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IN THE HIGH COURT OF NEW ZEALAND
WELLINGTON REGISTRY

CIV-2001-485-961

BETWEEN	A Plaintiff
AND	THE ROMAN CATHOLIC ARCHDIOCESE OF WELLINGTON First Defendant
AND	CATHOLIC SOCIAL SERVICES Second Defendant
AND	THE SISTERS OF MERCY (WELLINGTON) TRUST BOARD Third Defendant
AND	ST JOSEPH'S ORPHANAGE TRUST BOARD Fourth Defendant

Hearing: 1, 2, 3, 4, 5, 8, 9, 10, 11, 12, 15, 16, 17, 18, 19 August and 5, 12, 13, 14, 15, 16 and 19 September 2005

Appearances: Ms H A Cull QC together with
Ms N Levy for the Plaintiff
G J Thomas together with
Ms A S McIntosh for the First and Second Defendants
C F Finlayson together with
Ms M E Hubble and
Ms O C K Ormond for the Third and Fourth Defendants

Judgment: 31 July 2006 at 11.30 am

JUDGMENT OF FRATER J

This judgment was delivered by Justice Frater
on 31 July 2006 at 11.30 am, pursuant to
r 540(4) of the High Court Rules

Registrar/Deputy Registrar
Date:

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INTRODUCTION

[1] The plaintiff (referred to in this judgment as "A") claims that between 1968 and 1978, while at St Joseph's Orphanage in Upper Hutt, St Mary's College, Wellington, and various foster homes and holiday placements in Wellington and the Wairarapa, she was verbally, emotionally, physically and sexually abused and generally deprived of a normal upbringing. As the defendants were responsible for her care during this time, she claims that they should be liable for the severe emotional, physical and mental damage she suffered as a consequence.

THE DEFENDANTS

[2] The second defendant, Catholic Social Services, is the principal social service provider of the first defendant, the Roman Catholic Archdiocese of Wellington. Both the first and second defendants have charitable status pursuant to the Charitable Uses Act 1601.

[3] The third defendant, the Sisters of Mercy (Wellington) Trust Board is a charitable trust registered under the Charitable Trusts Act 1957 and is an institute of members of the order of the Sisters of Mercy, a Catholic order of nuns founded in Dublin in 1831, with a particular focus on providing "Christian education" and "care for the sick and those in spiritual and temporal need".

[4] The fourth defendant, which is managed by the Sisters of Mercy, is the registered proprietor of the land on which the orphanage stood.

THE NATURE OF THE CLAIM

[5] The primary cause of action against all four defendants is based in negligence. Alternatively, and only if the primary claim is unsuccessful, the plaintiff alleges breach of fiduciary duty. In each case she seeks compensatory, aggravated and exemplary damages for the loss which she says the defendants caused her.

DEFENCES

[6] As well as challenging most of the factual allegations made by the plaintiff, the defendants dispute that they owed the claimed duties of care to the plaintiff or that they are vicariously liable for the acts of others. They also raise positive defences under the ACC legislation and, in the case of physical abuse only, the Limitation Act 1950.

BACKGROUND

[7] The plaintiff was born on 16 December 1959, the third of the seven children of Mr A and Mrs A. She was christened SLA but much later adopted the name of AGA, by which she is currently known. She has four brothers: RA born in 1957 (now deceased); PA in 1961; AA in 1962; and MA in 1966. Her sisters, KA and LA, were born in December 1958 and August 1963 respectively.

[8] Her parents separated in early 1967 and all the children were placed in residential care. Mr A placed the plaintiff and her older sister, KA, in the Whatman Home in Masterton, a children's home run by the Salvation Army. LA and MA were admitted to the Salvation Army home in Newtown, Wellington, and the three older boys went to Sunnybank, near Nelson, a home then run by the Sisters of the Mission, an order of Catholic nuns unconnected to the third defendant.

[9] In February 1968 the plaintiff and KA were uplifted from the Whatman Home and placed, instead, in St Joseph's Orphanage in Upper Hutt. Later that year they were joined by LA.

[10] The plaintiff lived at St Joseph's Orphanage from 5 February 1968 until 4 May 1973: more than five years. The orphanage, like the nearby St Joseph's Primary School that she attended, was run by nuns of the Sisters of Mercy. In practice, they looked after her day to day care during term times and Catholic Social Services found foster placements for her during most, but not necessarily all, school holidays.

[11] From May to December 1973 the plaintiff lived with the M family in Karori and attended St Theresa's Catholic Primary School. When this placement broke down, Catholic Social Services arranged for her to attend St Mary's College and live in the boarding establishment attached to the college.

[12] The plaintiff attended St Mary's from February 1974 until she left school at the end of 1977. Her sisters also went there, although not as boarders.

[13] She continued as a boarder until the hostel closed at the end of 1976. Thereafter she was placed in a Catholic Social Services family home run by the Ds, where LA also lived.

[14] After leaving school the plaintiff worked for a short time in a restaurant and then, for four years, in a bank in Wellington. For the first year of her employment she remained with the Ds. Then she went flatting but retained some contact with them. In late 1981 or early 1982 she moved to Western Australia.

[15] In Australia she worked in a variety of jobs, up until the birth of her elder son in January 1987.

[16] Her distress at the time was such that her doctor, Dr Ralph Chapman, referred her to a clinic for specialist psychiatric care. In the four years thereafter she attended a women's therapy and support group run by Letitia Allan, with whom she also had some individual counselling. The primary focus of the counselling was on parenting issues and crisis management. It was during this time that she first disclosed that she had been sexually abused.

[17] The plaintiff's second son was born in December 1991. Both boys have the same father. He lives in New Zealand and has never lived with the plaintiff or played any part in the children's lives.

[18] From 1996 onwards the plaintiff has been a member of the Victory Life Church and between 1997 and 1998, attended Bible College. Through her connection with the church she met a therapist, Dee DuCrow, and became a member

of a counselling and support group for survivors of sexual abuse. This led her, in early 1999, to obtain a copy of her Catholic Social Services file.

[19] Reading the file triggered memories of her past life. In order to investigate and test the reliability of those memories she returned to New Zealand, with her sons, in September 2000. In the course of the visit she made a statement to the Police alleging that she had been sexually abused and, in March 2001, instituted the current proceedings. She then returned to Australia where she still lives.

THE PLAINTIFF'S VERSION OF EVENTS

The process of remembering

[20] Through counselling the plaintiff slowly, and often painfully, began to recall and address the events of her past. The allegations have emerged, piecemeal, over time. She readily acknowledges that she is not good at remembering dates or pinpointing when particular events occurred. Memories emerged during the sessions which she had with psychiatrists in 2003 and 2004 and further allegations of sexual abuse were made as late as May 2005. Some of her memories remain rather amorphous; others she has been able to refine and particularise by reference to her medical records and contemporaneous records provided by the second and third defendants, the Salvation Army, and the Department of Social Welfare. Still others have been triggered by speaking with members of her extended family and re-visiting places where she lived or visited during her childhood.

The first eight years

[21] The plaintiff's memories of her first eight years are generally happy, but not uniformly so.

[22] Although her family moved around, her only memories of their time together relate to their home in Carterton. She believes that her mother loved her and wanted to care for her. And although her memories of her father are limited, she feels that he too loved her and their family.

[23] However, there are also horrific memories. While she cannot remember either her father or mother verbally or emotionally abusing her, she accepts that her father physically abused her. She remembers sitting outside pubs waiting for him, and of him being violent to her mother. A particularly vivid memory is of hiding behind the back door of the Carterton home, watching her father kicking, hitting and screaming at her mother, who took off her wedding ring and threw it away.

[24] Shortly afterwards the family broke up and the plaintiff went to the Whatman Home. She remembers her time there fondly. She felt safe and happy.

St Joseph's Orphanage and School

[25] By contrast, her recollections of the years she spent at St Joseph's Orphanage are mostly negative. She described the atmosphere there as devoid of love, compassion, understanding or caring and said that she felt constant fear, anxiety, apprehension and distress. While acknowledging that others' experience of the orphanage and adjoining school may have been different, she claims to have suffered persistent and ongoing abuse there.

[26] First there was the verbal abuse. She claims to have been constantly verbally abused, harassed and harangued, shouted at and screamed at by all the nuns. There were some whose remarks she particularly remembered. There were also different types or topics of abuse, including:

a) Cruel and demeaning personal comments, for example that she was:

- A liar and a loser (Sr Ligouri and others);
- Selfish, ungrateful and unthinking (Sr Catherine, Sr S and Sr Gerardine);
- Undeserving (Sr Gerardine and Sr S);
- Unloved, inadequate or worthless (Sr Ligouri, Sr A, Sr S and Sr Gerardine);

- A sissy and a no-hoper (Sr A);
- A useless child, a pathetic dumb creature and a thief (Sr S);

and that:

- Nobody cared about her or wanted her (Sr S); and
- Her mother was useless (Sr Ligouri);

b) Threats of damnation, for example, that she:

- Was evil, immoral and wicked (Sr Ligouri, Sr A, Sr S and Sr Gerardine);
- Had committed mortal or cardinal sins; and
- Was the worst of the worst and would go straight to hell, not purgatory (Sr S and others);

c) Threats that if she caused trouble:

- Food would be withheld from her;
- She would be locked up, placed in the cells, or go to gaol; and
- Catholic Social Services (Father Peter McCormack) would be involved.

[27] This verbal abuse was said to be part of widespread emotional abuse which pervaded the running of the institution.

[28] An example of the type of behaviour – or more correctly, failure to act – which the plaintiff claims had a significant effect on her, was the alleged failure to tell her whether she would be returning to live with her parents and siblings, and

never being given an explanation about what was happening in her life and with her family.

[29] Other alleged behaviours, such as preventing her from keeping gifts or clothes given to her by her mother, were said to have been deliberately undertaken with a view to affecting their relationship. For example, Sr A is said to have taken a cuddly pink bunny rabbit, which Mrs A had given the plaintiff, and put it on a bed in another dormitory where she could see it, but not touch it. In addition, the same sister is said to have:

- Criticised her for showing affection to her mother;

- Treated her in an alarming and inconsistent way after she had been a bridesmaid for her aunt: on the one hand making a fuss of the wedding party and saying how beautiful they were, and then, after the plaintiff returned to the orphanage after the wedding, ripping the clips out of her hair and stripping the clothes off her, saying:

> Who do you think you are, wearing this dress; it's disgusting and indecent; you are not allowed to look nice; you're ugly.

- Verbally abused, humiliated and belittled her, in front of the other girls in the orphanage, after she wet her bed; and

- Wrongly accused her of setting fire to a dormitory.

[30] In addition, Sr S was said to have reprimanded the plaintiff and another girl for playing in a "cubby house" they had built on the tennis court and allegedly engaging in inappropriate sexual behaviour there. Another nun, originally thought to be Sr Catherine, was said to have made her write thank you letters to people she had spent holidays with, even when she had been very unhappy with them.

[31] More generally, the plaintiff claimed that the nuns:

- Isolated her from her sisters and other girls at the orphanage;

- Played one girl off against another;

- Sometimes put them in physical isolation;

- Emotionally manipulated them; and

- Depersonalised them by referring to them by their laundry numbers (hers was 18) rather than their Christian names.

[32] Physical abuse was also said to be an everyday occurrence, both at the orphanage and the school.

