**ORDER PROHIBITING PUBLICATION OF THE NAME OF THE APPELLANT AND THE IDENTITIES OF ANY INDIVIDUALS WHO ARE REFERRED TO BY LETTER IN THE JUDGMENT.**

**IN THE COURT OF APPEAL OF NEW ZEALAND**

**CA182/06**
**[2008] NZCA 49**

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| BETWEEN | A (CA182/06)<br>Appellant |
| AND | THE ROMAN CATHOLIC ARCHDIOCESE OF WELLINGTON<br>First Respondent |
| AND | CATHOLIC SOCIAL SERVICES<br>Second Respondent |
| AND | THE SISTERS OF MERCY (WELLINGTON) TRUST BOARD<br>Third Respondent |
| AND | ST JOSEPH'S ORPHANAGE TRUST BOARD<br>Fourth Respondent |

Hearing: 29 and 30 October 2007

Court: William Young P, Robertson and Randerson JJ

Counsel: H A Cull QC and N Levy for Appellant
G J Thomas and C Stanley for First and Second Respondents
C F Finlayson, M E Hubble and G P McLay for Third and Fourth Respondents

Judgment: 6 March 2008 at 3 pm

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**JUDGMENT OF THE COURT**

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**A The appeal is dismissed.**

**B We reserve all issues as to costs.**

**C Order prohibiting publication of the name of the appellant and the identities of any individuals who are referred to by letter in the judgment.**

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## REASONS OF THE COURT

(Given by William Young P)

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## The appeal

[1] On 5 February 1968 the appellant's mother placed her in St Joseph's Orphanage in Upper Hutt ("the Orphanage") – an institution that was run by the Sisters of Mercy as was the adjoining St Joseph's Primary School ("the Primary School"). The appellant remained at the Orphanage until May 1973. During this time, she attended the Primary School as a student. While she was at the Orphanage, she was primarily under the care and control of the Sisters of Mercy. As well, and more so in the later years, the Reverend Peter McCormack, the director of Catholic Social Services, and social workers employed by Catholic Social Services (particularly Mrs Mary McGreal) had involvement in her care.

[2] From May 1973 (when the appellant left the Orphanage) until the end of 1977 (when she left secondary school) the appellant was primarily the responsibility of Catholic Social Services, although the secondary school she attended was run by the Sisters of Mercy.

[3] The claims which give rise to this appeal relate to two periods: first between February 1968 and May 1973 when the appellant was living at the Orphanage; and secondly between 1974 and 1977 when she was at secondary school. These claims relate to the actions of the Sisters of Mercy and Catholic Social Services. Catholic Social Services is an unincorporated agency of the Wellington Roman Catholic Archdiocese but it is convenient to refer to as if it were an entity in its own right. The St Joseph's Orphanage Trust Board (which is the fourth respondent) is merely a land-owning entity and it had no involvement at all in the care of the appellant. We will therefore discuss the present appeal as if it involved claims against only the Sisters of Mercy and Catholic Social Services.

[4] The appellant sued on two causes of action: negligence and breach of fiduciary duty. The latter added nothing to the case and we will not mention it again. As to negligence, the appellant maintained that the Sisters of Mercy and Catholic Social Services owed her duties of care which encompassed:

(a) Protection of her physical safety;

(b) Promotion of educational opportunities; and

(c) Promotion of her emotional well-being and development.

On the appellant's case, these duties of care were breached because she was subjected to sexual, physical and emotional abuse, and denied appropriate educational opportunities. She alleged that the Sisters of Mercy and Catholic Social Services were liable to her, both directly and vicariously. There is no doubt that the appellant's childhood has left her with significant difficulties associated with her personality structure and general psychiatric health – difficulties which, on her case, were associated with the breaches of duty she complained of. The damages she sought included compensation for these personality difficulties and the impaired state of her psychiatric health.

[5] Frater J (*A v Roman Catholic Archdiocese of Wellington* HC WN CIV-2001-485-961 31 July 2006; partially reported at [2007] 1 NZLR 536) found that neither Catholic Social Services nor the Sisters of Mercy had breached any duty of care associated with promotion of the appellant's education. That conclusion is not challenged in this appeal.

[6] The Judge concluded that four of the appellant's allegations of sexual abuse were made out: an incident during a placement in Holly Grove in 1968–1970; indecencies between a Mr S and the appellant during a summer placement in 1972–1973; rape by a Mr N; and sexual intercourse with her maternal grandfather. She rejected allegations of negligence against Catholic Social Services and the Sisters of Mercy associated with the relevant placements. Her factual conclusions in this respect are not challenged. The appellant, however, does challenge the Judge's legal conclusion that Catholic Social Services and the Sisters of Mercy are not vicariously liable for the sexual abuse.

[7] The Judge found that the appellant was subjected to physical force at the Orphanage and the Primary School but she concluded that such physical force was

lawful as being within the scope of s 59 of the Crimes Act 1961. The appellant challenges the latter conclusion.

[8] The Judge concluded that the Sisters of Mercy were not under a duty of care to promote the appellant's emotional well-being, but held that Catholic Social Services owed what in effect was a professional duty of care as an agency engaged in social work that encompassed issues associated with the appellant's emotional well-being. She concluded that the appellant was not suited to the Orphanage environment, something which Catholic Social Services, but not the nuns, came to recognise. In her view, Catholic Social Services acted reasonably in the circumstances and she acquitted that agency of negligence. On appeal, the appellant primarily challenged the Judge's approach to the relevant duties of care but it will also be necessary for us to review her contentions as to negligence.

[9] The appellant's claim was thus dismissed by the Judge and she now appeals.

[10] Although the proceedings in this case were not issued until 2001, no Limitation Act 1950 point now arises (given the unchallenged finding by Frater J that the appellant may rely on s 24 of that Act).

[11] We propose to discuss the case under the following headings:

(a) Factual background;

(b) The legislative scheme;

(c) The legal responsibilities of the Sisters of Mercy and Catholic Social Services;

(d) Sexual abuse;

(e) Physical abuse; and

(f) Emotional harm.

**Factual background**

*A general narrative*

[12] The appellant was born on 16 December 1959. She was one of seven children. The situation into which she was born was unstable as her father had problems with alcohol and was sometimes violent. The family moved many times. In the end, her parents separated in early 1967.

[13] In March 1967, the appellant's father placed her in a Salvation Army home. The appellant makes no complaint about her treatment at that home.

[14] As noted, the appellant's mother placed her in the Orphanage on 5 February 1968 and she stayed there until 4 May 1973. While there, she attended the Primary School. For some of that time her two sisters lived with her. While at the Orphanage, the appellant was under the day to day control of the Sisters of Mercy. Father McCormack – the director of Catholic Social Services throughout the relevant period – was the manager of the Orphanage for the purposes of the relevant legislation. As time went by, Catholic Social Services (particularly through Mrs Mary McGreal, a social worker) became more directly involved with the appellant. In the holidays the appellant was placed with unpaid holiday caregivers. Catholic Social Services facilitated some, probably most, and possibly all of these placements. But it was also within the capacity of the nuns to organise holiday placements and it is possible that some were.

[15] Sometime after the appellant began living in the Orphanage, her mother made available the appellant's family benefit book to Father McCormack so that Catholic Social Services could collect the family benefit payments referable to the appellant. The first Catholic Social Services file on the appellant was not opened until 26 January 1972 although some earlier documents relating to her have been obtained from files maintained in relation to one of her siblings. It is clear that Father McCormack had some dealings with the appellant's family prior to the first documented interactions. In part this related to taking over the family benefit

payments. But it also appears that from 1969 or 1970 Father McCormack tried to persuade the appellant's mother to take the appellant and her siblings back into her care. To encourage her to do so, he said that he would endeavour to provide her with a house in which she could care for all the children. She did not take him up on this.

[16] A letter of 12 February 1971 from Father McCormack to the District Child Welfare Officer addressed custody arrangements associated with the then proposed divorce of the appellant's parents and what would seem to have been a custody dispute between them. At this stage the appellant's two sisters were living with her at the Orphanage. This letter observed of the appellant:

> [The appellant] is in Std. 4 at St. Josephs [sic] Convent School and like all her sisters, lives at St. Josephs [sic] Girls Home. Of all the children who desperately need attention and recognition from the parents, it would seem that [the appellant] possesses this need in the extreme. She literally craves affection and will do anything to obtain it. In the setting of St. Josephs [sic] this does make her seem somewhat a [sic] behaviour problem.
>
> Apart from this feature, it is anticipated that [the appellant] will respond as she grows a little older with some of the inevitable consequences of the separation that her parents have created. In the last few years, her holidays have been spent with Mr and Mrs [C] of Wainuiomata, who did not find her in any way difficult and are always delighted to have her return to them. It would seem therefore that given the minimum of security, understanding and attention with as much attention as can come from this sort of holiday home, [the appellant] will respond.

For the future, the letter commented:

> Catholic Social Services would be happy to continue exercising care for these children until such time as they are able to act responsibly for themselves. It would be appropriate that some form of legal maintenance might be entered into if this was to be the case. It seems unlikely that we will ever recover maintenance from [the appellant's father] though for the future, if [the appellant's mother] was to retain custody, we would be willing to work with her and in fact counsel her to have a more intimate and personal involvement with her children.

[17] Subsequently a decree dissolving the marriage of the appellant's parents was made absolute on 24 November 1971. By this stage agreement had been reached on custody, which was vested in her mother reserving access to her father. The associated Court documents show that the mother, at that time, intended to persist with the then current arrangement under which the appellant and her siblings (save for one who was in a foster home) would remain in Catholic institutions.

[18] One of the first documents on the Catholic Social Services file associated directly with the appellant is a note from her mother dated 8 December 1971 confirming that the appellant would be returning to the Orphanage for the 1972 year.

[19] In a letter of 4 December 1972 to the appellant's mother, in which he was addressing the position of the appellant and two of her siblings, Father McCormack said:

> On the advice of the sisters at St. Joseph's, Upper Hutt, it would seem … that [the appellant] has really gained as much as she possibly can from her stay at St. Joseph's. It is not impossible that children can become over exposed to the Institutional setting in which they are obliged to spend some years. It would be therefore in [the appellant's] best interests … if she could be found a place for the holidays and for the coming year.
>
> With regards to [X] and [Y] at Sunnybank: you realise I am sure that they have both been there for a considerable time now and like [the appellant], they too are showing in their behaviour and in their emotional life a considerable problem with regards to the rejection that they feel in terms of yourself and the family. While they are yet quite young, all of these children desperately need to feel wanted and it would seem appropriate that they could feel wanted by the right person. It would not be in [X] and [Y]'s best interest to return them to Sunnybank for any extra time with regards to Institutional care.
>
> This therefore leaves me in the very difficult position of knowing what to do with them and for them. It would be therefore very useful and beneficial for the children if you, as their natural mother, could possibly find the room and the willingness to allow these children of yours to live with you as a family.

The appellant's mother was not willing to take the children back.

