relationship with the doctor which permitted her to have access to those records. That's quite a different type of case to this. The other case your Honour may wish to look at is - I will endeavour to get the pronounciation right - Paramasivam and Flynn; another decision of the Federal Court which was a case concerning the sexual assault of a nephew. It was an argument that because the parties were in a relationship of guardian and ward, that that gave rise to certain duties. The difficulty in that case was that much of the criminal conduct had occurred in Fiji rather than in Australia, but there was some discussions by the full Federal Court in that case as to whether fiduciary obligations extended other than to the protection of economic interests, whether they intruded into personal relationships. That seems

to have been overtaken somewhat by the discussion by the High Court in Breen and Williams. There was also the case that your Honour may be familiar with of Clay and Clay where the Court-----

HIS HONOUR: I haven't read Clay. I understand it is concerning guardianship.

MR WILSON: Yes.

HIS HONOUR: One of the things I will be looking for your assistance on is whether, given that the High Court appears to have turned its face against the idea that fiduciary duties may be prescribed, you can characterise any aspect of the breach of duty you contend for here as proscriptive.

MR DAUBNEY: Before your Honour rises, to add on the topic your Honour has just been discussing authorities that might be of assistance to your Honour in preparing ourselves for argument, could we hand your Honour a copy of the judgment in Webber and the State of New South Wales which is reported in volume 31 of the Family Law Reports. It is a judgment of Justice Dunford earlier this year.

HIS HONOUR: I have seen it.

MR DAUBNEY: The only reason we give it to your Honour is it conveniently collects in one place the authorities and others to which our learned friend has been referring.

HIS HONOUR: Was either of you proposing to direct me to the decision of Justice Blow?

MR DAUBNEY: Yes. That is the judgment in Tusyn and State of Tasmania.

HIS HONOUR: Yes.

MR DAUBNEY: Yes, we were going to take you to that.

HIS HONOUR: Is there any useful discussion in the journals on these questions? The commentators seem to like writing on fiduciary duties. Is there any useful discussion in the journals concerning this?

MR WILSON: Your Honour, all I have been able to find is the discussion of Cubillo, but the case really deals with the principles exhaustively so far as the facts of that case were concerned. There is some debate about whether the extent of fiduciary obligations which has been applied in Canada and the United States would extend to Australia. That seems to be dealt with by the High Court in Breen as well.

HIS HONOUR: There has not been much enthusiasm in the High Court for Canadian developments for a long time. I remember hearing Sir Anthony Mason when I was a member of the bar speaking on fiduciary duties in Canada and if I remember correctly what he said was that his consideration of recent

Canadian cases suggested there were three classes of people who lived in Canada. There were people who already are fiduciaries; those who are about to become fiduciaries; and Judges. On the laches issue, what is the case that gives you most encouragement, Mr Wilson?

1

MR WILSON: Ford and Ford, your Honour.

HIS HONOUR: That is an old case, isn't it?

10

MR WILSON: 167 CLR.

MR WILSON: Go back to Herd, Herd & Lindsay Petroleum. They all seem to emanate from there.

HIS HONOUR: Thank you. Ten o'clock tomorrow.

THE COURT ADJOURNED AT 4.06 P.M. TILL 10 A.M. THE FOLLOWING DAY.

20

30

40

50