[33] The plaintiff claimed that, on one occasion, after she had been in the school hall, allegedly with permission, Sr Ligouri hit her on her hands, the backs of her leg and her bottom with a leather strap, causing bruising. She said that she was also strapped or hit by Sr A, Sr S and Sr Gerardine, among others. She recalled being hit by Sr Gerardine at least 10 times on the hand with a wooden-backed hairbrush and by Sr A over the head with an open hand and about her body with a long wooden ruler. She claimed that on several occasions she was hit over the head so severely that she lost consciousness. But she was not alone in receiving this type of punishment. She remembered girls being lined up in the workroom at St Joseph's on a regular basis and hit by Sr A if they gave the wrong answer to questions put to them.

[34] Another alleged form of physical punishment was to withhold food.

[35] However, by far the most serious allegation of physical abuse concerns an occasion in 1970, when, the plaintiff claims, Sr S beat her hard around the right side of her face and right ear about six times, causing massive bruising, and perforating the tympanic membrane in her ear. This happened after the sister found her, looking at the writing in another girl's exercise book. Sr S accused her of stealing other people's information and called her a thief. Sr Theodore is said to have seen the bruising a few days later, but done nothing about it.

[36] The plaintiff claimed that, as a result of the nuns' treatment of her at the orphanage she became withdrawn; she tried to behave like a robot, not showing any emotion or that she had any human needs.

[37] In addition, in May 2005, after the proceedings had been issued, the plaintiff claimed, for the first time, that she had been sexually abused at the orphanage by Peter McCormack. He was then a Catholic Priest in charge of Catholic Social Services, and visited the orphanage in that capacity. He also went there to see his aunt, who had Down's Syndrome. She lived there until her death in August 1968.

[38] The specific allegation was that when the plaintiff was about eight years old Mr McCormack made her perform oral sex on him. She remembered this happened in the front room and that, after the incident, she was very upset and vomited in the garden. The nuns who saw her took her into the playroom and reprimanded her for being upset.

Placement in foster and holiday homes

[39] From the time she started at St Joseph's until she left St Mary's, arrangements were made for the plaintiff to stay with families during the school holidays. Occasionally she also stayed with members of her extended family, or visited them during weekends.

[40] She alleges that she was sexually abused on some of these placements.

[41] The first occasion was when she was nine or ten years old, at a home in Holly Grove, in Maungarakei. This would have been some time between 1968 and 1970. She claimed that one evening, when she was in the bathroom, cleaning her teeth, the male adult in the house came into the room in his underwear, and made her masturbate him. The episode ended when the female adult walked in and queried what was going on. In the absence of any records of her earlier holiday placements while at St Joseph's, the plaintiff is unable to identify the alleged abuser. Initially she did, but she now accepts that the name she gave was wrong.

[42] The second abuser, in point of time, is said to have to been Mr S. At the time he was a farmhand on a large property in the Wairarapa. The plaintiff and her sister LA stayed with Mr S, his wife and young children during the 1972/73 Christmas holidays. The plaintiff claims that he sexually abused her many times. In particular, she said that when she rode on the back of his farm bike he would make her put her hand down the front of his trousers and masturbate him. Then, early one morning in January 1973, he and his wife came into the girls' bedroom, after an earthquake, to check that they were all right. Both adults were naked. After Mrs S went back to her bedroom, Mr S got into bed with the plaintiff. The plaintiff does not remember what happened next, if anything. However, she does remember that, at his suggestion, when they went swimming in the pool belonging to the owners of the farm, they swam in the nude.

[43] The next episode of sexual abuse was said to have been committed by SN, the son of the plaintiff's sister KA's foster parents, during a visit in the 1974/75 Christmas vacation, after the plaintiff had spent a year as a boarder at St Mary's College. She claims that he raped her in her bedroom, while one of his siblings was asleep in the same room. She now believes that she was set up as, unusually, SN's father made her have a shower both before bed that night and again the next morning. She mentioned this episode in a statement she gave to the Police in 2001.

[44] The alleged abuse by her maternal grandfather, FA, at his home in Wallaceville, Upper Hutt, was the first disclosed. The plaintiff used to visit him there when she was at St Mary's. She recalled that usually she was alone, although once she took two other boarders with her. Another time, her grandmother, who was separated from her grandfather, was also there. She said that she was abused twice. He was drunk both times. The first time he had intercourse with her in the bathroom. On the second, she was lying down on a bed. After that she never went back.

St Mary's College

[45] The plaintiff described her time at St Mary's as another nightmare period in her life.

[46] She is critical of the standard of education she received at the school. (She left after attempting School Certificate twice and failing to pass more than one subject each time).

[47] She claims that initially she was inappropriately placed in the top third form at the school; thereafter she effectively gave up trying. She thought she did not have the ability to achieve and was not supported to do so.

[48] She did not have friends and felt isolated in the boarding establishment. Initially she was placed in a dormitory with fifth form girls. Later she was placed with her peers, but she still felt different. Her basic concern was lack of money in a setting where some girls had plenty. She claims to have shoplifted in order to obtain appropriate clothes, and that she sometimes went to pubs with her father on Friday afternoon or evenings, before returning to the hostel, the worse for wear. She also claims to have smoked cigarettes, taken drugs and met up with boys. No one cared or even noticed. She was regarded as a "charity case".

[49] And while physical abuse did not figure nearly as much at this time, there was one incident when, she said, the boarding mistress, Sr Patricia, found her on the stairs at night, and told her that if she did not behave, she would be made to sleep downstairs. When the nun also told her that men sometimes got into the boarding school at night she spun out. Sr Patricia reacted by hitting her and she hit her back. The plaintiff claimed that Sr Patricia never showed any concern for her, asked her how she was or if she needed anything. In particular, she saw the problems she was having with her damaged ear, but never sought medical attention.

[50] During this time the plaintiff's contact person at Catholic Social Services was generally her social worker, Mary McGreal, and more sporadically, Mr McCormack. While the plaintiff acknowledged talking with Mrs McGreal, she denied that she provided her with support counselling.

[51] Her criticism of Mr McCormack at that time was that on one occasion he inappropriately chastised her for using too many tampons, telling her that she was "dirty" and that being a woman was dirty.

The Ds

[52] There are two particular aspects of this period which the plaintiff complains about.

[53] The first is the way that Mr D treated her. She believes that he took an immense dislike to her. He continually picked on her, put her down and showed no compassion when she was feeling upset or confused. He accused her of being "selfish", "lazy" and "only thinking of herself". The dislike was manifest in the following incidents:

- Turning the water on to cold while she was in the shower;

- Forgetting to collect her after school when she had a broken or sprained ankle and was on crutches, and then asking her why she could not catch the bus like the rest of the children; and

- Hitting her hand with the carving knife when she picked at scraps of meat as he was carving a Sunday roast.

[54] Secondly, she alleges that while she was living with the Ds, she was sexually abused by a neighbour, Mr L. She claims that after an evening at his home playing drinking games, she awoke in his daughter's bed to find him raping her. She thinks she was between 16 and 18 years old when this happened. She also remembers masturbating him in his bedroom.

THE OTHER WITNESSES

Who they were

For the plaintiff

[55] LA gave evidence for the plaintiff concerning her experiences of living at the orphanage, as did DS, Shirley Ford, RH and GT, all of whom also lived there, either before or during the time that the plaintiff did. In addition, CH and MC spoke about

their experiences at St Joseph's School in the decade before she was a pupil there. Apart from LA, and GT, who was originally briefed to give evidence for the third and fourth defendants but ultimately was subpoenaed by the plaintiff, all these women came forward as a result of media reports concerning this case.

[56] The plaintiff also called her doctor, Dr Chapman, her therapists, Ms Allan and Ms DuCrow, and two expert witnesses: Dr Crawshaw in relation to her mental health, and Dr Nash, concerning the injury to her ear.

[57] The evidence of Dr Ferris, a geophysicist for the Institute of Geological and Nuclear Sciences Ltd, concerning the date of an earthquake in January 1973 affecting the Wairarapa, was read by consent.

For the first and second defendants

[58] The witnesses for the first and second defendants fall into four categories:

- Family members:

  Mrs A (the plaintiff's mother), EA (her maternal aunt) and AA (her brother).

- Social workers and representatives of Catholic Social Services:

  John Consedine (the current director), Peter McCormack (the former director), Mary McGreal, who was a social worker at Catholic Social Services from 1970 to 1976, Antonius Roest, a social worker there from 1972 to 1976, and Kitty McKinley, who worked as a volunteer at Catholic Social Services in 1975 and joined the staff full-time at the end of 1976. John Lambie was called to give expert evidence as to social work practice.

- Caregivers:

  The Ss, the Ds, the Ms and Mrs W.

- Others accused of sexual abuse:

  Mr L, supported by his wife, Mrs L.

For the third and fourth defendants

[59] The following witnesses gave evidence for the Sisters of Mercy:

- Sr Denise Fox, the current congregational leader of the Order in Wellington, explained the composition and nature of the third defendant, both at the time when the plaintiff was associated with them and currently.

- All the nuns named by the plaintiff who are still alive. With changes in practice over the years, some have reverted to using their Christian names. Others have retained their religious names.

  The evidence of two of those nuns (Sr Denise O'Farrell and Sr Theodore Harrington) was taken before the Registrar in April 2004, in advance of trial and a videotape and transcripts of it were filed in Court. Their evidence concerned the orphanage years, as did that of Sr Ligouri and Sr S and Sr Justina. That of Sr Julian, Sr de Porres and Sr Patricia related to the plaintiff's time at St Mary's College. For ease of reference I shall call the nuns by the names by which the plaintiff knew them.

- Girls who attended St Joseph's Orphanage and school between 1968 and 1973: Nicolla Nicolls, Eveleen Bon and Margaret Rangiwhetu.

- Joan Jenkins, a lay-teacher at St Joseph's School between 1957 and 1987.

- Expert witnesses: Fr John O'Neill concerning practice in relation to matters like corporal punishment and provision of psychological services at Catholic schools and also concerning liturgical matters, Dr Dianne Bardsley, a language expert, and Dr Peter Blake, an ENT specialist.

Dr Marks

[60] Although, for practical purposes, Dr Marks was called by the third and fourth defendants, in accordance with an order made by Miller J, he was, in fact, the Court's witness under s 100 of the Judicature Act 1908. He interviewed the plaintiff, in the presence of Dr Crawshaw, over three days in December 2004.

What they said

About the family

[61] It is undisputed that the plaintiff's father, CA, was an alcoholic. Before their marriage ended Mrs A took out a prohibition order against him to prevent him going to hotels. She said that he had been violent towards her for years and that occasionally the children witnessed her or one of their siblings being hit.

[62] She confirmed that the marriage came to an end with the episode which the plaintiff remembered. Mrs A recalled that, on that particular day, Mr A came home in mid-afternoon and started drinking out of a half-gallon jar. He then tried to strangle her. The children were screaming and she ran outside. Neighbours called the Police. Mr A locked the doors and windows of the house so that she could not get in, put the children in the car, and drove away.

[63] She was both mentally and physically exhausted by her husband's treatment of her and resolved not to return. She went to live with her mother in Upper Hutt and started work at the Reserve Bank there. After some months she got a flat on her own and arranged for KA and the plaintiff to be brought from the Whatman Home to St Joseph's Orphanage so that they could be near to her.

[64] Mrs A met her current husband, Mr F, in 1969. They married in 1972. Their only child was born in 1974.

[65] When she was with Mr A, Mrs A was a full-time homemaker. She said that although the Carterton home was run down, she did her best to keep it clean. She was regarded as being a very good cook and went to considerable effort to dress

herself and her children well, making all their own clothes. Although there were times when there was little or even no money, and nothing to spend on luxuries such as going to the movies, she tried to create a family environment that was as enjoyable as it could be for the children.