[20] At the same Mrs McGreal was pursuing an alternative strategy that involved an attempt to place the appellant and her younger sister with a Mr and Mrs S as foster parents. As a trial they stayed with Mr and Mrs S over the summer of 1972–1973. The Judge held that Mr S sexually abused the appellant while she was living with him. From the point of view of Catholic Social Services, the placement broke down because Mrs S complained to Mrs McGreal that the appellant had developed a crush on Mr S. The upshot was that the appellant returned to the Orphanage and the Primary School.

[21] A Catholic Social Services file note of 4 May 1973 records that the appellant had been shoplifting, there had been social friction within her peer group and she had

been at the Orphanage "for too long a period, with possible risk of institutionalisation". On that day, Catholic Social Services placed the appellant with Mr and Mrs M for foster care.

[22] The appellant made no complaint at trial about what happened while she was living with Mr and Mrs M. But this fostering arrangement came to an end after about eight months. The reports associated with this arrangement indicate that the appellant was by then showing signs of "considerable social deprivation and gaps in social learning", difficulties relating to men and sexualised behaviour.

[23] Between 1974 and 1977, the appellant attended St Mary's College Wellington. The College was and remains a Catholic girls secondary school. At the time the principal and many of the staff were Sisters of Mercy. Her placement at the College was arranged by Catholic Social Services. She was a boarder for the first three years and in a foster home for her last year at school. The Judge made no findings of fact against any of the respondents in relation to the 1974–1977 period although, on her findings, the appellant was sexually abused by her maternal grandfather and was raped by a Mr N. The arguments on appeal in relation to the 1974–1977 period are confined to these incidents of sexual abuse and primarily involve legal issues. For this reason we will focus our discussion of the facts on what happened to the appellant while she was living at the Orphanage.

*The case for the appellant*

[24] At trial, the appellant maintained that she was very badly treated by the nuns both at the Primary School and the Orphanage. On her evidence, the physical violence she was subjected to went well beyond anything that could be justified as reasonable correction under s 59 of the Crimes Act. She alleged that one particular assault by a nun left her with permanent hearing loss. As well there were constant threats of physical violence.

[25] The appellant also claimed that she was subjected to persistent emotional abuse. Some of this related to verbal abuse, for instance that she was told by the nuns that she was a liar, a loser, selfish, ungrateful, unthinking, undeserving,

unloved, inadequate, worthless, a sissy, a no-hoper, a useless child, a pathetic dumb creature and a thief. The appellant claimed that she was told that nobody cared for and wanted her, and that her mother was useless. She was subjected to threats of damnation because she was evil, immoral and wicked, had committed mortal or "cardinal" sins, was the worst of the worst and would go straight to hell and not purgatory. She was often hungry and there were problems over food. Sometimes there were threats to withhold food and major issues if children would not eat the food which was provided. There were threats that she would be locked up, placed in cells or sent to jail. She was criticised for showing affection to her mother, treated inconsistently over her participation in a wedding ceremony for her aunt, humiliated in front of other girls after wetting her bed and wrongly accused of both setting fire to a dormitory and engaging in sexual behaviour with another girl. She says that she was isolated from her siblings and other girls, that she and the other children were played off against each other, physically isolated, emotionally manipulated and referred to in a depersonalised way by reference to their laundry numbers. More generally still, she complained that the Sisters of Mercy and Catholic Social Services never gave her any certainty as to her life, for instance whether she would be returning to live with her parents and siblings, and did not provide her with an explanation as to her way forward. She also maintained that there had been a general lack of supervision and monitoring on the part of Catholic Social Services.

[26] As well there were the incidents of sexual abuse which we have mentioned.

*The cases presented by the Sisters of Mercy and Catholic Social Services*

[27] On the case presented by the Sisters of Mercy, the Orphanage was a cheerful good-humoured place characterised by good relationships between the nuns and their charges. They maintained that all punishments were within the scope of s 59 of the Crimes Act. They also denied emotionally abusing their charges. The appellant's evidence was challenged in many of its particulars; for instance evidence was called to suggest that the word "loser" (in the sense complained of by the appellant) was not in common parlance in the late 1960s and early 1970s and would not have been used by the nuns.

[28] Catholic Social Services maintained that it did not assume a social work role in relation to the appellant until comparatively late in the piece (around 1972) and denied negligence.

*The Judge's findings*

[29] In her factual findings, the Judge came down somewhere in the middle between the starkly contrasting cases presented by the appellant and the Sisters of Mercy.

[30] The Judge made some general findings about the way in which the Orphanage was operated. On the one hand, as she noted, the Orphanage was described in contemporaneous reports as having a "happy atmosphere" with good relationships between the nuns and the children. She also found:

> [473] … By the standards of the time St Joseph's Orphanage provided an excellent standard of care … .

On the other hand, the Orphanage provided a "very structured environment with a strict routine and rules". And although "individual nuns did their best and genuinely cared for their charges, the reality is that the orphanage was not and never could be a home". In another part of her judgment, she observed:

> [363] In line with prevailing religious and societal standards of the time the St Joseph's Orphanage environment was strict. The Sisters had numerous responsibilities and their ability to give attention to individual children or recognise the underlying needs of some children was limited by human resource factors and a lack of formal training. Different children had variable experiences of the orphanage environment. The plaintiff's own experience was likely influenced by her pre-existing fragility stemming from her family situation.

The Judge saw some of the appellant's more general complaints as being associated with the inevitable incidents of institutional life:

> [278] Some of the things that she complained about were simply consequences of institutional life. The use of laundry numbers was one. This was a sensible means of keeping track of clothing for the 60 or so people who lived at the orphanage. I accept that when girls went to collect their laundry, Sr A called out their numbers rather than their names. Because that

was how she remembered girls she may have used their numbers in other situations. But there is no evidence that anyone else did.

[279] I accept also that, for security reasons and because of the limited space in the dormitory set-up, personal items, particularly anything of value, would have been removed and put in a place of safety. Unlike a child's home, there would be a limit to the amount of personal items that they could keep around their bed in the dormitory. The 1967 inspection report said that family photos, toys and trinkets were evident in the cubicles. No doubt the line had to be drawn somewhere, and toys or gifts were sometimes removed. I accept that would have seemed harsh, but I cannot see any ulterior motive for doing so. It was simply a matter of practicality.

[31] As to corporal punishment, the Judge found:

[259] It was not disputed that corporal punishment was administered in the school, as it was in other New Zealand schools at the time. I have no reason to believe that it was not also administered in the orphanage. When the girls were formally punished, in the sense of publicly lined up and punished, I am sure that this would have involved a strap or straps to the hand. Blows to the head or other parts of the body, as the plaintiff claimed, were more likely to have been the result of an angry response by a particular nun to particular behaviour, rather than considered formal discipline. But I accept they did happen.

[260] I am also in no doubt that some nuns used physical force, or the constant threat of it, as a means of exerting a semblance of control over their sometimes unruly charges. Sr A is the prime example. I accept that she often carried her sewing ruler with her and used it indiscriminately. The "tap on the side of a knee or shoulder" that Sr S recalled being used to get a child, sitting on the floor, to move over further, could well have become a rather painful jab or poke. It seems that Sr A was not averse to slapping a child with her hand or the strap either, but she was somewhat more careful or restrained about what she did when other nuns were around.

[32] As to verbal abuse the Judge observed:

[261] I accept that for others, particularly the teaching nuns, a verbal dressing down of a miscreant was generally sufficient to bring either a particular child or the whole class under control. In doing so, they may well have used some of the words claimed. Others may in fact be the girls' translation of the meaning of the words used. So whether or not Sr [L] actually used the word "loser", or whether it was in general parlance at the time, is not strictly material. I am also satisfied that the threats of damnation or similar were made. This was a church school after all, and I find it difficult to believe that the use of terms such as "purgatory" and "damnation" or "mortal sin" were restricted to the chapel or religious education lessons. In fact, the plaintiff herself, in a letter written in 1974 in which she tells Mrs McGreal how unhappy she is on a holiday placement, says:

> Well, I must try to enjoy myself but I can't, I put up with it for the holy souls in pergurty [sic].

> [262] It is also probable that threats were made to bring in the Police, or that girls would go to gaol if they misbehaved, as there is evidence that the Police did become involved when they ran away or were caught shoplifting.
>
> [263] However, the words alone were innocuous enough. Their effect was in the delivery, and I accept that after being on the receiving end of a verbal rebuke from an expert like Sr [L], a pupil would not have felt very good about themselves.

[33] As to physical isolation:

> [264] I am also satisfied that some form of time out or "isolation" was used as a form of punishment, although I doubt that girls were physically isolated for the length of time (days or weeks) that LA, for example, suggested, as there is no evidence that they were kept from school. What it probably involved was the withdrawal of privileges such as outings, or the home visits that DS spoke of.

[34] As to the issues raised by the appellant over food:

> [266] It is not necessary for this Court to become involved in an analysis of the food and whether or not the nuns ate the same as the girls (they said they did; some girls said they did not). In common with children generally, there were some foods – for example, sago pudding – that some loved and others hated. Other things, such as molasses, were universally unpopular. However, there was nothing to indicate that there was either insufficient food or that it was inadequate. Of more relevance, for present purposes, were the allegations about the way that girls were made to eat food that they did not like. The stories varied. Some said that it was literally forced down their throats; others that rejected food was brought out again and again at subsequent meals until it was eaten. What is significant that like other practices that were criticised, these things do not seem to have been done in general view. DS was kept back from the others until she complied.

[35] The Judge then wrapped up this portion of the discussion in this way:

> [267] While unacceptable by current standards, these practices – corporal punishment, verbal tirades, making children eat all their food, emotional pressure, even random assaults of the "clip around the ear" variety, were not universally condemned in the mid 1960s to early 1970s. Indeed such behaviours would have been commonplace in many homes across the country and there is no evidence that they were seen as inappropriate in an institutional setting either.

[36] The Judge then turned to discuss the appellant's particular experiences at the Primary School and Orphanage:

> [272] While the teaching nuns would have had some training in child development and experience gained through their work, there was no

> indication that they had any training to address the particular needs of the children from troubled backgrounds who came into their care.
>
> [273] As a result, no one recognised the devastating effect that life in the orphanage had on the plaintiff.
>
> [274] A well-adjusted child, or even one who was reasonably phlegmatic, would have shrugged off the occasional verbal and physical assault as part of life. But for someone like the plaintiff, who was clearly vulnerable when she came to the orphanage, each apparently innocuous incident was taken personally, internalised, and combined with others to undermine her already fragile self-esteem.
>
> [275] No matter how happy her time was at the [Salvation Army] home, the questions about her parents' separation and the future of the family remained unanswered when she arrived at St Joseph's and she looked to the nuns to provide the answers and the loving support which her parents did not, and maybe because of their own emotional shortcomings, never could, provide. But she was not given that support.

[37] The Judge noted that most of the other girls at the Orphanage had someone outside the institution who cared for them and took an active interest in them, unlike the appellant and her sisters.

[38] She then went on:

> [280] I am satisfied that during her time at St Joseph's the plaintiff was sometimes on the receiving end of physical chastisement that was at the upper end of what was regarded as reasonable or normal discipline, even at the time. I have no doubt that she did not escape Sr A's attentions. Apart from my general conclusions, there is independent evidence from GT, who I regarded as a very fair witness, of an incident when Sr A hit both the plaintiff and her sister, LA, on the back with a strap when they were singing.
>
> [281] The evidence suggests that Sr [G] was another who was wont to discipline excessively – although whether this happened at the orphanage, as distinct from the school, is not clear.
>
> [282] Sr [L] remembered reprimanding the plaintiff about using the school hall when she did not have permission. The plaintiff said that she was not only reprimanded, she was strapped on her legs and body as well as her hands. Sr [L] was generally regarded as a strict disciplinarian. She herself accepted that she may have seemed stern. I accept that she was authoritarian and that she probably used the strap more frequently and fervently than she would care to acknowledge. But she was also professional. There is nothing to suggest that she was deliberately cruel or sadistic. Accordingly, I doubt whether her punishment went beyond several hard straps to the hand.
>
> [283] I accept that the younger nuns such as Sr [J] and Sr S interacted with the girls more than some of the older nuns. They were generally enthusiastic and keen to make the orphanage as much a home as was possible, within the confines imposed by the numbers living there.

> [284] I accept also that Sr S sometimes administered the strap at the orphanage as a disciplinary measure. This was confirmed by Ms [N]. But I am not persuaded that Sr S carried a strap about with her as a matter of course. Her explanation that the pockets in the habit the nuns wore after 1967 were large enough for a handkerchief and a rosary but not a strap is plausible. She volunteered that she had smacked each of a group of eight year olds on their pyjama clad bottoms after they persistently got out of bed, and I have no reason to believe that she would not have responded in a similar fashion, if pushed, to others. Many parents would have, at that time.

[39] The Judge then turned to discuss an allegation that a particular nun had seriously assaulted the appellant leading to permanent hearing loss in one ear. In the end the Judge was not persuaded, on the balance of probabilities, that this incident had taken place.

[40] As to the sexual abuse the Judge concluded that the appellant was abused at the holiday placement at Holly Grove when she was aged nine or ten years. She also accepted that there was a further incident (or incidents) of sexual abuse over the summer of 1972–1973, during a placement which had been organised by Catholic Social Services. She rejected allegations made by the appellant that she had been sexually abused at the Orphanage when she was eight years old.

[41] The Judge dismissed the contention that Catholic Social Services had been negligent in relation to the key decisions made as to the appellant's living arrangements.

[42] She also found in favour of the Sisters of Mercy, albeit in more guarded terms:

> [475] Knowing what we know now about the plaintiff, her family and her psychological makeup, it seems obvious that she needed much more individual attention, encouragement and support than she received, or was likely to receive in either of the third defendant's institutions [ie the Orphanage and St Mary's]. It is also clear that because of her particular circumstances she was more affected than most by verbal reprimands, sarcastic or denigrating comments, and physical discipline, some of which, such as occasional slaps with a hand, or ruler would be completely unacceptable by today's standards. However, I am not persuaded that, by the standards of the day, that either the overall care she received or the discipline that was meted out at St Joseph's can be regarded as abusive.
>
> [476] Nor is there any evidence that the third defendant failed to provide the plaintiff with an appropriate education, if, indeed, such a duty exists. …

> [477] In the absence of a duty to promote her emotional well-being, I do not believe that the third defendant can be found to have breached its duty of care to the plaintiff, either.

**The legislative scheme**

[43] The Child Welfare Act 1925 ("the 1925 Act") provided for the committal of children who were in need of care and attention to the care of the Superintendent of Child Welfare, and a child so committed would be taken to such institution as the Superintendent might direct. That institution might be operated either by the Crown or privately. The 1925 Act provided for the establishment by the Crown of, inter alia, receiving homes (s 7(3)(a)):

> … where children may be received and maintained pending the making of arrangements for their admission to suitable private homes, as provided for in this Act, or until they may be otherwise dealt with in accordance with this Act:

It also recognised certain private institutions, including St Joseph's Industrial School, Upper Hutt which was a precursor of the Orphanage.

[44] Under the 1925 Act, a magistrate or justice making an order of committal was required to specify the religious denomination "in whose faith and doctrines the child should be educated" and it was the duty of the Superintendent to ensure compliance with the order. Where such an order required education in the doctrines of the Roman Catholic Church, the Superintendent might transfer the child to any of the private institutions recognised under the 1925 Act.

[45] Under s 12 the Superintendent could, on the application of, inter alia, either parent of a child, assume control of that child for such period and on such terms as to cost and maintenance and otherwise as may be agreed. Where such an agreement was in place, the Superintendent had, while the child was under his control, the same powers and responsibilities as he would have had if the child had been committed to his care, save that guardianship was not vested in the Superintendent. Some indication of contemporary thinking as to the degree of formality required for an agreement under s 12 is given by the Child Welfare (Forms and Procedure) Regulations 1926 ("the 1926 Regulations"). These Regulations provided a non-

mandatory form for recording s 12 agreements. The form was by way of a deed. The recitals recorded the statutory status of the party making the application (ie being one of the parents, the guardian or a person having at the time being custody or control of the child) and also that the Superintendent had agreed to assume control of the child. The form made provision, in a reasonably elaborate way, for the Superintendent to recover financial costs associated with the assumption of control of the child.

[46] Under s 16 of the 1925 Act, the Superintendent had the powers of a guardian in relation to any child in respect of whom a committal order had been made. Sections 19 and 20 provided:

> **19 Children not to be permanently maintained in institution, save in exceptional cases—**
>
> Children committed to the care of the Superintendent pursuant to this Act, or in respect of whom the Superintendent assumes control by agreement as hereinbefore in this Act provided, shall not, save in exceptional cases to be determined by the Superintendent, be permanently maintained in any institution under this Act.
>
> **20 Children to be placed in suitable homes or situations—**
>
> (1) The Superintendent or any officer of the Child Welfare Division authorised by the Superintendent in that behalf may, subject to such conditions as may be prescribed by regulations under this Act, arrange for any suitable person to take charge of any child committed to the care of the Superintendent or in respect of whom the Superintendent has assumed control, on such terms as to the maintenance, education, training, and employment of the child, and of the payment (if any) to be made by the Superintendent in respect of its maintenance, and, in the case of children whose services are to be paid for, the payment of wages, as may be agreed on between the parties, with the approval of the Minister. The approval of the Minister given pursuant to this subsection may be general in its application, or may apply to any particular child or children or classes of children.
>
> (2) The Superintendent, or any officer of the Child Welfare Division acting with the authority of the Superintendent, may at any time, in his absolute discretion, cancel any arrangement or agreement made under this section, and may thereupon take possession of the child, by force if necessary, and may place it in an institution under this Act, or may arrange for its being taken charge of by any other suitable person.
>
> …

[47] More directly material to the facts of this case is the Child Welfare Amendment Act 1927 ("the 1927 Act"). This Act provided directly for children's homes which were operated as private institutions. It defined "controlling authority" in relation to such a home as (s 2):

> [A]ny person or persons, society, or body corporate having control of the administration of the home:

The manager with respect to a home was defined as:

> [T]he person appointed by the controlling authority as the manager for the purposes of this Act.

The Orphanage was set up in 1952 and was such a home. The Sisters of Mercy constituted its controlling authority. This case has been conducted on the basis that Father McCormack, in his capacity as director of Catholic Social Services in the Wellington Archdiocese, was the manager of the Orphanage. We are satisfied (as we will later explain) that this is a correct analysis of the legal position. But, as will become apparent, this description of Father McCormack's role did not always entirely tally with the situation on the ground.

[48] Most materially, s 13 was in these terms:

> **13 Manager may assume control of child by agreement** –
>
> (1) The manager of any children's home, acting on behalf of the controlling authority, may, on application in that behalf made by either parent of any child or by its guardian, or by any person for the time being having the custody or control of the child, assume control of that child for such period and on such terms as to cost of maintenance and otherwise as may be agreed on by the parties.
>
> (2) In respect of any child to whom any agreement under this section relates the manager shall so long as the child is under his control (whether he is for the time being in the children's home or elsewhere) have the same powers and responsibilities in all respects as the Superintendent would have if the child had been committed to the care of the Superintendent in accordance with the provisions of the principal Act, save that the guardianship of the child shall not by virtue of such agreement be deemed to be vested in the manager.
>
> (3) If during the currency of any agreement under this section the parent or guardian of any child, or any other person, contrary to the terms of the agreement, attempts by any means to obtain possession of the child the manager may apply to the nearest Children's Court for an order for the

> enforcement of the agreement, and thereupon the Court may make an order confirming the agreement, or may make such other order as it thinks proper having regard to the welfare of the child.
>
> (4) On the expiry of an agreement under this section, or at any time before such expiry, a Stipendiary Magistrate, if he is satisfied that such agreement will not be extended or that a new agreement with respect to the maintenance of the child in the children's home will not be entered into, may, on complaint by the manager or any other person that in the interests of the child he should not be under the control of his parents or of either of his parents, or of any other person specified in the complaint, make an order committing the child to the care of the Superintendent, to be dealt with as provided in the principal Act.

**The legal responsibilities of the Sisters of Mercy and Catholic Social Services**

[49] Complicating features of the case are uncertainty as to the legal basis upon which the appellant was in the Orphanage and the double role of Father McCormack as director of Catholic Social Services and manager of the Orphanage.

[50] The appellant's position, largely adopted by the Judge, was as follows:

(a) The placement of the appellant in the Orphanage was pursuant to an agreement under s 13 of the 1927 Act;

(b) Father McCormack was the manager of the Orphanage with statutory powers and responsibilities for the appellant;

(c) Accordingly he owed the appellant a duty of care associated with his statutory role; and

(d) Because he held his position as manager of the Orphanage as an adjunct of his role as director of Catholic Social Services, Catholic Social Services was vicariously liable for his actions (or inaction).

[51] We recognise that from May 1973, and possibly earlier, actual responsibility for the appellant corresponded (at least broadly) to this analysis. Further we recognise that in 1974 Catholic Social Services, as an institution, was to take the view that it had power and responsibility for the appellant under s 13 of the 1927

Act. On the other hand, prior to 1971 or 1972, Father McCormack had comparatively little say over the way the Orphanage operated and only minor involvement with the children. Consistently with this, he had had comparatively little to do with the appellant apart from taking over the family benefit book and attempting, unsuccessfully, to persuade the appellant's mother to take back her children.

[52] Given the close textual similarity between s 12 of the 1925 Act and s 13 of the 1927 Act, the 1926 Regulations provide an interesting insight into the level of formality which the legislature might have envisaged for agreements under s 13 of the 1927 Act. The form of agreement provided for in the 1926 Regulations was extremely specific and unambiguously recorded an assumption of "control" by the Superintendent.