[66] She was happy for the girls to go to the orphanage. She herself had been a pupil at St Joseph's School and knew some of the older nuns who were still at the convent. She believed that the girls were well cared for. She said that in the interviews she had with Sr Denise O'Farrell, she was never told that anything was amiss. She used to meet the girls almost every other day, as she went back to work from lunch, either in the school grounds or at the convent gates. Then she would walk back with them and other girls, and sometimes a nun, to the school. She described her daughters as "happy, giggly, smiley facey".

[67] Mrs A was also content with the involvement of Catholic Social Services in her children's lives. She thought that the plaintiff had a good relationship with their staff; she never complained to her about them. She was enthusiastic about all her holidays and appeared happy at both the Ms and St Mary's.

[68] EA, who is younger than Mrs A, said that she and her mother (the plaintiff's grandmother) used to keep in contact with the children. The girls would go to their house in Upper Hutt once a month. Then, after she herself married in 1970, the plaintiff and LA would separately stay at her home. All of the A children came to her with their troubles over the years. The plaintiff had various gripes about places she had been staying, for example, about doing domestic chores and discipline, but there was nothing of concern.

St Joseph's Orphanage and School

[69] St Joseph's Orphanage was opened in late 1952. It was purpose built and set in spacious and attractive grounds. There was a swimming pool and hard court and lawn areas. The orphanage building was in the form of an "H". On the right hand wing were two large dormitories with a total of eighty beds (the "pink" and the "blue" dormitories). At either end of each dormitory there was a cell for a nun to

sleep in. A corridor led from the dormitories to a large recreation room. Leading off the corridor were a sewing room and a laundry area on one side, and washrooms and toilets on the other. The left hand wing, parallel to the dormitory wing, housed the refectory and kitchen area at one end and, in the other, a playroom, community room, sick bay, two rooms variously referred to as an office and a parlour, another office and a main entrance hall. The chapel and a two-storied block of sisters' rooms were separate.

[70] Between 1968 and 1973 the number of girls in the orphanage fluctuated from a high of 41 in October 1969 to a low of 18 in January 1973. The average was between 28 and 35. From 1972 onwards there was seldom more than 28 girls living there.

[71] The number of nuns living at the orphanage during that time varied between 12 and 15. Congregational records show when the nuns named by the plaintiff lived there:

- Sr Denise O'Farrell, sister in charge of the house 1968 to 1971;
- Sr A, orphanage only 1968 to 1972;
- Sr Ligouri, Principal St Joseph's School 1968 to 1973;
- Sr Gerardine or Geraldine, teacher 1968 to 1969;
- Sr Theodore, teacher 1968 to 1970;
- Sr S, teacher 1970 to 1972;
- Sr Agnes Finucane, sister in charge of the house 1972 to 1973;
- Sr Paschal, teacher at the school from 1968 to 1973.

[72] With the exception of Sr S and Sr Agnes, the ages of the nuns ranged from 47 to 62. Sr S was in her mid 20s and Sr Agnes in her early 40s.

[73] Although the plaintiff named Sr Catherine as one of the nuns who abused her, she now accepts that their time at the orphanage did not coincide. Sr Catherine died in 1968.

[74] Sr A, Sr Gerardine and Sr Paschal have also died.

[75] Sr Agnes took over from Sr Denise O'Farrell as superior at the beginning of 1972.

[76] Daily life at the orphanage ran to a strict routine. The girls were woken at 7.00 am and had prayers, breakfast and completed chores before school. They returned to the orphanage for lunch, which, until 1972 or thereabouts, was the main meal of the day. After school they had afternoon tea, followed by playtime, bath-time, tea, and study (not necessarily in that order), and then bedtime. On special feast days they went to mass in the chapel before school. Otherwise they only attended mass on Sundays.

[77] At all times they were supervised (prefected) by nuns.

[78] All the sisters who taught at St Joseph's School lived at the orphanage. Most had duties within the orphanage, as well as their teaching duties. For example, Sr A was in charge of the sewing room and responsible for the girls' clothes, Sr Gerardine looked after their medical needs, and Sr Ligouri supervised study.

[79] There were further chores to be completed on Saturdays and that was the day for hair washing. On Sundays, after mass, some girls visited family members. There were also occasional organised outings arranged by community groups such as Rotary and Lions, which the girls remembered fondly. Some trips went as far afield as Picton. Local events included picnics, lolly scrambles, sports days and Christmas parties. At times nuns or priests took a girl or a small group outside the orphanage. The plaintiff remembers Sr Agnes taking them shopping and swimming. Ms Ford talked about going with a priest to the airport to farewell a local girl who was joining the Carmelite nuns. Others spoke of being taken to the movies by

Sr Denise O'Farrell and of Sr Gerardine taking girls to Masterton or Carterton to pick apples.

[80] LA generally endorsed her sister's account of abuse meted out by the nuns at the orphanage.

[81] She arrived at St Joseph's on 1 September 1968 and, apart from a year from December 1971 to December 1972, when she was with a foster family in Taita, remained there until December 1975. This means that she and the plaintiff were there together for approximately three and a half years, from 1968 to 1971 and from December 1972 until May 1973, when the plaintiff left to live with the Ms.

[82] LA agreed with the plaintiff that they were not allowed to have a relationship with each other and that there was a lack of love at the orphanage. She also alleges that she was physically, sexually, verbally and emotionally abused there and, as a result, has instituted her own proceedings against the same defendants. She said she was strapped virtually every day by one nun or another, but made specific mention of Sr S and Sr Paschal in that regard.

[83] She thought that Sr A did not like her or the plaintiff very much, possibly because she was irritated by their singing voices. She recalled the plaintiff being hit by Sr A with a yard stick ruler. She also remembered Sr Ligouri using the strap.

[84] She described Sr S as a "vindictive, nasty person". She remembered her calling her a "naughty horrible child" and saying that she was punishing her to make her pray to God.

[85] She claimed Sr Agnes and other nuns used to force-feed her tripe and boiled cabbage and that Sr Paschal fed her sunlight soap for telling a dirty rhyme.

[86] She also recalled being sent to the pink or the blue dormitory as a form of punishment after running away, and being left there as long as the nuns saw fit. She said that this could be for several days, while they debated what to do with her. Sometimes they threatened to send her to the Police Station to be held. Other alleged

punishments included being made to smoke a whole packet of cigarettes after she had been caught smoking, and having her hair cut short.

[87] Although she acknowledged that some of the nuns were kind to her – Sr Barbara and Sr Theodore for example – LA could not remember receiving comfort, reassurance or kindness from any of the others. She felt that they deliberately tried to lower her self-esteem, that the nuns regularly yelled and screamed and verbally abused the girls, and that those children whose parents did not go to the orphanage often were picked on more than others.

[88] She agreed that the girls were often called by their numbers, not their names. Hers was 35. Like the plaintiff, she complained that no one sat down with her or wanted to listen to her. She needed to be told what was going on with her family, but this never happened; the people from Catholic Social Services did not talk about such things either.

[89] Two of LA's claims went further than those of the plaintiff. First, there was her claim that exorcisms were carried out on her by Mr (then Father) McCormack, with Sr Denise O'Farrell and another priest present. She said that the first exorcism took place in the day room. Others were in the dormitory bedroom.

[90] LA did not claim to have been sexually abused by Mr McCormack. Her complaint against him was that, when she was nine or thereabouts, he asked her if she knew about the "birds and the bees" and if she had started having her periods. However, she did claim she was abused by other priests. She said that when she was an altar girl at mass she had to perform oral sex on them. The abuse happened in one of the side rooms of the chapel. She was also sexually abused in the dormitories when she was being held there in isolation. She claimed that at least four priests sexually abused her and that after one of the worst abusers died, she had to kiss his face as he lay in state in the chapel.

[91] She said that she learnt about sexual play at the orphanage as the girls used to play with each other sexually.

[92] Five of the plaintiff's other witnesses also had bleak memories of their time at the orphanage and/or St Joseph's School. Two of them, RH and Shirley Ford, lived there before her time.

[93] RH was admitted to the orphanage in April or May 1960 and departed in December 1964.

[94] It was not a happy experience. Among her memories were:

- Being told not to cry, despite the fact that her mother had died (by suicide). She did, and was punished for it;
- Mental cruelty, especially threats that the girls would go to hell or purgatory if they did not go to church or do certain things;
- Being called words similar to "no hoper" and "loser", although not those exact words;
- Being treated differently from the day pupils at school, including not having play lunch;
- Having different food from the nuns;
- Physical abuse: she was screamed at and smacked if she wet her pants; and
- Sr Ligouri and Sr Gerardine had terrible tempers.

[95] Ms Ford and her five siblings were placed in care in 1960. She was sent to St Joseph's in 1963 because her mother had been released from a psychiatric hospital and was living in Wellington. She remained there, attending the associated school until 1966.

[96] She described the orphanage as a wasteland – a barren, sterile, loveless, rigid place, lacking warmth, caring or nurturing. The prevailing atmosphere was of

intense religious fervour and fear: fear of doing wrong and being punished. The girls reacted by becoming quiet, docile, compliant and withdrawn.

[97] Other recollections were that:

- Sr Gerardine was extremely cruel and vicious. She was an ogre. She was the worst for administering the strap. Ms Ford was a bed-wetter and Sr Gerardine humiliated her, making her wash and hang out her sheets each day;

- Sr Ligouri was a distant figure;

- The food was barely adequate. The nuns had different meals and the girls were force-fed if they would not eat the food. For example, a girl who refused to drink the molasses they were given each week had her breakfast porridge brought out at each subsequent meal until she did, then she had to eat the porridge; and

- Sr Justina gave her piano lessons, which she enjoyed, but they were suddenly stopped on the basis that it would not be fair to the other girls for them to continue.

[98] Ms Ford said that, at best, the sisters were terribly misguided in inflicting on the girls what they thought was for their own good; at worst, their regime would have done the Gestapo proud.

[99] DS's mother died November 1967. She was sent to St Joseph's Orphanage in March the following year, when she was six. She remained there until the end of 1972.

[100] It was a terrible experience for her. She claimed that the nuns were abusive. Both verbal and physical abuse was common. As a child she was a stutterer, but the nuns considered she was attention seeking and regularly strapped her on the back of her legs. This happened most days. She said that if a child was found to have been strapped at school, they were strapped again at the orphanage.

[101] She was also smacked and screamed at if she wet her pants or if her underpants were found to smell of urine when inspected.

[102] She was told she was useless, lazy, good for nothing and would never amount to much, that nobody loved her, and that she was a thief. She had no emotional support because her mother had committed suicide and that was a sin.

[103] Of the nuns she said:

- Sr Ligouri was a tyrant. She was always strapping and disciplining and making cutting, demeaning remarks. She was awful;

- She was frightened of Sr A.

[104] DS's other relevant memories, for present purposes, were of:

- Being placed in isolation when she was about seven or eight after she stole some "Sparkles" from the supermarket. The Police were called and returned her to the orphanage. She was then put in isolation for two weeks and was not allowed to go home in the weekends for six weeks. She was also strapped;

- Mr McCormack visiting regularly. She had to sit on his knee. The meetings were held in the parlour (not the recreation room) and lasted about 10 minutes to half an hour. Sometimes she was with him on her own;

- LA rocking herself to sleep. The nuns would hear the noise and come and strap her. She was a very miserable child;

- The food was adequate. Once she was force-fed silverbeet. This took a couple of hours. It was never done when anyone else was around. The girls were made to wait until everyone had left the dining-room before being force-fed.