[53] Allowing for the legal responsibilities associated with a s 13 agreement, one would expect that it would be entered into by the manager (in this case Father McCormack). But the initial arrangement was between the appellant's mother and the Sisters of Mercy. The only direct dealings between Father McCormack and the appellant's mother that were directly referable to the appellant living in the Orphanage were associated with the family benefit. Otherwise the interaction between Father McCormack and the appellant's mother involved attempts by Father McCormack to persuade her to take the children back.

[54] Both the appellant's mother on the one hand and the Sisters of Mercy (and Father McCormack) on the other would have been surprised in 1968 if it had been suggested that the informal arrangements involving the appellant's placement with the Orphanage carried the consequences identified in s 13 of the 1927 Act. For instance, it does not seem particularly likely that the Sisters of Mercy (or Father McCormack) and the appellant's mother thought that this placement gave rise to a duty under ss 19 and 20 of the 1925 Act to place the appellant with foster parents. Nor would the appellant's mother have envisaged that her entitlement to claim the appellant back would be subject to ss 13(3) and (4). Although the reality, viewed with hindsight, is that the appellant's mother abandoned her, this abandonment

occurred by degrees, with what was presumably initially intended to be a temporary arrangement being allowed to carry on for over five years.

[55] We construe the words "assume control of that child" in s 13(1) as requiring more than an agreement that, in the meantime, a child should be cared for in the institution. Instead, we see those words as envisaging an agreement which fairly contemplates the sort of "control" envisaged by s 13. We are not persuaded that such an agreement was entered into in this case.

[56] Further, we record that we have some reservations whether vicarious responsibility for Father McCormack's actions as the manager of the Orphanage should lie with Catholic Social Services (as the Judge thought) as opposed to the Sisters of Mercy. The 1927 Act contemplates that the manager will be appointed by the controlling authority (which was the Sisters of Mercy). His "appointment" as manager by the Archbishop (as part and parcel of his appointment as director of Catholic Social Services) would not have been of legal effect under the 1927 Act unless it was at least in substance adopted or acquiesced in by the Sisters of Mercy. It is clear on the evidence that his appointment was so adopted or acquiesced in with the result that he is properly regarded as having been the manager. The scheme of the 1927 Act associates the manager with the controlling authority (the Sisters of Mercy) which suggests that if Father McCormack had incurred a tortious liability to the appellant, it would have been the Sisters of Mercy rather than Catholic Social Services which would have carried the associated vicarious liability.

**Sexual abuse**

*Overview*

[57] The Judge found that the appellant was sexually abused twice in the years between 1968 and 1973. On each occasion this was at the hands of a care provider organised by either Catholic Social Services or the Sisters of Mercy. There were also further incidents of sexual abuse which may well have occurred after 1 April 1974 involving Mr N and the appellant's maternal grandfather.

[58] The appellant maintains that:

(a) At all material times she was subject to an agreement under s 13 of the 1927 Act;

(b) Accordingly the manager (ie Father McCormack) had the powers and responsibilities of the Superintendent provided under s 20 of the 1925 Act; and

(c) It being established law (*S v Attorney-General* [2003] 3 NZLR 450 (CA)) that the Superintendent was liable vicariously for sexual abuse of children by foster-carers appointed by the Superintendent under s 20 of the 1925 Act, it follows that the Sisters of Mercy and/or Catholic Social Services are vicariously responsible for the sexual abuse which occurred.

[59] These arguments can only relate to the first two incidents (ie at Holly Grove and involving Mr S). Mr N was not, on any view of it, a foster-carer of the appellant and the same is true of her grandfather (cf the remarks in *S v Attorney-General* at [73]). So we will focus on the first two incidents only. There is, however, one point associated with the later incidents which we should mention. The Judge concluded that if these incidents occurred after 1 April 1974 (as they very probably did), the statutory bar associated with the ACC scheme did not exclude the appellant's common law claim. We do not agree with this conclusion.

[60] The Judge's view was based on s 21A(1)(c) and (5)(b) of the Injury Prevention, Rehabilitation, and Compensation Act 2001 ("the 2001 Act"). Section 21A was introduced in response to the approach adopted in *S v Attorney-General* to s 8 of the Accident Rehabilitation and Compensation Insurance Act 1992, a section which corresponded to s 21 of the 2001 Act. The purpose of s 21A was to extend ACC cover and entitlements to those who suffered particular forms of personal injury by accident before 1 April 1974 and not to confer rights of civil action for compensatory damages in relation to incidents that occurred after 1 April 1974 and for which cover was always available. This is spelt out in the explanatory

note to the Injury Prevention, Rehabilitation, and Compensation Amendment (No 3) Bill which resulted in the enactment of s 21A:

> *ACC cover for sexual abuse claimants for whom sexual abuse occurred before 1974*
>
> Currently, the Act (like its predecessor, the Accident Insurance Act 1998) provides that the date on which a person suffers a mental injury arising from sexual abuse is the date on which the claimant first receives treatment for that mental injury. Cover and entitlements may therefore be provided to people who suffered sexual abuse before 1 April 1974 (that is, before the introduction of the ACC scheme). The Court of Appeal has held that the Accident Rehabilitation and Compensation Insurance Act 1992 did not provide cover for mental injury arising from certain sexual crimes that occurred solely before 1 April 1974 and that any affected claimants have the right to pursue civil action. The Bill provides cover and entitlements for people who were first treated for mental injury as a result of sexual abuse during the period in which the Accident Rehabilitation and Compensation Insurance Act 1992 was in force, from 1 July 1992 to 30 June 1999, as long as the other cover and entitlement criteria are met. The Bill also precludes affected claimants from obtaining cover and also taking civil action.

[61] The appellant had cover under the Accident Compensation Act 1972 ("the 1972 Act") in relation to the sexual assaults on her after 1 April 1974; cf *G v Auckland Hospital Board* [1976] 1 NZLR 638 (SC) where it was held that mental and physical injury resulting from a rape that took place on 2 April 1974 fell within the term "personal injury by accident" and was therefore covered by the accident compensation scheme. Accordingly, under s 317 of the 2001 Act, the appellant has no entitlement to claim compensatory damages in relation to such assaults.

*S v Attorney-General*

[62] *S v Attorney-General* involved a child (referred to in the judgments as "BS") who had, by agreement, been placed in the care of the Superintendent under the 1925 Act. We note that this agreement was informal (cf our earlier conclusions as to whether there was a s 13 agreement in this case) but what was clear was that the parents of BS in effect had washed their hands of him and had consented to him being adopted and the Superintendent had assumed full control of him. The Superintendent in turn placed him with foster-carers who sexually abused him. In issue was whether the Superintendent was liable for that abuse.

[63] Two judgments were delivered. The judgment of Blanchard, McGrath, Anderson and Glazebrook JJ, delivered by Blanchard J, proceeded on the basis of agency. The relevant reasoning was as follows:

> [68] It seems to us that the more appropriate characterisation, as Ronald Young J thought, is of an agency. For, while there was certainly no employer/employee relationship, the position of the foster parents was not established by means of any formal contract and they were not undertaking a business venture for profit (or loss). The superintendent had a duty imposed upon him by statute to take care of the children. He was obliged to fulfil that duty by placing them in suitable private homes where there was supposed to be adherence to practices in accordance with a departmental manual and continued departmental monitoring. The department had a right of inspection and a right to remove any child at any time. The children were said, in the words of the long title to the Child Welfare Act, to be "*specially* under the protection of the State". That protection cannot have been intended to diminish when a fostering arrangement was made. We think that in this setting it would be quite inappropriate to regard such an arrangement as constituting the foster parents as independent contractors. Because of the continuing statutory duty of the superintendent to provide for the special protection of each child, the foster parents should be regarded as having been made agents of the State, albeit that their agency was of an unusual, indeed unique, nature.
>
> [69] The further question is whether the sexual and other abuse of BS by his foster parents can be said to have occurred in the course of the performance of the agency duties of the foster parents. By analogy with the facts in the Canadian cases and in *Lister*, we have no doubt that it can, and that such abuse was sufficiently connected with the purpose of parenting for which the placements were made, even though it was absolutely contrary to the intentions of the department. The foster parents were empowered to exercise full-time parenting control over BS in the course of which they were expected to supervise or assist him in intimate activities. He was therefore particularly vulnerable to a wrongful exercise of power by the persons to whom the department had entrusted him. There was always a risk of sexual abuse of a foster child from a foster parent who had not been carefully enough selected or whose perverted tendencies had not previously surfaced. The placement of BS in a foster home, though effectively directed by the legislation, necessarily put him in a place where day-to-day supervision by departmental personnel could not be expected as it would have existed for a child in an institution run by the state.
>
> [70] Therefore, no matter that it did so for good reasons and in response to the dictate of Parliament, a department of state, by placing children in private homes where their condition necessarily was not able to be monitored as regularly and fully as in an institution, has created or increased a risk of child abuse. That factor, together with recognition of the special obligation of protection of children imposed on the superintendent as a surrogate of the New Zealand community, renders it fair that compensation for the innocent victim's serious and long-lasting injury should be borne by and distributed amongst the community; or else it will not be compensated at all and the community obligation will not have been recognised. In all the

> circumstances, the imputation of an agency and the imposition of vicarious liability is justified.
>
> [71] This result may provide an incentive for the state to take even greater precautions in the future for the protection of children in its care by way of vetting and monitoring of foster parents. We do not see that as likely to affect the department's trust in people who take on this role to an extent which has an adverse impact on the relationship.
>
> [72] If those efforts are successful even in only a few cases in preventing or limiting abuse of a child, there may well be savings in social costs of the kind to which Ms Cooper drew attention, to which we would add the costs of accident compensation claims by sexual abuse victims now that all emerging cases of child abuse are covered under the current legislation: see *W v Attorney-General* [CA227/02 15 July 2003] at para [29].

[64] Tipping J in a separate judgment agreed with the result but preferred to avoid the language of principal and agent. Rather he proceeded on the basis that the relevant duties of the Superintendent were non-delegable.

*The approach of the Judge*

[65] The Judge took the view that Father McCormack, as director of Catholic Social Services, was the manager of the Orphanage for the purposes of the 1927 Act. She also took the view that his actions (or inaction) were to be attributed not to the Sisters of Mercy but rather Catholic Social Services. She distinguished *S* v *Attorney-General* for the following reasons:

> [491] In my view the necessary relationship between [Catholic Social Services] and holiday caregivers has not been made out. I accept that they differed from that between the Crown and the foster parents in *S v Attorney-General*. [Catholic Social Services] did not have ultimate legal responsibility for the plaintiff. Furthermore, the placements were not long term. They were relatively short – six weeks at most. They were informal. The necessary element of control was missing.
>
> [492] I accept that there are also policy reasons against imposing vicarious liability in this case.
>
> [493] Much has been made of the fact that [Catholic Social Services] is a charitable organisation. That in itself is not a bar to imposing liability – see *Blackwater v Plint* [[2005] 3 SCR 3] at [39] to [44]. However, the consequence is that imposing liability upon [Catholic Social Services], unlike the Crown, will not spread the burden of compensating the plaintiff's injury through the community. Secondly, I agree with Mr Thomas that imposing vicarious liability in this case will neither deter nor limit child abuse. The primary effect would be to cause volunteer agencies to withdraw

> from being involved in this very important work – as has, in fact, already happened here.
>
> [494] Therefore I decline to hold [Catholic Social Services] vicariously liable for the actions of holiday caregivers. …

*Should S v Attorney-General be applied?*

[66] The Judge's primary basis for distinguishing *S* was her assumption that in *S* the Superintendent had complete responsibility for the child whereas in the present case, the manager did not, see [491] of her judgment. But if there had been a s 13 agreement between Father McCormack and the appellant's mother (as the Judge had independently concluded), this would not be a true point of distinction. In *S* the child had been placed with the Superintendent by agreement and the powers of the Superintendent in relation to the child were the same as those enjoyed by a manager under s 13 of the 1927 Act. So the Superintendent and a s 13 manager had exactly the same "legal responsibility". Accordingly, the first of the two reasons given by the Judge in [491] of her judgment was not sound. As well, if there had been a s 13 agreement, it is at least doubtful whether the short term nature of the holiday arrangements and the private (as opposed to State) character of the Orphanage would have provided a legitimate basis for distinguishing *S*.