[105] Each of these three women regarded themselves as better off than the A girls as they had loving family members to visit during weekends.

[106] So too did GT, who was at the orphanage from September 1971, when she was eleven and a half, until December 1973. She also drew a distinction between those girls whose parents were paying for them to attend the orphanage, and those who were "charity cases".

[107] Reading the evidence of the plaintiff and her witnesses made her recall Sr A and her straps and an incident when LA and the plaintiff were practising singing in the sewing room and they were struck from behind by Sr A. She carried a strap in her right pocket. GT never saw her carrying a stick.

[108] Other pertinent parts in her evidence were that:

- The food improved in 1972 after a change in cook. In 1971 it was stale and off. The bread and buns were never fresh. Main meals included tripe once or twice a month and they never had roast meat, junket, sago or steamed puddings;

- If you did not eat your meals, you were fed. "We had to eat it", she said;

- The environment at the orphanage was cold and uncomfortable when Sr Denise O'Farrell was in charge. It changed when Sr Agnes became Superior. There was a lot more activity. It was a good place for some, although not for everyone. Sr Agnes was the person that she saw if she was in trouble; she mainly made her write lines;

- Most of the time Sr S was happy go lucky. She helped GT with her speech therapy and sometimes joined the girls in activities like games or dancing. Occasionally, however, she got angry and when she did her whole face looked like she was going to explode;

- The girls kept out of the way of Sr Ligouri;

- Once, when she went back to the blue dormitory during the day she saw nuns and a priest there.

[109] CH and MC attended St Joseph's School from 1954 to 1959 and 1958 to 1960 respectively. Both thought that the orphanage girls were treated more harshly at the school than the day girls.

[110] CH described the nuns as merciless and intimidating and said that they publicly humiliated the children. She said that although not physically ill-treated, she was mentally and emotionally abused.

[111] MC spoke of her time in Sr Gerardine's class. She said that she was an absolute tyrant. She preyed on those who were most vulnerable. She often used a leather strap and a pointed ruler. She constantly mocked, humiliated and belittled those in her care. She terrified the children with religious threats.

[112] The former orphanage girls who gave evidence on behalf of the third and fourth defendants painted a much more positive picture, as did the nuns themselves.

[113] Margaret Rangiwhetu (1967-1969 aged 11-14), Nicolla Nicolls (1968-1972) and Eveleen Bon (1971-1972) all lived at the orphanage for at least some of the same time as the plaintiff. While there they all had regular contact with at least one family member.

[114] Ms Rangiwhetu's time at St Joseph's School was very happy. While there was firm discipline, she never saw any students being strapped. She appreciates the social and educational foundations she received from the school.

[115] She denied that the sisters yelled or called the girls names, or isolated particular girls or prevented them from bonding with others. Of particular nuns she said:

- She had nothing but good words for Sr Gerardine. She was never terrified by her;

- Sr A could be strict; you couldn't pussyfoot around with her. She did not remember her carrying a stick;

- Sr Denise O'Farrell was kind and loving, and very approachable. She would let Ms Rangiwhetu ramble on when she got teary;

- Sr Ligouri was a very quiet person, not a yeller. She was very approachable; she could be asked questions when she supervised study;

- Sr Paschal was a beautiful nun, gentle and quietly spoken.

[116] Ms Rangiwhetu had no concerns about the food. She did not recall seeing anyone denied food. Her memory was of good food, decent sized helpings and sometimes seconds. There were also special treats like giant scones with cheese on Saturday.

[117] She agreed that girls were reprimanded if they stepped out of line and recalled being scolded if she did something wrong or used naughty words, but said that it was a rare event for someone to receive the strap. Once she got the strap, but more often she was asked to reflect on what she had done.

[118] She did not recall being threatened with hell or purgatory. She was more concerned that Sr Denise O'Farrell would tell her mother, as then she would really have been in trouble.

[119] Nicolla Nicolls' memories of her time at St Joseph's were supported by letters, reports and other records which her mother kept.

[120] Ms Nicolls disputed the allegations of abuse. She denied that the girls were referred to by numbers or that anyone was abused in any kind of systematic way. Far from being tense, she remembered a loving atmosphere.

[121] She agreed that physical punishment was administered by Sr Denise O'Farrell, using a leather strap, but she did not think it was harsh – or, if it

was, she did not see it. She also accepted that Sr A could have carried a stick. She described her as "not the warmest human being in the world".

[122] She remembered seeing Mr McCormack a couple of times in the room off Sr Denise O'Farrell's office. Sr Denise was always present when that happened.

[123] Generally she thought the food was good, but confirmed that, on occasions, food she did not like was served up three times until she ate it.

[124] Eveleen Bon, like the A girls, came from a home where her father had problems with alcohol and there was domestic violence. She was relieved to be somewhere stable, with clear routines and a good standard of basic care. She thought it good to be with other girls from similar backgrounds, but acknowledged that sometimes they were picked on by other children at school and that some hated being there. In her experience, if a girl was having a hard time she could let the nuns know and they would listen to her. She knew the rules and thought the discipline was fair. Ms Bon said:

> It was not a touchy feely sort of place and the nuns were quite clear that they were caregivers not mothers.

[125] She recalled a daily assembly in the playroom before dinner at which girls would be disciplined if they had broken the rules. This might consist of a verbal reprimand or a strap to the hand. She did not remember nuns losing control or calling girls losers or sissies. Rather, these were the kinds of things the girls would say to each other.

[126] In her view most of the nuns were fair. Sr A was the only exception. If someone interrupted while she was brushing a girl's hair, they would be given a whack with the hairbrush. After the girls complained she refrained from doing this while being watched.

[127] Ms Bon remembered Sr S as "a very sporty, vibrant, sprightly younger nun" who would help with musical productions and administer discipline from time to time. She had no memory of her screaming at people and "going on at them".

[128] Under cross-examination Ms Bon remembered that Sr S was the nun responsible for strapping, usually administering one strap, but sometimes more, and that Sr A would use a ruler, which she sometimes carried. Discipline was normally administered in public, in front of all the girls.

[129] She remembered girls being told that the Police might be involved if they were behaving badly and that the Police were called after she was involved in a shoplifting incident. By way of punishment she had bread and water for dinner.

[130] She recalled all the A girls. She described LA as a rebel: she seemed angry, feisty, stocky, a kicker and had a foul mouth. By comparison, the plaintiff was calm, although sad a lot of the time. She was Ms Bon's assigned buddy. She did not have much to say, but would sometimes talk fondly about her mother.

[131] In answer to the plaintiff's allegations, she remembered plenty of food, did not remember being called by her number, disagreed that they only had one set of clothes and that clothes given to them would be taken away. She agreed that there was a fair amount of religion, but denied that the nuns threatened them with hellfire and damnation.

[132] Her only memory of males going anywhere near the dormitories were of fathers and brothers on visiting days. The only part of the orphanage building she remembers priests being in was the dining-room.

[133] The nuns who gave evidence painted a similar picture of a stern, but fair and happy environment. They uniformly denied using physical force to discipline a child at the orphanage, or of seeing other nuns doing so.

[134] The following passage from Sr Denise O'Farrell's evidence is typical of that given by the nuns concerning discipline:

> I never smacked the children. I always wanted to think they could come to me if necessary. If children came from broken homes, then it was a sad fact of life that often they would blame the nuns for the fact that they were in the orphanage and that did not make them easy. On occasion I found it necessary to punish the children but I never used physical force. My usual form of punishment was to ground children ... other forms of punishment

> would involve telling the children that they could not go for a swim in the orphanage pool, play games for a period. In other words, I did nothing more than what parents do to their children all the time when they are disobedient.
>
> ...

[135] Sister Agnes' evidence was to similar effect. She said:

> I never witnessed A being verbally abused, harassed, harangued or screamed at by any nun. I certainly did not do so myself. Of course, in the course of daily life certain sisters may have either raised their voice to or reprimanded A to correct her. The girls were constantly in a group so, in order to be heard, nuns would occasionally have to raise their voices above theirs. It was never raised to order individual girls to do things. I do not recall having to discipline A directly in my capacity as superior.

[136] Sr S denied beating the plaintiff about her head or injuring her ear, as claimed. The only time that she can remember ever touching a child was an incident when 10 of the under eight year olds repeatedly got out of bed after they had been told to settle down. On the third occasion that she found them, she smacked each of them with her hand on their pyjama clad bottom.

[137] She agreed that if a child had been naughty she may have told her that she was "wicked", "selfish", or "ungrateful". She may also have threatened her with gaol, but she disputed using the other words alleged.

[138] Sr Ligouri remembered the school hall incident about which the plaintiff complained. She recalled allowing her to use the hall on a previous occasion to prepare for a play and reprimanding her when later she saw her using it again without permission, but denied ever strapping her. She also denied strapping DS or strapping any of the children at the orphanage, rather than at school.

[139] More generally, she said that corporal punishment was administered at St Joseph's in the 1960s and 70s, just as it was in other Catholic and State primary schools in New Zealand, and this was confirmed by Fr O'Neill. Teachers used the strap to punish acts of disobedience, for example, playground bullying. But more often than not a child who transgressed would be verbally reprimanded. There were no specific rules on corporal punishment and how and when the strap was to be used. It was a matter of judgment for the individual teacher. In the plaintiff's time all staff

at St Joseph's School had a strap available to them. She kept hers (a leather strap like a barber's strop) in her office. She did not usually carry it about with her and did not recall other teachers doing so either.

[140] Although she did not regard herself as a strict teacher, she was not surprised that others regarded her as such. While she did not accept that she had a terrible temper or was nasty, she acknowledged that sometimes when she corrected children about their lessons, she would have come across somewhat sharply if she felt it warranted. She denied that she would have used the term "loser", as it was never part of her vocabulary.

[141] Sr Justina, who had left the orphanage by the time the plaintiff arrived, agreed that Sr Ligouri was strict with the children but said that she was interested in their welfare and wanted them to achieve their potential. She also acknowledged that a child might have thought Sr Gerardine sarcastic. She did not remember the strap being used routinely at the orphanage, although acknowledged that it was used occasionally, for a serious "infraction". She did not carry a strap around with her, and did not remember others doing so.

[142] Mrs Jenkins agreed that most discipline was in the hands of the classroom teacher. In her 30 years as a teacher at St Joseph's School she never heard or saw anything to suggest that children were being excessively punished.

[143] The nuns' general recollection was that the plaintiff was a very nice child, who, although sometimes a little sad or withdrawn, never caused any problems.

[144] Sr Theodore, who taught her in standard 3 (1970), described her as

> an average child ... trying very hard in her classes and ... very well behaved.

[145] The nuns uniformly denied any emotional abuse. Those who were asked all said that they ate the same food as the girls, that it was wholesome and that there was plenty of it, although they did acknowledge that there was no room for fussy eaters.

[146] They also denied the allegations of lack of privacy and enforced uniformity. For example, while they acknowledged that, for administrative convenience, the girls' school uniforms and similar clothing was numbered, they said the girls' own clothing was not. And they emphatically denied that this clothing was ever taken from the girls, or that they were known by their laundry numbers. They insisted that Christian names were used.

[147] They accepted that outside help, in the form of counselling or other assistance to help a child deal with their family situation, was never sought. Sr Denise O'Farrell, for one, did not think it necessary.

[148] Nor were psychological services for difficult children readily available.