[67] On the other hand, we have concluded that there was no s 13 agreement and thus Father McCormack did not have a legal status in relation to the appellant which was equivalent to the legal status between BS and the Superintendent. In *S*, the majority of the Court held (at [49]) that there was a s 12 agreement despite some informality in the underlying arrangements. The result was that the Superintendent had the statutory powers conferred by s 12(2). There are subsequent references to the consequences of the conclusion that the Superintendent had statutory control of BS (see [50]–[52]) and these consequences are fundamental to the conclusion of the majority at [68] and [70] as to vicarious liability. The judgment of Tipping J also very much turns on the control which the Superintendent had over BS and the associated statutory duties. The consequence of concluding (as we have) that there was no s 13 agreement is that the Sisters of Mercy and Father McCormack did not

have legal control of the appellant corresponding to the legal control vested in the Superintendent in *S*. This means that *S* is necessarily distinguishable.

[68] For the reasons we have just given *S v Attorney-General* is not of controlling significance. But the fact remains that the de facto position of the Sisters of Mercy and Father McCormack in relation to the appellant looks to be similar to that of the Superintendent in *S*. This raises the question whether we should adopt the same approach as was taken in *S* despite the rather different legal context.

[69] We have concluded we should not apply the *S* approach.

[70] In the absence of a s 13 agreement, the Sisters of Mercy and Catholic Social Services had no statutory control over the appellant. Rather they were fulfilling the obligations of the appellant's parents to maintain her. In that sense they were acting in effect as the agents of the appellant's mother. We accept (as will become apparent) they had duties of care associated with that de facto control, but these duties of care are conceptually different from the statutory duties of the Superintendent in *S*.

[71] The Orphanage was not set up to provide care for children during school holidays. So the assumption of responsibility of the Sisters of Mercy in relation to the appellant did not extend to year round care. Placing the appellant with holiday care-givers therefore did not involve the Sisters of Mercy delegating obligations that they themselves had accepted. Nor did the Sisters of Mercy inspect or supervise the holiday placements. In this sense, it is unreal to regard the holiday care-givers as the agents of the Sisters of Mercy (cf the main judgment in *S*) or as performing the duties of the Sisters of Mercy (cf the judgment of Tipping J).

[72] Broadly the same considerations apply to Father McCormack in his role as manager of the Orphanage. In the absence of a s 13 agreement, his obligations were associated with the operation of the Orphanage which did not purport to provide holiday care. So the holiday care-givers were not his agents or performing a duty which by statute was vested in him.

[73] As social workers, Father McCormack and the staff at Catholic Social Services had duties of care as to the placement of the appellant in holiday care, but neither Father McCormack nor Catholic Social Services had ever accepted personal responsibility for looking after the appellant in the holidays. Again it would be unreal to regard the holiday care-givers as their agents or as performing a statutory duty vested in them.

[74] Given that the holiday care-givers were not acting as the agents of – and did not perform non-delegable statutory duties imposed upon – the Sisters of Mercy and Catholic Social Services there is no principled basis for us to impose vicarious liability.

**Physical abuse**

[75] The Judge appears to have found that the appellant was, on occasion, hit by angry nuns on the head or other parts of her body (presumably involving slaps with the hand), struck with a ruler and hit by Sr L with a strap when she was singing. The Judge noted that Sr G was "wont to discipline excessively". But the Judge also concluded that judged by the standards of the time, the force used was reasonable and thus within s 59 of the Crimes Act.

[76] We have some difficulty rationalising some of the Judge's specific findings (particularly as to blows to the head and other parts of the body by angry nuns) with the overall conclusion that such force was reasonable by the standards of the day. It seems difficult to resist the conclusion that there were some (perhaps isolated) incidents which were not justified under s 59.

[77] On the other hand, the appellant's case was very much that she was the victim of a pattern of physical abuse which was a significant contributing factor to her later difficulties in life. She was not seeking what would have to be limited compensation for unjustified pain associated with perhaps isolated incidents in which she was punished in a manner falling outside s 59. The claim was for negligence of a systemic nature and not for assault and battery. There is no obvious correlation (in terms of cause and effect) between some incidents involving corporal

punishment outside the scope of s 59 and the personality and psychiatric difficulties which were at the heart of the appellant's claim for damages.

[78] In that context we do not think it would be consistent with the way the case was pleaded or run for us to seek to identify specific incidents in which force was used outside the protection of s 59 and to award comparatively small sums of money for associated pain and suffering, say $500 for the occasion when she was struck by Sr L while she was singing.

[79] For those reasons, we propose to be guided by the general conclusions of the Judge. The level of corporal punishment at the Primary School was at the high end of what was acceptable but the nuns who taught there were professionals who acted accordingly. The Orphanage was well-run and, on the whole, was a reasonably happy place. Corporal punishment at the Orphanage was not so common as at the Primary School and was reasonable by the standards of what was then happening in New Zealand homes. While we are inclined to the view that incidents of inappropriate corporal punishment occurred on occasion (and probably at both the Primary School and the Orphanage), the overall pattern of the Judge's findings, suggest that such incidents must have been the exception and not the rule.

[80] Against that background we have concluded that we should uphold the Judge's conclusion that this aspect of the case was not made out.

**Emotional harm**

*Overview of the issues*

[81] As we have noted, the appellant alleged that the Sisters of Mercy, who had actual care and control of the appellant, owed duties of care in three broad respects:

(a) Protection of her physical safety;

(b) Promotion of educational opportunities; and

(c) Promotion of her emotional well-being and development.

Associated with this – and leaving aside the overlap issues relating to Father McCormack's double role – she maintained that Catholic Social Services owed a duty of care in its social work role (in effect a professional duty of care) which in practical terms became more onerous after 1972 or 1973 as Catholic Social Services took primary responsibility for the appellant.

[82] Some of this is either uncontroversial or does not give rise to any difficulty in this case given the unchallenged findings of fact made by the Judge.

[83] It is obvious that the Sisters of Mercy owed the appellant a duty of care as to her physical safety.

[84] Further, we accept that in their role as trained teachers running St Joseph's School and St Mary's College, the Sisters of Mercy owed a professional duty of care to the appellant associated with her education. But given the unchallenged findings of fact made by the Judge absolving the Sisters of Mercy of professional negligence in relation to the appellant's education, there is no need for us to explore the extent of this duty.

[85] It is likewise obvious that Catholic Social Services owed the appellant a duty of care in relation to the social work it carried out on her behalf. On the other hand there is factual uncertainty as to when Catholic Social Services became involved in a social work capacity in relation to the appellant. There is also some scope for argument about the practical extent of this duty.

[86] Fundamental to this aspect of the case is the extent to which the Sisters of Mercy and Catholic Social Services were required to act in a way which promoted the appellant's emotional well-being.

*The approach of the Judge*

[87] The Judge's approach to the duty of care owed by the Sisters of Mercy was expressed in this way:

> [434] The relationship between the plaintiff and the [Sisters of Mercy] was … sufficiently proximate. Accordingly, the [Sisters of Mercy were] clearly under a duty to provide for the plaintiff's physical needs – to feed and clothe her and to send her to school, as it acknowledged. It was also under a duty to keep her physically safe – see *McCallion v Dodd* [1966] NZLR 710 [(CA)]. This meant that any discipline had to comply with contemporary standards concerning the administration of discipline in an institutional context.

But the Judge concluded that the respondents were not liable for errors of judgment, omissions, actions equivalent to bad parenting and so on unless those acts or omissions crossed the line into identifiable behaviour such as sexual abuse or physical abuse going beyond reasonable discipline.

[88] It is perhaps open to question whether the Judge's approach was necessarily quite as narrow as all of this suggests because she did later in her judgment conclude that there had been no emotional abuse (see for instance at [475]). For present purposes, however, it is sensible to accept that her [434] formulation of the duty of care was the basis upon which she approached the case.

[89] In the case of Catholic Social Services, the Judge described the duty in this way:

> [433] In that situation there can be no question of the proximity of the relationship. Nor, as a matter of policy, can there be any suggestion but that the representatives of the agency – their human face – principally Mr McCormack and Mrs McGreal, should carry out their responsibilities and duties as social workers with due care and skill, in accordance with the standards of the time. That required [Catholic Social Services] to monitor the plaintiff's residential placements – whether at St Joseph's, St Mary's, her holiday placements and her foster homes, to check new placements, and to generally oversee her progress.

Although the Judge was not explicit as to the extent to which Catholic Social Services was required to take steps to promote the emotional well-being of the appellant, the findings she made as to the absence of negligence suggest that she

regarded the emotional well-being of the appellant as falling within the scope of the duty of care owed by Catholic Social Services.

*The argument for the appellant*

[90] Ms Cull QC made it clear that she was not seeking to rely on generalised allegations of bad parenting or poor teaching. Rather she claimed that the Sisters of Mercy and Catholic Social Services had acted in breach of their duties by failing to provide an environment that was suitable for the appellant's needs. In support of this she noted that both Catholic Social Services and the Sisters of Mercy were Christian organisations undertaking social work and accepting into their care orphans and children from broken homes. Ms Cull particularly sought to invoke aspirational language in the constitution of the Sisters of Mercy.

[91] Ms Cull also relied on the House of Lords decisions, *Barrett v Enfield London Borough Council* [2001] 2 AC 550 and *Phelps v Hillingdon London Borough Council* [2001] 2 AC 619.

*Discussion – the extent to which a parent owes a duty of care to children*

[92] The Sisters of Mercy and Catholic Social Services acted, broadly, in loco parentis towards the appellant. So a logical starting point for assessing the extent of the duty of care they owed to her is the law as to the duties of care owed by a parent to a child.