[149] Mrs Jenkins said that to the extent that help was required, the school used to rely on the local parish priest, who regularly visited the school. Sometimes children, particularly slow learners, were referred to her. She thought that that was probably because, from her experience as a mother, she was a little more understanding or tolerant of those children than the nuns.

Catholic Social Services' involvement during the St Joseph's years

[150] Catholic Social Services was developed as a separate arm of the Catholic Church during the 1950s. Peter McCormack was appointed director of the agency in 1968 and remained in that position until he went overseas in mid 1977, although the amount of individual social work that he was involved in declined after 1971, when he became a parish priest.

[151] Mr McCormack's evidence was that the vast majority of children in children's homes in the 1960s and 70s were from socially dysfunctional families; there were not many orphans. The prevailing approach of the agency, over the years that he was in charge, was to try to put children into foster homes where they could have a normal family life, rather than living in an institution. Alternatively, they tried to get them back to their parents as soon as possible. But often the parents were set on having a new life, and did not want them.

[152] Part of the work of Catholic Social Services at this time was the placement of children in family homes during holiday periods. Invariably the families providing these homes were members of a Catholic parish within the archdiocese. Their name would be forwarded to Catholic Social Services by the parish priest. They were volunteers. They were not paid. Before a child was placed with a family, Catholic Social Services would endeavour to carry out an independent check of the home. Sometimes this involved a social worker from the agency physically checking the placement. Mrs McGreal's practice was to telephone and speak with the mother of the family. On occasions Mr McCormack sought references from people. He said that everyone was vetted by someone other than the local parish priest, although the final recommendation always came from him.

[153] At the end of the placement, the social worker would take the opportunity, when picking up the child and returning them to school, to find out how things had gone and whether there had been any problems.

[154] This type of individual contact was not possible once a child was back at an institution like St Joseph's. He said that the nuns provided bed and board and some comfort and spiritual advice, but that was all. There was little individual counselling and indeed no formal counselling, although referrals could be made to the psychological service of the Ministry of Education, and such a referral was made for LA.

[155] Mr McCormack said that during the time that the plaintiff lived there, he used to visit the orphanage every two or three months. In the course of doing so he would talk to the nuns about the girls. He would also talk with them. Any such discussion with a girl would take place in the large room used as a playroom and gym. His recollection was that there was always a nun present when he spoke to any girl, and that the nuns were very protective.

[156] He disputed that he ever saw DS on her own and was adamant that he did not have regular meetings for up to half an hour with any one girl.

[157] In the early years after the A children came into the care of Catholic Social Services, in line with his view that children were better placed with their parents, he endeavoured to persuade their mother to have them back, and, to that end, offered to help with food and clothing and even to provide cheap accommodation. But to no avail. Mrs A felt that they had changed for the better. She did not want to go back and re-expose them to Mr A's violence. Mr McCormack's perception was that after she found a new partner she was not prepared to let the children be part of her life, as Mr F was not keen on having them.

[158] On 21 August 1970 Mrs A was granted a decree nisi in divorce from Mr A. During the following year there was an ongoing dispute between the parents concerning custody. In that context, on 12 February 1971, Mr McCormack sent a detailed report on the seven A children to the Masterton District Child Welfare Officer. He said:

> 1. The care of the A children has been the concern of this agency for some time; their future and the uncertainty of parental affection and concern also raises a question of considerable importance.
>
> ...

[159] Then, having explained how each of the children came into the care of the agency, he commented in relation to the plaintiff:

> A is in Std. 4 at St. Josephs Convent School and like her sisters, lives at St. Josephs Girls Home. Of all the children who desperately need attention and recognition from the parents, it would seem that A possesses this need in the extreme. She literally craves affection and will do anything to obtain it. In the setting of St. Josephs this does make her seem somewhat a behaviour problem.
>
> Apart from this feature, it is anticipated that A 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 at Wainuiomata, who do 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, A will respond.

[160] And then he commented on the parents, and the ongoing role of Catholic Social Services, saying:

> 4. <u>Parental Contact</u>:-

Probably the most disturbing feature of this family problem is the considerable disinterest shown by the parents. While it may be true to say that Mrs A has indicated over recent months a little more concern and attention than she did previously, I feel obliged to point out that it is only through my constant demands and pressures for her to do so.

With regards to Mr A I have seen only a disturbing influence which the children could have well been without. Apart from a very recent contact in the last few days, Mr A has given no evidence whatsoever of the true nature of his concern for his children in any tangible way. There have been no letters, visits, birthdays or Christmases remembered for as long as these children have been in my care. Occasionally, to be fair to him, he has phoned Sunnybank or St. Josephs, and at these times, has been under the influence of alcohol. These telephone calls have been both confusing and disturbing for the children receiving them. Elaborate promises have been made and never kept and the number of times that the boys, especially at Sunnybank, have awaited the arrival of their father, leaves me no doubt as to his total inadequate parental nature.

With regards to Mrs A unfortunately a similar but not quite so callous situation has developed. Mrs A's problems would seem to me, to stem from her own inadequacies and needs. It is my impression that these children have grown up around about her, for she was married when she was particularly young and she has never really come to grips with the fact that she is their mother.

Personally, I am not inclined to blame Mrs A too much and with the more regular discussions I have had with her over the last two years, it would seem to me that despite the circumstances of her present involvement, she does show the type and quantity of emotional concern of which she is capable. Without doubt, this is far too limited for the emotionally hungry seven children she has brought into this world.

Knowledge of her present situation will no doubt be made through other avenues and I feel that at this stage, that despite the social consequences, she alone may be able to provide limited and occasional affection and home surroundings to the children in ones and two's [sic].

5. <u>The Economic Situation</u>: -

I must make it quite clear in this report that Mr A has never at any stage contributed to my knowledge, any money whatsoever for the upkeep of his children. It might be true to say that in the physical and material order, he has completely neglected them. After many months of constant persuasion, the Family Benefit Books were eventually made over to Catholic Social Services. This is the only contribution that Mrs A makes, except that it might be stated in fairness to her, that she has in recent years, when occasion has demanded it, bought incidental clothing for the children.

If I was to calculate the total cost to Catholic Social Services these children have been since coming to our care, I am sure the figure would reach some thousands of dollars. I am not particularly worried about the financial consequences, but I do indicate it as a valid type of the neglect which Mr A in particular and Mrs A in her own way, have been guilty of.

I would hope that some enquiries are made into the capacity and adequacy of both of these parents before any judgement is made concerning the future care of the seven children. From a personal point of view it would seem to me that Mr A has not exercised suitable parental interest and probably, I feel there is little likelihood, that he will do so in the future.

Mrs A is a victim of her own circumstances yet I feel there is some little hope that she might effect some care in a limited way for her children.

Looking back over the last two years and more recently for some of the younger A children, we have felt that the security and affection which has been given has helped a great deal in the general settling down of the members of this family.

The responsibility to accept these children for care was made simply on the basis that they needed adequate and constant assurance, that there was somebody in the community to look after them and their needs. Sub-consciously I am quite sure that all the A children realise the inability of both parents to really exercise their proper parental function.

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 Mr A though for the future, if Mrs A was to retain custody, we would be willing to work with her and in fact counsel her to have more intimate and personal involvement with her children.

[161] The Child Welfare Officer included and expanded upon this information in her report to the Registrar of the Supreme Court of 2 March 1971. She said:

Background History:

It appears that this marriage was unstable and unsatisfactory from the outset. Mr and Mrs A were married when Mrs A found that she was pregnant with RA. Mrs A claims that she was unwilling to marry, but that at the time she felt she had no alternative.

Between 1957 and 1965 this couple are said to have shifted 14 times. They then spent 4 years, until the marriage broke up, living in a house in Carterton provided by Mr A's parents. During those four years there were frequent arguments followed by short separations. Mrs A contacted this office on several occasions, complaining of her husband's excessive drinking habits, lack of finance and on one occasion, the family's lack of food. It was noticeable that in spite of her complaints of lack of finance, Mrs A was usually well dressed.

The couple eventually separated in 1967 and the children were placed in various Homes.

...

Mr A: Aged 41 years.

Mr A is the adopted son of a Lebonese [sic] couple. He appears to have been over-indulged in his youth and has never been encouraged to face his responsibilities. The cultural .... pattern of life seems to favour the male in the household, and to justify any male pleasures at the wife's expense. Mr and Mrs A (Senior) have frequently come to their son's aid when he has been in financial difficulties.

Early last year Mr A served a term of imprisonment for non-payment of fines. He is also said to have been imprisoned on several occasions for nonpayment of maintenance. Although he denies this, I understand that Mr A frequents the local Hotels.

Mr A claims to "love" his children, but certainly does not convey this impression by his actions. I feel that this man is more interested in having his children with him to uphold the A name, rather than any real affection or consideration for them.

Should Mr A gain custody of his children he intends to bring them to his mother's house in Carterton. She would supervise them during the day.

...

Finance:

... I do not think that Mr A works. I have frequently seen him wandering in the streets during the day.

...

Mrs A: AGED: 31 years

Mrs A is at present working [for a bank in] Upper Hutt. She earns approximately $49.00 per week. This woman has formed a defacto relationship with Mr F aged 44 years. He is a married man with one dependant child. ...

This couple live in a luxuriously furnished home which they are at present renting.

Mrs A openly admits that she would be unable to manage the children, and has difficulty in controlling them, particularly PA and AA. She claims that she did not want 7 children and does not see why she should take financial responsibility for them if her husband does not do the same. On occasions she has supplied some clothing for them.

Mrs A appears to have little affection for her children, but does take them out for the occasional outings. She does plan to have them for some weekends in the future. It seems that this attitude has only been brought about by constant pressure from Reverend Father McCormack.

Should Mrs A gain custody of these children, she intends to continue with the present arrangements, i.e. that the children remain in the care of the Catholic Social Services.

> I can only say in conclusion, that I have grave reservations over either parents ability to give these seven children the care and affection that they so desperately require.
>
> ...

[162] In the event, when the decree nisi was made absolute on 24 November 1971, Beattie J made an order giving the custody of all seven children to Mrs A, reserving reasonable access to Mr A, who was ordered to pay Mrs A maintenance of $4 per week for each child.

[163] Mr McCormack said that he took a particular interest in the A children after it became clear that they were to be left in homes on a long-term basis and remembered talking with the plaintiff, and possibly also both her sister, and their inevitable questions about when they would go back to their parents. However, he categorically denied any sexual impropriety with either the plaintiff or her sister, KA (which the plaintiff also hinted at, but did not present any evidence to substantiate). He denied being in the front room alone with the plaintiff or sexually abusing her. He said that the alleged incident did not happen. He also denied that he let her go to families where she was sexually abused. He was not aware that she was abused by caregivers and regards her allegations against them as bizarre.

[164] In the same vein, he dismissed the allegations made by the plaintiff during sessions with Dr Marks to the effect that he had arranged for the A children to go into care because he wanted to sleep with their mother, and LA's allegations about exorcisms. He said that he met Mrs A no more than five or six times and that all his dealings with her were entirely professional. Secondly, he had never performed an exorcism in his life, nor was he aware of any exorcism being performed in the Wellington Diocese.

[165] The plaintiff's holiday placement in Wainuiomata, referred to in Mr McCormack's report to the Child Welfare Officer, at [159] above, was arranged by Mrs W directly with the nuns at St Joseph's. It seems that Catholic Social Services only became involved in arranging placements for her in 1971, after the Ws moved to Rotorua. Certainly Mrs McGreal only became the plaintiff's social worker in late 1971 or early 1972, which is when her file with Catholic

Social Services begins. Mrs McGreal had earlier arranged a holiday placement for LA with a family in Taita, which led to a foster placement during 1972. She did not make arrangements for the A boys. That was the responsibility of Mr McCormack and later, Anton Roest.

[166] After all these years, Mrs McGreal cannot remember whether, when she was asked to keep a weather eye on the plaintiff, she travelled out to St Joseph's Orphanage to meet her, or whether she waited for an issue to arise. She thought that she probably saw the children at St Joseph's as a group.

[167] What is clear is that she arranged for the plaintiff and LA to stay with the Ss over the 1972/1973 Christmas holiday period and then, at the plaintiff's request, arranged what, it was hoped, would be a long-term foster placement for her with the Ms. Mrs McGreal's note recording this move, and the process leading up to it, is dated 4 May 1973. It states:

> A has not been very happy this year at St. Josephs – as a result of social friction within her peer group. There are four older girls, Form II, and there has been constant shifting of friendships, within the group which has resulted in A becoming unsettled and depressed. She was also involved with two of this older group in petty shop-lifting, not through any real desire to steal, but mainly to gain social acceptance by the other two girls involved. A was the only one of the three to show sorrow and guilt for what she had done, which would indicate a social conscience. All were punished equally.
>
> Over a period of two months, I was involved in group counselling for sex instruction of these older girls, and as a result formed a relationship with A. She asked to speak to me privately at the end of one of these group sessions, and begged me to find her a foster home, threatening to run away if I did not do so. She also phoned me on one occasion again saying she would run away, and I spent some time counselling her on the phone, and persuading her to stay, and trust me to take some action.
>
> The decision was therefore made to find a foster home, for three reasons:-
>
> 1. A has been at St. Josephs for too long a period, with possible risk of institutionalisation.
>
> 2. To break the influence of the other girls in the group, with A being led into further trouble, in order to gain approval by her peers.
>
> 3. Hopefully, that she may be retained in the foster home through her career at secondary school, starting Feb. 1974.
>
> She left St. Josephs on 4 May 1973, at the start of the holidays, and has moved into a foster placement with:

> Mr & Mrs M,
>
> This foster home is on a trial basis until the end of 1973 to see how the Ms and A relate to each other. Probable day school – St Mary's, 1974.

Placement with the Ms

[168] Initially the placement seemed to be working well. In July 1973 Mrs McGreal recorded in some detail the problems that the plaintiff was having leaving one group of friends and making new ones at her new school, saying:

> We talked about this in our interview, and the difficulties of moving into a new school when friendships are already established, and it is hoped that she may be able to put into action some of the aspects we talked about. ...

[169] Mrs McGreal then went on to record her views about the capable way in which the foster parents were handling the initial problems, including the rules that they had established and the steps that they had taken to assist the plaintiff to settle.

[170] Unfortunately, however, at the beginning of the August holidays there was a crisis in the relationship between the plaintiff and the Ms which could not be resolved. Mrs McGreal noted that the plaintiff reacted to discipline which Mr M imposed following his return from an overseas trip. She created a scene and demanded to see her.

[171] In her file note of their meeting Mrs McGreal recorded that:

> We talked over her relationship with her foster-parents in considerable depth and many suggestions were made to A as to how she could help the situation as she is anxious to remain in the foster home situation and is genuinely trying to make it work. It would seem that both she and the Ms are trying too hard and the child is reacting to a lack of relaxation in their relationship in the home environment.
>
> It was suggested to A that we have a joint counselling session with Mr & Mrs M but she was reluctant to do this as she feels inadequate to express her opinions and feelings to Mr M. It was therefore agreed that I would talk to them and she gave me her permission to express these feelings on her behalf. I also emphasised that I would expect her subsequent to this to attempt to communicate directly with the foster parents. A related well to me in this interview and we were able to explore to some extent her own feelings towards her mother, father and the other members of her family. I feel that A is beginning to accept the rejection by her mother and the whole A family situation and is desperately looking for acceptance as an adult and an individual by the foster parent.

> There are signs of considerable social deprivation and gaps in social learning as a result of her long years in the institution and it is doubtful whether these gaps can ever be filled and to some extend [sic] she will always be a deprived personality. This is particularly so in the sexual area and her relationships with males.

[172] Mrs McGreal met with Mr and Mrs M on 2 September 1973. At the interview Mr M is said to have expressed concern that:

> ... emotionally [the plaintiff] was at the level of a seven to a eight year old but that her physical and sexual maturity was that of a normal 13 year old. The combination of these two factors made her difficult to help in the family situation. He felt her obsession of [sic] sexual matters made her a problem as far as freedom and discipline were concerned and that she was "a ripe plum ready to drop into the lap of the first available male".
>
> ...

[173] However, Mrs McGreal also noted:

> Both Mr & Mrs M realise that A's main problem has been her inability to relate to Mr M both as a person and as a male figure; that she is unable to relate to any male as such and that this was an area of deprivation which it may never be possible to completely diminish.
>
> ...

[174] At the same time as the issues with regard to the foster placement were being worked through, Mr A, encouraged and assisted by his son RA, had been attempting to re-establish contact with all his children.

[175] On this issue, Mrs McGreal recorded:

> From this it has emerged that A, whilst having few real feelings towards her father, is prepared to manipulate the situation to her own advantage and to exploit his willingness to provide gifts and presents. She indicated to me that she is ambivalent about returning to live as a family with the father as suggested by Mr A; being afraid of her father when he is drinking, and yet longing like most deprived children, for a family of her own. The Ms are trying to help her to work through these feelings whilst at the same time providing warmth and security. At this particular time I do not feel that A has the maturity to make a real decision for herself and I have outlined the reality of the legal situation, that she is still in her mothers custody, and our care, and that any possibility of custody by her father is remote.

[176] Subsequently, the Ms decided that they were unable to keep the plaintiff in the foster placement with them. Problems they identified were:

- Her unacceptable behaviour;

- Her failure to accept authority;

- Her refusal to communicate with the family or to take any part in family activities; and

- Her acting on advice from her brother, RA as to "how to get out of a foster home".

[177] She was told of this development at a meeting with Mrs McGreal and Mr McCormack on 29 November 1973.

[178] Mrs McGreal's file note of the meeting records:

> ... It was decided that ... she would be interviewed by Father and myself. We would accept the responsibility of making the change of placement.
>
> This was a highly directive interview, with A being told by Father in no uncertain terms that she had been responsible for wrecking her own foster placement. She had listened to the confused ramblings of RA instead of accepting guidance, and that any problems during the last few months had been of her own making, due to her own lack of responsibility, and quest for freedom (as she saw it).
>
> She was told that we had three choices, to send her to her father, to make her a State Ward, or to retain her in our care, and if the third choice was made, she would have to do exactly as she was told, with no repetition of the chaos and problems she had caused by her running away and general selfish attitudes.
>
> It was interesting to see her reactions in this interview situation – she was firstly embarassed [sic] and giggly, then pushed her chair further and further into the corner of the room, all the time glancing towards me for support. There was simply no emotional reaction, she was not worried, tearful, repentant, or even concerned by what was being said. She showed no hostility or agressiveness [sic] or resentment. The words simply flowed past her, with no signs of internalization.

St Mary's College and life as a boarder

[179] Catholic Social Services' solution to this situation was to arrange for the plaintiff to go to St Mary's College as a boarder. They paid the boarding fees, her school uniforms and out of pocket expenses.

[180] The nuns who gave evidence about St Mary's had only a limited recall of the plaintiff. Sr Patricia spoke of the boarding establishment. Sr Julian was the Principal of the college from 1975 to 1982 and Sr de Porres taught at the college from 1975 to 1979 and was Principal there from 1983 to 1995.

[181] In 1974, when the plaintiff started boarding at St Mary's, there were 56 boarders. By 1976, when the hostel closed, numbers decreased to about 30.

[182] Boarders had the whole weekend off once a term. One Sunday a month they could go out for the whole day. At other times they could go out on Sunday afternoons and after school on Fridays provided they were back by teatime.

[183] Sr Patricia did not recall the plaintiff having any behavioural problems at either the boarding school, or at the school, where she was her form teacher in 1977. She seemed quite deferential; she could be polite and she never flew off the handle. Apart from the fact that she had to have holiday placements arranged, Sr Patricia did not regard her as any different from the other boarders; she never indicated that she was unhappy; she simply blended in.

[184] Sr Patricia had no recollection of the incident in which she is alleged to have slapped the plaintiff on the stairs outside the dormitories. She denied that it would have happened or that she would have threatened the plaintiff, as alleged.

[185] Sr Patricia did not believe that the plaintiff was treated any differently from other pupils with regard to the quality of the education provided for her. She said that St Mary's had a good reputation as a secondary school in the 1970s.

[186] Sr Julian's evidence was that the college taught the same curriculum as State schools, and was regularly inspected.

[187] In line with general practice at all Catholic secondary schools at this time, the girls were not subject to corporal punishment.

[188] If there was a problem with a student the first point of contact would be the parents, or, in the case of a boarder, the boarding mistress, who was expected to deal

with the matter appropriately. In practice the Psychological Services Division of the Department of Education was never called upon, because State schools had priority. Other avenues for help were the priests at the Basilica next door, and, on rare occasions, the Police Youth Aid Officer was called in. Sometimes parents contacted Sr Catherine Hannan, who was a counsellor with Catholic Social Services, but the school did not. Nor could Sr Julian remember having anything to do with Mrs McGreal. There was no special coaching available if a student was having trouble academically.

[189] Sr de Porres said that in the 1960s and 70s there was no funding available to help students suffering from emotional trauma. But in any event, she doubted that the nuns would have picked up underlying psychological problems. They had no training to do so.

[190] Sr de Porres remembered the plaintiff from the times when she supervised at the boarding school. She struck her as someone who never rocked the boat. Nor did she ever approach Sr de Porres, in her capacity as Senior Dean of the college, for help. And Sr de Porres did not approach her because she had no concerns; she did not know of her family circumstances or of her involvement with Catholic Social Services. The plaintiff had a reputation for being a plodder in the academic sense, but played her part in the life of the college and achieved in the sporting arena. She was a member of the college's athletics team in both 1976 and 1977 as a shotputter and also played netball for the school.

[191] The only records of the plaintiff's time at St Mary's are, once again, those on the Catholic Social Services file.

[192] The file notes indicate that from 1974 to 1976 Mrs McGreal was the plaintiff's main point of contact at Catholic Social Services. She liaised with Sr Patricia and dealt with any issues that arose in relation to the boarding school situation or the school generally. She also endeavoured to monitor or control contact with the plaintiff by Mr A and RA. To that end, she wrote on 21 February 1974 to Sr Patricia saying:

> Further to our talk the other day, Father McCormack has asked me to get in touch with you regarding a recent interview he had with CA, father of A, regarding access to the A children who are in our care. The legal situation is that A's mother has the custody of the children, but they are in our care under order of the Court, and Mr A has limited access. However, as you may be aware, Mr A caused considerable problems last year, by contacting the foster homes and institutions direct, demanding immediate access to the children, and this contributed considerably to the break-down of A's foster placement.
>
> Father McCormack has put the agreement and the conditions in writing to Mr A, and has asked me to quote to you the following paragraph from this letter:-
>
> > "The other condition was as you will readily recall, that we would cooperate with the access, as long as the placements of the children, be they foster homes or Institutions, are left entirely to the contact of Catholic Social Services and that any dealings, worries, or concern you may have, would be directed to the Director of Catholic Social Services. In other words, I would hope that these children would be able to assume an uninterrupted pattern of life in the foster home or institution, watched over carefully by ourselves and that there would be no interference whatsoever with the foster parents or person in charge of the Institution by yourself or members of your family – including RA. This has been in the past, one of the greatest confusions that the children have had to live with, and I feel that it would be more appropriate for them if we can tidy up the lines of communication so that their emotional disturbance will be at a minimum."
>
> A knows that if she wishes to visit her father she has only to get in touch with me, and a supervised visit will be arranged, but if Mr A should attempt to get in touch with you direct, he should be referred to Catholic Social Services. We hope this situation will not arise, and there will be no repetition of our previous problems.