[93] The question whether a parent, *qua* parent, owes a duty of care as to the supervision and control of a child arose and was answered by this Court (North P, Turner and McCarthy JJ) in *McCallion v Dodd* [1966] NZLR 710. In that case the plaintiff child had been walking along the road and had been struck by a car driven by the defendant. In the resulting claim for damages the defendant joined the child's father on the basis that the father had not been exercising proper supervision and control over the child at the time. The jury concluded that the father had been negligent and was liable to the defendant for contribution under s 17 of the Law

Reform Act 1936. In the result, the defendant obtained judgment against the father for 20 per cent of the damages he was required to pay to the child. As the father was uninsured but presumably had other assets (perhaps the house the family lived in), this outcome presented those acting for the child with major difficulties in enforcing the judgment against the defendant. The imposition of a duty of care was, in the particular circumstances of the case, thus inimical to the interests of the child. The Court nonetheless held unanimously that the father owed a duty of care to take reasonable care to protect the child from foreseeable dangers.

[94] Given the issues which arise in the present case, the basis upon which the Court reached this conclusion is material. Common to all the judgments was the conclusion that the common law did not recognise a concept of parental immunity. Beyond that, however, there was some difference of approach. North P (at 721) regarded the parent-child relationship as qualitatively different to that of a stranger and a child. Parents, at all times while present, were regarded as "under a legal duty to exercise reasonable care to protect their child from foreseeable dangers". The judgments of Turner and McCarthy JJ adopted a different approach. Their Honours held that the foundation of the duty of care was the assumption of responsibility in any given situation, not the parent-child relationship. A parent, like any person, will be under a duty of care in relation to any child for whom they have assumed responsibility. The existence of a parent-child relationship was seen to be of evidential rather than legal significance.

[95] More recent authority is broadly in accord with the approach adopted by Turner and McCarthy JJ, see for instance *Attorney-General v Prince* [1998] 1 NZLR 262 at 277 (CA), the speech of Lord Hutton in *Barrett* at 587 and the remarks of McLaughlin CJ in *KLB v British Columbia* [2003] 2 SCR 403 at [38] – [51]. Reference can also be usefully made to *Surrey v Speedy* [2000] NZFLR 899 (HC). The fundamental position is that parents, *qua* parents, do not owe a duty to use reasonable care in the way in which they bring up children. So claims for damages for bad-parenting will not be entertained. This is for reasons associated with the level of autonomy which the law grants to the guardians of children, reluctance on the part of judges to intrude into the detail of parent-child relationships and perhaps a sense that such litigation would involve issues which are not practicably justifiable.

*The duty of care of an agency acting in loco parentis - general*

[96] The considerations which justify a restricted approach to the extent to which a parent owes a child a duty of care as to general parenting are not necessarily controlling in the case of an agency (whether governmental or charitable) which acts in loco parentis, see *Barrett* at 587 – 588 per Lord Hutton:

> … I do not agree … that because the law should not permit a child to sue his parents, the law should not permit a child to sue a local authority which is under a duty by statute to take him into care and to make arrangements for his future. I consider that the comparison between a parent and a local authority is not an apt one in the present case because the local authority has to make decisions of a nature which a parent with whom a child is living in a normal family relationship does not have to make, viz whether the child should be placed for adoption or placed with foster parents, or whether a child should remain with foster parents or be placed in a residential home. I think that it is erroneous to hold that because a child should not be permitted to sue his parents he should not be permitted to sue a local authority in respect of decisions which a parent never has to take. Moreover a local authority employs trained staff to make decisions and to advise it in respect of the future of a child in its care, and if it can be shown that decisions taken in respect of the child constitute, in the circumstances, a failure to take reasonable care, I do not think that the local authority should be held to be free from liability on the ground that it is in the position of a parent to the child.

[97] Although Lord Hutton cannot be taken to have been prescriptive as to the extent of the duty of care owed by an in loco parentis agency, the two examples he gave are reasonably particular:

(a) In relation to decisions which are not required in a normal family relationship (eg as to adoption, fostering or placement in a residential home); and

(b) In relation to actions or decisions taken by trained staff employed by the agency. In such a case, the trained staff can fairly be regarded as being under a direct duty of care to the child with the agency being vicariously responsible for their actions. We note that this point is developed in the speech of Lord Slynn of Hadley in the same case at 573.

[98] In *Phelps*, the House of Lords addressed four appeals dealing with claims against education authorities in relation to alleged negligence involving special needs pupils. These cases largely fell to be determined by reference to the actions of professional staff (including educational psychologists and teachers) employed by the education authorities and the actual or possible vicarious liability of the authorities for their actions. So these cases are analogous with the second of the types of case referred to in the preceding paragraph. Lord Nicholls of Birkenhead, however, addressed some broader issues (at 667 – 668):

> It cannot be that a teacher owes a duty of care only to children with special educational needs. The law would be in an extraordinary state if, in carrying out their teaching responsibilities, teachers owed duties to some of their pupils but not others. So the question which arises, and cannot be shirked, is whether teachers owe duties of care to all their pupils in respect of the way they discharge their teaching responsibilities. This question has far-reaching implications. Different legal systems have given different answers to this question.
>
> I can see no escape from the conclusion that teachers do, indeed, owe such duties. The principal objection raised to this conclusion is the spectre of a rash of "gold digging" actions brought on behalf of under-achieving children by discontented parents, perhaps years after the events complained of. If teachers are liable, education authorities will be vicariously liable, since the negligent acts or omissions were committed in the course of the teachers' employment. So, it is said, the limited resources of education authorities and the time of teaching staff will be diverted away from teaching and into defending unmeritorious legal claims. Further, schools will have to prepare and keep full records, lest they be unable to rebut negligence allegations, brought out of the blue years later. For one or more of these reasons, the overall standard of education given to children is likely to suffer if a legal duty of care were held to exist.
>
> I am not persuaded by these fears. I do not think they provide sufficient reason for treating work in the classroom as territory which the courts must never enter. "Never" is an unattractive absolute in this context. This would bar a claim, however obvious it was that something had gone badly wrong, and however serious the consequences for the particular child. If a teacher carelessly teaches the wrong syllabus for an external examination, and provable financial loss follows, why should there be no liability? Denial of the existence of a cause of action is seldom, if ever, the appropriate response to fear of its abuse. Rather, the courts, with their enhanced powers of case-management, must seek to evolve means of weeding out obviously hopeless claims as expeditiously as is consistent with the court having a sufficiently full factual picture of all the circumstances of the case.
>
> This is not to open the door to claims based on poor quality of teaching. It is one thing for the law to provide a remedy in damages when there is manifest incompetence or negligence comprising specific, identifiable mistakes. It would be an altogether different matter to countenance claims of a more general nature, to the effect that the child did not receive an adequate

> education at the school, or that a particular teacher failed to teach properly. Proof of under-performance by a child is not by itself evidence of negligent teaching. There are many, many reasons for under-performance. A child's ability to learn from what he is taught is much affected by a host of factors which are personal to him and over which a school has no control. Emotional stress and the home environment are two examples. Even within a school, there are many reasons other than professional negligence. Some teachers are better at communicating and stimulating interest than others, but that is a far cry from negligence. Classroom teaching involves a personal relationship between teacher and pupil. One child may respond positively to the personality of a particular teacher, another may not. A style of teaching which suits one child, or most children in a class, may not be as effective with another child, and so on. The list of factors could continue. Suffice to say, the existence of a duty of care owed by teachers to their pupils should not be regarded as furnishing a basis on which generalised "educational malpractice" claims can be mounted.

*Did the Sisters of Mercy and Catholic Social Services owe duties of care associated with the appellant's emotional health?*

[99] It will be recalled that Ms Cull's argument, broadly, was that the Sisters of Mercy and Catholic Social Services were obliged to take reasonable steps to ensure that the appellant was in an environment that met her needs, emotional as well as physical.

[100] It is a sad reality that some parents do not bring up their children in a way which meets their emotional needs. But as already indicated, the Courts will not entertain claims along the lines that, "My father acted inimically to my emotional well-being because he was always drunk and a bad role model" or, "My mother destroyed my self-esteem by always yelling at me". It is therefore clear that the broader duty contended for by Ms Cull goes beyond the duties which parents owe their own children.

[101] There are policy reasons which point away from the imposition on the Sisters of Mercy and Catholic Social Services of a duty of care which extends beyond that of a parent.

[102] The Sisters of Mercy operated within constraints which were physical (eg the buildings and land which made up the Orphanage), logistical (eg there was a limited

number of nuns to look at the children) and financial. Analogous constraints applied in the case of Catholic Social Services.

[103] There will often be no settled consensus about what constitutes best practice in relation to the upbringing of children and standards and practices change over time. This is illustrated by the recent legal effacement of the "spare the rod and spoil the child" philosophy which still held sway in the 1960s and 1970s. Although that is an aspect of child rearing which is now subject to legal control, the law generally has left the guardians of children (usually their parents) with considerable autonomy over the way that their children are brought up. Parents are generally entitled to bring their children up in accordance with their own religious and cultural beliefs, even if those beliefs are perhaps thought of as inappropriate by other sections of the community.

[104] The appellant was put in the Orphanage by her mother with a view to her receiving from the Sisters of Mercy a Catholic upbringing. Relevant to this (although not directly applicable to the situation of the appellant) are the provisions of the 1925 Act which related to bringing children up in accordance with the doctrines of the Catholic Church. The relative austerity of the lives lived by the nuns naturally flowed on, to some extent at least, to the children who were, as well, necessarily exposed to Catholic teaching which extended to the concept of damnation. With the benefit of hindsight, it would appear that the appellant was not well suited to the relative austerity of her life in the Orphanage and that she may have become anxious about damnation (something which is more hinted at than expressed in her evidence). So it is possible that the appellant was damaged emotionally by these aspects of her upbringing. But it is difficult to see how there could be associated legal liability. The fundamental decision to place the appellant in the Orphanage was made by her mother and at least acquiesced in by her father. They were at all times her guardians. And given the wishes of the parents and the scheme of the 1925 legislation, the Sisters of Mercy and Catholic Social Services can hardly be legally liable for giving the appellant a Catholic institutional upbringing with all that was reasonably expected to entail at the time.

[105] Further we must allow for the inauspicious circumstances in which most of the children came into the Orphanage. Such circumstances are likely to have an adverse impact on future emotional well-being. This is particularly so in the case of the appellant. Her primary problem in life has been that she was abandoned by her parents. As a result she became, in her own terms, "a charity case". Her childhood and adolescence were characterised by institutional living, no real family life, substantial separation from her siblings (leaving aside the time she and her sisters lived together in the Orphanage), poverty and acts of sexual abuse. It is important to keep steadily in mind the reality that the Sisters of Mercy and Catholic Social Services were not responsible for the appellant's abandonment by her parents. It is true that her associated vulnerability is a factor which points to the existence of a duty of care (see [115] below). But the multi-faceted disadvantages which she faced make it hard to establish a cause and effect relationship between what is alleged against the Sisters of Mercy and Catholic Social Services and her later difficulties in terms of personality development and mental health. All of this emphasises the difficulty of doing justice if a broad duty of care was recognised.