[193] That is the last mention on the file of trouble with Mr A. Thereafter, reports from Sr Patricia were that the plaintiff had settled down reasonably well in the boarding school with "no trouble, other than over-eating and [being] scatty".

[194] However, there was a crisis in the classroom situation. The plaintiff was reported to have been taken to the head mistress following an altercation with her form mistress. A file note of 31 March 1974 records:

> Threatened with expulsion. Mother James intervened and had personal talk with A. Told her that they wanted to help her and did not want her to miss out on opportunities of boarding school, but requested her co-operation.

[195] Eight days later, Sr Patricia reported that the plaintiff had been placed in a different class at school under fairly strict discipline and was having to work hard academically. But in reaction to this and the boarding school situation she was being emotional, difficult, non-co-operative and had led a group of girls in a runaway attempt.

[196] Another "highly directive interview" followed, in which the plaintiff was:

> ... given her last chance to try and improve her behavioural pattern. As usual A made excuses that it was every-bodies [sic] fault but her own, but it was explained to her that she must face the reality of the situation; that the Sisters were giving her every opportunity, as were we, to make the most of the next few years. If she persisted in her present behavioural pattern, there would probably be an expulsion from St Marys and that we had no other alternative to offer. The choice was hers and the opportunity.
>
> She accepted this better than in our previous direct interview and is just beginning to show some small degree of maturity. She is however not very bright, highly institutionalised personality; with few ego-strengths and a low self-image.

[197] After Easter there were problems with money. Catholic Social Services' budget allowed the plaintiff pocket money of $1.50 per week, in the expectation that 50 cents of that would be banked and the balance of $1.00 would cover toiletries, fares and purchases at the school tuckshop. In addition, she had a clothing allowance of $30 per term. A social worker acting when Mrs McGreal was on annual leave recorded that:

> Several requests for money after Easter which were refused. The $2.00 appeared to last her until the end of term.
>
> ...
>
> A arranged for her portrait to be painted at a cost of $50.00, Sister Patricia was informed and spoke to the nun concerned.
>
> Further conversations with Sister Patricia revealed that A had been noisy at night and made little constructive use of her free time. We both felt that this was a result of A having to toe the line all day.
>
> She finds Sister Eulalia's discipline difficult to maintain.
>
> ...
>
> A further phone call from Sister P. revealed that A had a large toiletry bill something between $16.00 and $19.00. When asked she denied spending all this. Father had a word with her regarding this and her bostrious [sic]

behaviour at night. Also there were two or three instances when she left the school grounds in the company of other girls without telling the appropriate mistress where she was going. In one case this was discovered because she was asigned [sic] to read the prayers at Mass and arrived half way through.

A final phone call from Sister P. to say that A had arrived at school with a new blouse which she had bought at McKenzies apparently she used the money left over from RA's $5.00 and some given to her by EA? And someone else she could not remember. No action taken except to say that if she received any further money she was to hand it into Sister P.

[198] By August 1974 Mrs McGreal reported that:

A has made considerable progress during her first six months at St. Mary's Boarding School. The Sisters have placed her with the more stable girls within her peer group and she has also been transferred to a School class with a strong directive teacher. The increased maturity that she has achieved as a result of these measures was very apparent in this interview. She has lost many of her childish mannerisms and was able to speak clearly, rationalize her thoughts and conversation and relate in a mature manner in the interview situation.

She came along to the interview with a list of points she wished to talk about. We were able to work through these in an orderly manner.

...

She was able to for the first time to see both her father and mother as inadequate people with personality problems and accept them as such, without too much emotional involvement. She also wanted to discuss with me, LA and MA.

...

This was a most interesting interview in that for the first time A showed an acceptance of herself and of her parents and siblings. This is the beginning of the maturity.

[199] Mrs McGreal's primary concern after that seems to have been in arranging holiday placements. In February 1974 she had noted that:

Attempts to find a possible home setting for weekends, free Sundays etc, have so far been unsuccessful. EA, her aunt was approached to see if she would provide this, but had to decline.

[200] But Mrs McGreal persisted with her endeavours to obtain family assistance. On 16 September 1974, she wrote to the plaintiff's maternal grandmother in Upper Hutt as follows:

Dear Mrs. J,

> I am taking the liberty of writing to you rather than trying to get you on the phone, with regard to possible arrangements for A for the coming Christmas holidays. As you know, she turns 15 on the 16th December, and like all girls of this age, she is anxious to get a job these holidays. I feel she would be better to do so, and to keep occupied as well as earn a bit of money, rather than have her go off to a holiday home in the country as she has in the past. She is doing nicely at St. Mary's, and maturing fast, I have noticed a lot of difference in her this year. But it is important that she feels as much like the other girls as possible and not just a child in the care of a welfare agency, and it is this aspect that concerns me now she is growing up.
>
> I just wonder if you would consider taking her for the December-January holidays, and what chance there would be of getting her a job in the Upper Hutt area. I know one has to get in early, as the student holidays jobs soon go. I hesitated to ask you this, as you have been so good having both her and LA in the past, and shall understand if it is not convenient. I shall then have to try to find her another family to live with in Wellington, but this will not be easy over that particular period.
>
> I would really like to have a talk to you about both A and LA, one of these days if we could arrange it, they are very much on my mind at the present, as both are at the stage when they are missing their mother very much, and cannot understand why they cannot see her, or their new brother.

[201] This resulted in Mrs A having the plaintiff to stay with her during the 1974/75 Christmas holidays. While this contact did not bring about any long-term changes, Mrs McGreal's final file note, dated November 1975, ended on a positive note. It states:

> A spent Christmas holidays 74/5 with her mother, Mrs. A in Lower Hutt. As A was reluctant to go to a new holiday home, understandably at 15 yrs. of age, I visited Mrs. A to ask if she would consider taking her for these holidays. Good interview, in which I explained our problem – and tried to convey some insight into A's feeling about facing new families every holiday, and being a recipient of "charity", however kind and understanding these people were. To my surprise, Mrs. A not only agreed to take A, but also arranged that LA should go to the extended family for these holidays.
>
> However, this was short lived interest in her children, as the baby is the centre of attention, and Mrs. A, on my follow up visit after the holidays, had a long catalogue of complaints about A's behaviour, and a thousand excuses for not taking her again. Mrs. A. is hard, rejecting, and very limited intellectually, quite unable to gain any real insight into the feelings of her adolescent children. She really does not care, though I felt it was important to A to maintain some limited contact with her mother.
>
> A has survived at St. Mary's over 1975 – there have been some behavioural problems in the boarding school situation, and a poor relationship between her and Sister Patricia, but there are signs of greater maturity, and she has been given regular supportive counselling both at the boarding school and in the office. She is showing improvement academically, though not very bright, and is prepared to continue at school in 1976 to attempt School

> Certificate. ... KA's foster parents, Mr. and Mrs. N, now living in Featherston, have come to the rescue with holiday accommodation, for A, in 1976, and she has benefitted [sic] tremendously from their warmth and understanding this year. She has fitted in well with their family, and accepted without question the mores and rules of their family and home. Her behaviour whilst with them has been exemplary, though Mr. and Mrs. N have had to work through some jealousy by KA. However, this has been handled, and KA now accepts that A sees the Ns as a home base. Mr. and Mrs. N have indicated that they would be prepared to continue this contact through 1976.
>
> As the Ns are short of accommodation for the Christmas, 75/6 period, A will be staying with Mrs. N, Snr. in Taita. A sees me as a mother figure, as well as Social worker. This has been inevitable, though the relationship has been attempted to maintain professional. She literally for many months had only the Agency as a home base, and myself her only stable figure, so she related to me as a maternal figure.
>
> Conclusion. A has maintained a steady improvement both academically, socially and emotionally throughout 1975. She is developing insight into herself, and an objectivity about her parents and family. She will need continuing support for some time yet, but the progress is encouraging.

[202] While there was a degree of hope of finding a foster placement for the plaintiff for 1976, none was forthcoming. Accordingly, she returned to the boarding school for that year.

[203] Mrs McGreal left Catholic Social Services during 1976. No one took over the type of role that she had assumed. If anyone, thereafter a Mrs Sellars was the main contact person. She was the person to whom caregivers wrote.

[204] Kitty McKinley joined the full-time staff of Catholic Social Services at the end of 1976 and became social worker for AA and PA, who were then at boarding school in the Wairarapa.

[205] In 1977, when the plaintiff was living with the Ds and still attending school, Ms McKinley organised a reunion for all the A children. She offered to talk with the plaintiff, if she needed someone, but the plaintiff said that she talked with her older sister, KA, and did not want any counselling. Because of her age, Ms McKinley respected her view.

Living with the Ds

[206] The plaintiff went to live with the Ds, in a property at Konini Rd, Hataitai, owned by the St Vincent de Paul Society and administered by Catholic Social Services, in early 1977.

[207] Mr and Mrs D had previously run a family home called Garindale, on the site of the former Sunnybank Orphanage in Nelson. LA had joined them there in 1975 and returned with them to Wellington at the end of 1976.

[208] There were six foster children at Konini Rd: A and LA from the A family, three boys from another family and a fourth boy. In addition, Mr and Mrs D had two young children of their own, born in 1975 and 1976.

[209] Later in 1977 the Ds and the eight children moved into the Ds' own home in another Wellington suburb. When their youngest child was born in 1978 there were eleven people in the household.

[210] Mr and Mrs D are both teachers by profession. Both had earlier been members of religious orders. Mr D was a Marist Brother and Mrs D a Sister in the Society of the Sacred Heart. At the time that the plaintiff was with the family, Mrs D was a full-time mother and Mr D taught at a nearby Catholic school.

[211] At 17, the plaintiff was the eldest of the children in the home. LA was 13.

[212] After they moved to their own home the Ds supported the family on payments of $15 per week per child paid by Catholic Social Services, together with clothing allowances, in the form of vouchers payable to retailers. From those funds Mr and Mrs D fed and cared for the children and paid them $2 per week pocket money. They paid for things like birthday and Christmas presents and holidays from their own resources.

[213] In addition, during the two and a half years that the plaintiff was with the Ds, Catholic Social Services paid for her driving lessons, all the clothing and gear required for her school sports activities, and, after she had left school, for her dress and tickets when she was presented at the St Mary's debutante ball. She and Mr and Mrs D shared the costs of providing drinks at the pre-ball party.

[214] Mr and Mrs D said that notwithstanding the number of children in their care, they endeavoured to run their homes as normal family homes. While they were not told of any issues to do with the plaintiff requiring particular care, they were generally aware of her institutional history and were forewarned, having previously cared for LA, of how she might react to being in a family home after having been at a boarding school and an institution. In particular, they were aware that in an institution it is very easy to play one person off against another. They also knew that some foster children had greater needs than others but were not aware of any support systems which they could access through Catholic Social Services.

[215] In their view, the plaintiff was a perfectly normal, slightly stroppy, teenager, who always felt that everybody else was getting more attention than her. They were aware that she was conscious of the financial disparity between herself and some of the others at St Mary's, and how she hankered for the "high life". But they did not think she was deprived. Nor were they aware of her being upset or down.