[106] Associated with all of this is the spectre of meritless but hard to defend claims (cf the remarks of Lord Nicholls in *Phelps*). Such claims are likely to emerge decades after the event (or alleged event). The Limitation Act is, at best, a frail shield for defendants (given reasonable discoverability issues and s 24). Where historical claims are brought, those who could answer the allegations may have died or be unable to recall the relevant events and the associated difficulties may be exacerbated by an absence of contemporaneous written material. It is true that the courts are sometimes required to address problems of this nature in criminal cases alleging historical sexual abuse (although in such cases there is of necessity a defendant who can answer them). The courts must also address similar problems in civil cases where physical mistreatment (including sexual abuse) is alleged and the plaintiffs can get around the Limitation Act. In such instances Judges just have to do the best they can. But it is right to recognise the more open-textured and subtle a complaint is, the more difficult it will be to respond to. It is one thing to expect a defendant to be able to respond to an allegation of sexual abuse. It is rather more difficult to recall, three or four decades later, nuances associated with the emotional development of a particular child who was one of many children under care at the

time. Indeed, as this case shows it is extremely difficult to capture, decades after the event, the atmosphere of the time.

[107] On the other hand, it is not difficult to envisage situations which might be thought to call out for legal intervention.

[108] On a perhaps literal view of the Judge's conclusions, the Sisters of Mercy's duties of care were confined to providing the children with food, shelter and clothing and taking reasonable precautions in relation to their physical safety. As well, the nuns were not permitted to use physical force against the children unless it was justified under s 59 of the Crimes Act. But it is not a discrete tort to engage in emotional abuse (even when the victims are children). So if the legal liabilities of the Sisters of Mercy were as narrow as the judgment suggests, it would have been legally open to the nuns to engage in acts of mental cruelty. In saying that we recognise the loaded nature of the phrase "mental cruelty" and definitional issues associated with it. Nonetheless, a proposition that those running a children's institution have a legal entitlement to act in that way is unattractive.

[109] Other situations which might warrant legal intervention are also easy to identify. Say for instance the appellant had developed an association with a criminally-minded group of friends with whom she engaged in shop lifting. (This in fact is pretty much what did happen in the case of the appellant in 1973.) Or say the appellant had been the subject of emotional bullying by another child at the Orphanage to an extent that there were tangible adverse effects on her behaviour and educational achievement. Could the Sisters of Mercy (in their custodial as opposed to educational role) have ignored problems of this nature?

[110] In all of this there are definitional problems. The duty of care as to the physical safety of the children obviously extended to their health (including psychological and psychiatric health) and it is not always easy (or possible) to distinguish between the consequences of psychological and psychiatric ill-health on the one hand and the adverse impacts of childhood emotional abuse on personality development. Likewise, the educational duty of the Sisters of Mercy in relation to St Joseph's Primary School may well have extended to a practical requirement to

address any issues associated with the appellant's education which arose out of her emotional health.

[111] As the speech of Lord Nicholls in *Phelps* indicates, it is easier to contemplate a duty of care associated with addressing specific and tangible problems than in purely general terms. So it is easier to propose that the Sisters of Mercy and Catholic Social Services might be liable in negligence for failing to address specific and tangible problems in relation to the appellant's emotional well-being than for failing to provide an environment that met her emotional needs.

[112] In negligence cases with a public law overlay, English courts have sometimes sought to confine liability to circumstances which equate to *Wednesbury* unreasonableness (cf the speech of Lord Hoffmann in *Stovin v Wise* [1996] AC 923 at 953 (HL)). This approach is broadly equivalent to confining liability to instances of gross negligence and there are hints of this in Lord Nicholls' speech in *Phelps*. But this Court has been reluctant to conflate public law and negligence principles (see the discussion in *Attorney-General v Body Corporate 200200* [2007] 1 NZLR 95 at [47] – [49]). We have also been cautious about purely situational duties, that is duties of care which are defined by either reference to a very particular risk which has crystallised or what is said to be the breach, see the *Body Corporate* case at [43] – [46]. In that case, after referring to *Fleming v Securities Commission* [1995] 2 NZLR 514 (CA) we observed:

> [46] The majority's approach in *Fleming* suggests that where a plaintiff's case proceeds on the basis of an alleged situational duty (that is, closely focused on particular circumstances of risk which are said to have existed), the Court should:
>
> (a) during the proximity phase of the inquiry, be careful to ensure that the narrow duty alleged can credibly be regarded as discrete from a broad (and untenable) duty of care in relation to the relevant statutory functions; and
>
> (b) in assessing policy considerations, analyse carefully the implications, in terms of the scheme and structure of the relevant statute, of recognising even a situational duty.

[113] There is one other English case to which we should refer, *Flintshire County Council v Coxon* [2001] EWCA Civ 302, which resulted from an appeal against the

judgment of Scott Baker J on a number of claims associated with the historical abuse of children in homes in North Wales. There were many claimants and they had a number of complaints which largely revolved around allegations of sexual and physical abuse. Some of the complaints, however, were of emotional abuse and the case proceeds on the basis that these complaints too sounded in damages. The difficulty is that the judgment does not identify with precision the legal basis for this, that is whether the duty of care owed to the children extended to the preservation or perhaps enhancement of their emotional well-being or whether the claims were so tied up with sexual and physical abuse that it was unreal to give them separate treatment. The same position obtains with respect to the first instance decision.

[114] In the end, we consider that there are three controlling considerations.

[115] In the first place, the children in the orphanage were particularly vulnerable.

[116] Secondly, there were assumptions of responsibility by both the Sisters of Mercy and Catholic Social Services. In reaching this conclusion in relation to the Sisters of Mercy, we do not rely on the aspirational language in their constitution (which presumably did not have wide currency amongst those who left their children at the Orphanage). Rather we simply rely on the public face of the Sisters of Mercy which was material to the decisions which parents (such as the appellant's mother) made to place children with them and is consistent with the imposition of a pastoral duty of care. While it is impossible to conceive of a duty of care which requires kindness in action, there would be a complete incompatibility between the public face presented by the Sisters of Mercy and a legal freedom on their part to engage in, or ignore, the emotional abuse of the children in their care. Similar considerations could presumably be invoked in relation to any licensed children's home irrespective of its religious character (or otherwise). Catholic Social Services acted as a social work agency in relation to the appellant from, at the latest, late 1972, and it seems obvious that in accepting that role it assumed corresponding responsibility.

[117] Thirdly, there is the position under the child welfare legislation at the time. Under s 13 of the 1925 Act, a committal order could be made in the case of a child who was, inter alia, "neglected … not under proper control, or is living in an

environment detrimental to its physical or moral well-being". We see this language as extending to a child who was living in an environment which was characterised by emotional abuse. This seems to us to be consistent with a legal duty on those running children's institutions operating under the child welfare legislation, or supervising children in such institutions, to take reasonable steps to avoid emotional abuse. Such a duty of care is certainly not inconsistent with the scheme of the legislation. As well, under s 24 of the 1925 Act it was an offence to ill-treat or wilfully neglect children who lived in a children's home. In context, the emotional abuse of such children could fairly be regarded as ill-treatment for the purposes of s 24.

[118] In this context we think it would be possible to impose on those providing or supervising the institutional care of children a duty to take reasonable steps to avoid the emotional harm associated with either their own behaviour (ie ill-treatment) or problems of which they are aware or ought to be aware (ie the sort of problems which would make it clear that the child was living in an environment which was detrimental to the child's "moral well-being"). Such a duty would be closely associated with the obvious duty of care as to the physical safety (including health) of the children and it would be broadly consistent with societal expectations. Providing it is limited in this way and does not extend to anything approaching a duty to maximise (or enhance) the emotional well-being of children, claims brought in reliance on the duty, even decades after the event, should be reasonably manageable.

[119] In short, we see the duty of care that the Sisters of Mercy were under as somewhat broader than that explicitly identified by Frater J. In the case of Catholic Social Services, our conclusions as to duty of care are substantially the same as hers.

*Analysis of the appellant's complaints - general*

[120] Against that background, the appellant's concerns about the way she was treated seem to us to fall under four general areas of complaint:

(a) Against the Sisters of Mercy, emotionally abusing the appellant.

(b) Against both the Sisters of Mercy and Catholic Social Services, allowing her to stay at the Orphanage so long that she became institutionalised.

(c) Against both the Sisters of Mercy and Catholic Social Services, failing to respond to problems as they became manifest.

(d) Against Catholic Social Services, failing to monitor the appellant more actively.

*Against the Sisters of Mercy, emotionally abusing the appellant*

[121] There was no indication that the appellant suffered emotional harm associated with her experiences in the Orphanage (as opposed to problems flowing from her rejection by her mother and associated sadness about living in an institution) until December 1972 when concern about institutionalisation was recorded, a concern which is not particularly related to the allegations of emotional abuse. Further, it is important to remember that the most florid allegations of ill treatment made by the appellant were rejected by the Judge.

[122] On the Judge's findings, corporal punishment at the Primary School and Orphanage was at the upper levels of what could be regarded as being appropriate by the standards of the day. We are inclined to conclude as well that there were instances where corporal punishment went beyond what was acceptable. As well, on the Judge's findings, the appellant was sometimes dressed down and/or ticked off by nuns who were sometimes angry or had lost their tempers.

[123] In an institution such the Orphanage, there will be errors and perhaps isolated acts of misconduct on the part of staff. If that misconduct is tortious, then the individual staff members (directly) and perhaps the institution (either directly or vicariously) will be liable. But as we have noted already in relation to the corporal punishment issue, the appellant's case is not about isolated instances of inappropriate punishment. There could be no demonstrable correlation between such occasions and the damage to her personality development and psychiatric health which is at the

heart of her claim. These considerations apply even more strongly in the case of the alleged emotional abuse. A few occasions on which nuns lost their tempers and yelled at or otherwise verbally abused the appellant simply could not have brought about the effects for which the appellant sought damages.

[124] To put this another way, in a claim against an Orphanage for the *negligent* infliction of harm associated with emotional abuse, a plaintiff must show that the way in which the institution was relevantly operated did not meet contemporary standards of reasonableness. Such a claim cannot succeed simply by establishing that there were some incidents of a kind which, while inappropriate, can be expected where people interact in sometimes stressful circumstances and which could not be foreseen as likely to cause damage to the emotional well-being of the plaintiff.

[125] Given the Judge's general findings that the standard of care provided by the nuns was excellent by the standards of the day and was not abusive, we conclude that this aspect of the case does not succeed.

*Against both the Sisters of Mercy and Catholic Social Services, allowing her to stay at the Orphanage so long that she became institutionalised*

[126] The Sisters of Mercy regarded themselves as responsible for the day to day care and welfare of the appellant. They did not see it as their role to make major decisions about her future. It would appear that they saw such decisions as the responsibility of either her mother or perhaps Catholic Social Services.

[127] There was surprising (at least by current standards) informality and lack of documentation in relation to the appellant's placement in the Orphanage and her progress there. It appears that her school reports from the Primary School were probably sent to her mother and either no longer exist or cannot be located. The Sisters of Mercy did not maintain a filing system in relation to the girls who were at the Orphanage. Catholic Social Services did not open a file on the appellant until January 1972 and the first document which provides anything like a contemporaneous evaluation of the appellant is the letter of 12 February 1971 from Father McCormack to the District Child Welfare Officer (see [16] above). It is

likely that Father McCormack's evaluation was based on what he was told by the nuns.

[128] The limited documentation is consistent with an absence of substantial oversight in relation to the appellant by Father McCormack and Catholic Social Services before the end of 1972. Prior to then, Father McCormack had sought to persuade the appellant's mother to take her children back. As noted, he went as far as to indicate that he would endeavour to make a house available to her if she did so. Although attempts to this end continued at least until December 1972, this strategy was perhaps a lost cause by 1971 (a point recognised in Father McCormack's February 1971 letter). Otherwise the involvement of Catholic Social Services with the appellant was confined to organising holiday placements. Catholic Social Services seems to have assumed an active social work role in relation to only some of the children in the Orphanage, presumably those who were exhibiting particular problems or were otherwise seen as needing oversight. It therefore seems that neither the nuns nor Father McCormack saw the appellant as in need of such oversight at least until the beginning of 1972, when the first file in relation to her was opened and, in all probability, somewhat later.

[129] In her evidence, the appellant was very critical of the absence of record keeping, claiming that she had been seen as just a name on a roll. We have sympathy with that criticism. The absence of record keeping suggests a lack of strategic thinking about her. It also shows that there was not a systematic approach to the monitoring of the welfare of the children in the Orphanage. The absence of a systematic approach meant that there was a real risk of children being lost sight of, a risk that did to some extent crystallise in the case of the appellant.

[130] Associated with this absence of documentation is the informality of the arrangements. The nuns, Father McCormack and Catholic Social Services did not seem to address the legal framework within which they were operating in relation to the children in the Orphanage. In particular there was no focus on whether the Orphanage and Catholic Social Services were simply helping out (or perhaps acting as agents for) the guardians of the children or rather were exercising independent statutory functions under s 13 of the 1927 Act. We have concluded that there was

not a s 13 agreement. It follows that the Sisters of Mercy and Catholic Social Services were, in legal terms, the agents of the appellant's parents, and, in practical terms, the agents of her mother. We do not see this as a complete answer to the complaints made by the appellant but it is at least of relevance in assessing the actual roles of the Sisters of Mercy and Catholic Social Services in relation to the appellant and the steps which were reasonably open to them. As well, it would be a little odd if they could be held liable for implementing as the agents of the appellant's mother decisions made by her for which she could not be sued directly. To put this more specifically, the appellant cannot sue her mother for deciding that she should live in the Orphanage and this at least raises the question whether the Sisters of Mercy and Catholic Social Services can be sued for implementing that decision.

[131] Against that background, there are some other related background considerations which have to be taken account of in addressing the appellant's complaints that she was allowed to become institutionalised.

[132] The original placement of the appellant was probably seen as temporary. Her parents remained her guardians with legal control over her. The circumstances of the appellant's mother were presumably evolving and, given this, the best strategy, at least initially, probably was to attempt to reunite the appellant and her siblings with their mother.

[133] There was a custody dispute between the appellant's parents which, as late as October 1971, had not been resolved. It is not entirely clear when the dispute started but it provided the context in which the letter of February 1971 was written. There was some suggestion in the evidence that long term thinking about the appellant and her siblings was largely put on hold while this dispute was sorted out in the courts.

[134] Another relevant factor is that the appellant was one of seven children. It would have been practically impossible to place all siblings in a single foster home. At least in the Orphanage she could be with her two sisters and, as well, she was living in close proximity to her mother.

[135] Our impression of the evidence and the documents is that by 1971 it was becoming increasingly unlikely that the appellant's mother would resume day to day control of the children. In the case of the appellant's younger sister, fostering arrangements were put in place in October 1971 on a tentative basis (dependent on the outcome of the custody dispute which seems finally to have been resolved the next month). The appellant's younger sister's behaviour in 1971 had caused concern and for this reason Catholic Social Services had become directly involved with her and sought psychological assistance. Presumably the reason why the appellant was not so closely monitored during 1971 is that she was not then giving rise to the same concerns as her sister. So in a real sense, the appellant would appear not to have been on the books of Catholic Social Services during 1971.

[136] As we have noted, a file for the appellant was opened at the beginning of 1972. Our impression is that the file was opened as Catholic Social Services began to adopt a more systematic approach to its operations (as opposed to being a response to particular problems). Interestingly the first document on the file is a request from the appellant's mother that the appellant stay in the Orphanage for the 1972 year.

[137] There is nothing of relevance recorded in relation to the appellant until the letter of 4 December 1972 from Father McCormack to the appellant's mother (see [19] above). That letter indicates that Father McCormack was still (perhaps now rather forlornly) seeking to persuade the appellant's mother to resume care of the children. This letter provides the first documented suggestion that the appellant may have become institutionalised and, interestingly, the suggestion that this was so came from the nuns. About this time, Catholic Social Services was beginning to investigate the possibility of putting in place fostering arrangements for the appellant and her younger sister. Indeed, the placement over the summer of 1972–1973 was effectively on a trial basis with a view to seeing whether the children could be fostered by Mr and Mrs S. This trial was not successful. It will be recalled that the Judge accepted the appellant's contentions that she was sexually abused by Mr S while living with him and his wife.

[138] When further difficulties arose in May 1973, the appellant was placed in foster care.

[139] It is difficult to see how either the Sisters of Mercy or Catholic Social Services could be regarded as negligent in relation to the period prior to the end of 1971. Although the appellant was recognised as presenting something of a problem in February 1971, the problems described might be thought to have been fundamentally related to her abandonment by her mother and some associated (and understandable) difficulties in dealing with institutional life. In this context, the strategy of trying to persuade the appellant's mother either to take her back or at least assume a more active and helpful role in her life seems reasonable. In 1971 there was a dispute as to custody and a long term fostering arrangement would have been difficult to implement while that was going on. Indeed Catholic Social Services did not appear to have accepted (in a practical sense) a social work role in relation to the appellant prior to the beginning of 1972.

[140] Slightly different considerations apply for the period from the beginning of 1972 to May 1973.

[141] The result of the court proceedings was that custody had been vested in the appellant's mother. This was on the assumption that the children would remain in institutions. For the 1972 year, there was the request by her mother that the appellant be looked after in the Orphanage. The appellant's mother was the guardian of the children and legally none of the children could have been put into long term foster care without her approval. But in practical terms, the Sisters of Mercy and, by now, Catholic Social Services had oversight and a large measure of de facto control over the appellant. With that oversight and de facto control came duties of care. The legal position over the children had not prevented the appellant's younger sister being placed in a foster home in late 1971 and there is no reason to suppose that foster care arrangements for the appellant could not also have been arranged (with her mother's consent if necessary). This raises the question whether there was negligence on the part of the Sisters of Mercy and Catholic Social Services from 1972 associated with delays in arranging foster care.

[142] At the beginning of 1972, we think the Sisters of Mercy would rightly have seen strategic decisions about the appellant's future as being the responsibility of the appellant's mother and Catholic Social Services. So we do not see any negligence on their part in relation to this period. As for Catholic Social Services, we likewise see no discernible negligence. There was still a residual hope that the appellant's mother might take her back. There is no indication of obvious problems with the appellant (other than those noted in the February 1971 letter) and by the end of 1972 attempts were being made to arrange foster care. There was no expert evidence to suggest that the delays between the beginning of 1972 and December 1972 and between January 1973 (when the placement with Mr and Mrs S broke down) and May 1973 when foster care was arranged, involved negligence. As well, it is entirely speculative whether foster care arranged in say early or mid 1972 would have made any difference to the appellant in terms of eventual outcome.

*Against both the Sisters of Mercy and Catholic Social Services, failing to respond to problems as they became manifest*

[143] It is clear from the evidence as a whole, that Catholic Social Services were taking a reasonably active interest in the appellant's family in 1971 and particularly in relation to one of the appellant's sisters. On the basis of the meagre documentation generated in relation to the appellant as compared to the far more voluminous material generated in relation to her sister, there is remarkably little evidence prior to the end of 1972 that the appellant was displaying any particular problems associated with her institutional care (as opposed to her understandable reaction to her rejection by her mother and associated difficulties with living in an institution – being the sort of difficulties she would have had about any institution). And by the time that these problems (in particular the implicit suggestion that she was becoming institutionalised) first emerged, it was Catholic Social Services rather than the Sisters of Mercy who were primarily responsible for decisions about her welfare.

[144] In this context, we see no basis for concluding that the Sisters of Mercy could fairly be regarded as negligent in failing to respond adequately to manifest problems associated with the appellant's life in the orphanage. Indeed, contrary to the Judge's

view, our interpretation of the evidence is that when the appellant did begin to display problems with institutionalisation, this was recognised first by the nuns.

[145] For slightly different reasons we conclude that there was no negligence by Catholic Social Services. Catholic Social Services were not significantly involved with the appellant prior to 1972. There is no indication of the appellant having displayed problems other than those associated with her abandonment by her mother and her difficulty in coping in an institutional setting. Since she could be expected to have experienced similar problems in any institution, the sensible course was to pursue the possibilities of reuniting the appellant with her mother and, failing that, stable foster care. In this context, our conclusion that Catholic Social Services was not negligent in terms of failing to arrange foster care earlier disposes of this aspect of the claim.

*Against Catholic Social Services, failing to monitor the appellant more actively*

[146] We are inclined to the view that this claim applies only from the point when Catholic Social Services assumed a social work role in relation to the appellant. A file on the appellant was opened in January 1972 but it is not clear to us that Catholic Social Services in any real sense assumed a role in relation to the appellant until late in 1972.

[147] If the social work role of Catholic Social Services did not commence until late 1972, we see no basis for criticism of the steps they took from then until the foster care arrangements which commenced in May 1973.

[148] If the social work role of Catholic Social Services did begin earlier, then the appellant's case faces the now familiar problems associated with the limited options which were available. For reasons which we have already explained, the strategies adopted by Father McCormack were reasonable.

[149] It is far from clear what would have come out of a more systematic approach to the appellant's welfare. The nuns and Father McCormack recognised that she was a sad girl. This was seen, and probably rightly, as primarily associated with her

abandonment by her mother and the realities of institutional life. The Judge has rejected what might be regarded as the more extreme of the appellant's allegations against the nuns. The fundamental problem, as the Judge recognised, was that she was not well-suited by temperament and background to living in the Orphanage. But the only alternatives to her living in the Orphanage were either a return to her mother or a placement with foster-parents. Attempts were made to persuade her mother to take her back and, for reasons already given, we are not persuaded that there was any negligence in terms of the delay in arranging foster care.

**Disposition**

[150] The appeal is dismissed. We reserve all questions of costs.

Solicitors:
Margaret Powell & Wendy Davis, Wellington, for appellant
Thomas Dewar Sziranyi Letts, Lower Hutt, for first and second respondents
O'Regan, Arndt, Peters & Evans, Wellington, for third and fourth respondents