The plaintiff's psychiatric condition

[216] All parties accept that the plaintiff is mentally unwell. The differences between them concern the cause or causes of her disability.

[217] For the purposes of this proceeding she was assessed by two experienced and well-regarded psychiatrists: Dr John Crawshaw and Dr Anthony Marks.

[218] In accordance with their obligations as expert witnesses, they conferred and, as a result of their discussions, prepared a joint statement setting out the matters upon which they agreed and disagreed.

[219] They agree that the plaintiff has been very disturbed throughout her adult life, with multiple areas of psychological dysfunction. In diagnostic terms they agree that she suffers and has suffered from depression, generalised anxiety disorder with panic attacks, alcohol abuse and possible dependency and that she has a mixed personality disorder of the cluster B type.

[220] They also agree with a diagnosis of post-traumatic stress disorder (PTSD). Where they differ in relation to this issue is upon the degree of reliance that can be placed on the plaintiff's recall of traumatic events.

[221] They consider that the following factors may have contributed to the disturbances in her adult functioning:

- Inherited temperamental factors which may have influenced her response to stress-like events and aspects of her adult personality functioning;

- A disturbed and dysfunctional first seven years of life, including traumatic events which would have predisposed her to later impaired functioning;

- Indications that she has some level of attachment to her mother and that she experienced serious parental loss, which continued to affect her through her childhood and is likely to have affected her adult functioning;

- The events which she alleges occurred at St Joseph's, if they did occur;

- The alleged sexual abuse. They agree that such abuse, if it occurred, would have had harmful enduring consequences and would be responsible for a significant portion of her adult impairment and disorder; and

- Indications that she was showing signs of being institutionalised and other disordered functioning when under the care of Catholic Social Services.

[222] The psychiatrists also agree that, over time, the plaintiff's attribution of meaningful events has changed, which has implications for the timing of and the context of causal links that she has made.

[223] Finally, they agree that, from a psychiatric point of view, the plaintiff has been disabled for most of her adult life, and continues to be so. Accordingly, they

consider that her capacity to submit her claim within the prescribed timeframe would have been reduced.

FACTUAL FINDINGS/COMMENTARY

Difficulties in ascertaining the truth

[224] Determining where the truth lies in relation to the plaintiff's factual claims has not been easy.

[225] First there is the obvious problem caused by the passage of time. It is understandable that after 30 or more years witnesses could not recall some events with any particularity, or at all. That does not mean that they did not happen, but it reinforces the need for caution when considering allegations about things that happened or were said or felt so long ago.

[226] Secondly, there is the absence of any records from any of the schools the plaintiff attended, or the orphanage.

[227] Thirdly, during the time that has lapsed some witnesses have died.

[228] Fourthly, and importantly, there is the plaintiff's ongoing disability. This manifested itself in the way that she gave her evidence. At times, the narrative ran smoothly; at others she suffered evident anguish as she re-visited particular events or situations. Sometimes she was emotionally stuck in a room or a corridor and we had to wait for her to get out of that place. There were also occasions when she responded as if she were a little child. She would close her eyes and say that she had to "talk to my little girl". No one in the courtroom at those times would have been in doubt that she was deeply affected by what she described. However, Dr Crawshaw and Dr Marks differ as to the weight that can be placed on those reactions and, in particular, whether they can be used as confirmation of the veracity of the events or whether her strong feelings influence her belief as to the truth of what happened, so that her account of her past is unreliable.

Psychiatric evidence

[229] In addressing this issue I found Dr Crawshaw's evidence about current psychological/psychiatric knowledge concerning memory and its disturbances and specifically, the process of retrieving memory, helpful. He explained that in order to retrieve a memory a person needs to be able to access memory traces. To do this they need association with events or cues or hooks. Sometimes this process is interfered with by the laying down of closely similar memories. In that case the stronger memory trace will more likely be recalled, but can be conflated or confused with the original memory. Sometimes information can be forgotten and then restored, once the appropriate cues or hooks are provided.

[230] Factors which are known to influence this retrieval include:

a) Recreating the context in which the event or memory task occurred. This involves the process of literally or figuratively retracing steps.

b) The person's emotional state, which can differentially affect their ability to recall information.

[231] Certain variables can affect a person's ability to work effectively and recall accurately. For example:

a) We can make up connecting events to smooth out gaps in our personal narrative. It is possible to implant false memories when a person is in a suggestible state.

b) Certain memories, related to painful or difficult experiences, can be difficult to access or bring to mind when required.

c) Recall of memory by trauma victims is often fragmented and somewhat disorganised. It is often disrupted by the triggering of vivid memories and strong emotional responses. Disassociation is often a feature of severe trauma.

[232] Dr Crawshaw accepts that there is a subset of individuals who have false memories or false recovered memories. These generally arise in situations of intense

therapy or exposure to other very suggestible states when memories have been implanted over a period of time. Although cautious about the recovery of accurate memories from total amnesia, he accepts that genuine recovered memories exist.

[233] He acknowledges that the plaintiff has strong feelings, but does not accept that they necessarily made her believe something was true which did not happen. In his view, it was equally reasonable that her strong feelings and her responses are consistent with the type of disassociation and display of affect that is seen when someone is responding to what he described as a "trauma script". Factors which he considered supported the veracity of her claim were that the account she gave to him appeared consistent with that given to others and that her sister appeared to describe similar experiences, suggesting that they were both exposed to the same psychologically damaging environment.

[234] Dr Marks, on the other hand, was more inclined to conclude that A believes to be real what she thinks and feels about something because of the intensity of her feelings. But those feelings could change, he said, as could her allegations. By way of example he cited the plaintiff's initial belief that her mother was responsible for placing her in St Joseph's, which she subsequently changed to believing that Mr McCormack was, and with that, shifted to him the hate and blame she originally felt towards her mother.

[235] Dr Marks considered that the change in the substance and emphasis of the plaintiff's recollections resulted from changes in her "self-explanatory narrative". He explained this as the process of picking through individual pieces of information and creating a mental set of ideas, which creates an explanation for these pieces of information. The explanation itself then becomes an item of strongly held belief. He referred to this as a "search for meaning", whereby given her strong desire to find answers, "feelings become meanings" in the plaintiff's mind.

[236] In line with this observation, Dr Marks also noted that the plaintiff exhibited a tendency to discredit information that did not reconcile with her self-concept or own explanation of events. For example, when she was shown positive aspects of her school reports, she minimised this and focused upon negative events, unable to

accept positive information about herself without supplanting it with something negative. In his opinion the plaintiff now has such a strong view that she is incapable of dealing with conflicting information except by discounting it in some way.

[237] Finally, Dr Marks commented upon the way in which the plaintiff tended to polarise or split how she felt and viewed people or circumstances into very good or very bad, with little or no grey in between.

Credibility of the plaintiff

[238] I do not believe that the plaintiff has deliberately made up her allegations. Generally this is not a case of false recovered memories. I accept that most if not all of her allegations have a basis in fact. Her memories were repressed and triggered by some later experience whether counselling, re-visiting the school, or reading something in one of her files. But they are not complete memories.

[239] The difficulty I have in relying upon what she says is in the detail. She has no memory for dates and in the absence of corroborating evidence could make only general assertions as to when things happened. Her estimates may have been years out.

[240] Secondly, I share Dr Marks' concern about the effect that her feelings have on her memory. There were times when she evidently inflated what, objectively, were relatively minor incidents into major ones. An example is her recollection of Mr D reprimanding her son for taking too much rice when they were staying with the Ds in 2000. At the time she reacted to this event by leaving the house and staying elsewhere and in Court she became so distressed that an adjournment had to be called. Incidents like this caused me to question her assessment of the seriousness of some of the other abuse she allegedly suffered.

[241] Another problem was her willingness to believe things and relay them as truth when they were patently untrue or bizarre. Her assertion to Dr Marks that Mr McCormack arranged for her family to go into care because he wanted to sleep

with her mother and did so, is one such example. The fact that, in evidence, she resiled from this allegation, denying that she ever made it, is indicative of the evolving and changing nature of her claims.

[242] I accept that there is a general consistency in the nature of her claims, but given these changes I cannot be certain which memory is soundly based and which not.

[243] The cumulative effect of these various factors is to undermine the credibility of the plaintiff's evidence as a whole.

The approach taken

[244] In the face of these difficulties I have relied heavily upon contemporaneous documentation to corroborate the plaintiff's assertions. Where that is missing it has been a matter of weighing the other oral evidence against the plaintiff's account to test the credibility of her recollections.

Parental default

[245] The psychiatrists agree that some degree of attachment occurred between the plaintiff and her mother during her early years. It also seems quite clear that, insofar as she was able, Mrs A ensured that her children were well fed and clothed. However, whether either parent provided the plaintiff with the ongoing emotional security she needed and craved as she went to school and grew up is doubtful. For one thing, there were numerous changes of home (some 14 according to the Social Welfare report). But of more significance was Mr A's persistent drunkenness and physical violence towards both his wife and children. The last of these incidents was especially traumatic for the plaintiff, who recalled observing it in a kind of out of body experience.

[246] After they separated, the plaintiff's parents' involvement in their children's lives was inconsistent and unhelpful.

[247] Although Mrs A said that she decided to place the girls at St Joseph's so that they could be close to her and she saw them regularly at lunch times, the evidence suggests that their meetings were, at best, irregular and infrequent. The girls sometimes visited her when she was living with her mother (their grandmother), but do not seem to have done so when she was in her own home, before she remarried.

[248] And although Mrs A spoke of meetings with Sr Denise O'Farrell, such meetings seem to have happened only once or twice, and there is no evidence that she made any independent enquiries about her daughters' progress or took an active interest in what they were doing. Anything she did do was as a result of being "hassled by" Mr McCormick, or in the latter years, by Mrs McGreal. A vivid memory of both Sr Agnes and Sr S was of the girls waiting to be collected by their mother and of her not showing up. Sr S recalled one Easter when the girls did not go to a holiday placement because Mrs A wanted to visit them on Easter Sunday, but reneged, without explanation. As a consequence, not only were they bitterly disappointed, but they were left on their own at the orphanage with the nuns, for the whole holiday period.

[249] If anything, this intermittent contact was worse for the plaintiff than if there had been no contact at all because, in her mother's absence, she tended to build up an idealised view and hopes about her, only to have them dashed when they eventually met and she was forced to acknowledge the reality of her mother's indifference. Dr Crawshaw and Dr Marks agreed that the fact that Mrs A was around but not available substantially worsened the plaintiff's functioning.

[250] Mr A's influence on the plaintiff was equally damaging. It seems that, over the years, he would turn up to visit his daughters, often unannounced and invariably drunk. Sr Denise O'Farrell remembered that he once came to the orphanage in such a state that she gave him a cup of tea and sent him away.

[251] The problems associated with his visits seemed to increase after the plaintiff moved to Wellington to the extent that Mr McCormack had to spell out that he was only to meet her after making prior arrangements through Catholic Social Services.

It is obvious from Mrs McGreal's notes that these meetings, when they did occur, had an unsettling effect on the plaintiff.

The Whatman Home

[252] The only evidence about the year the plaintiff spent at the Whatman Home is hers. Although she initially under-estimated the period that she was there, there was nothing to indicate that it was not a happy, secure place for her. In particular, she spoke of the family atmosphere, of the older children caring for the younger ones, and the lack of regimentation.

The St Joseph's years

[253] It does not seem that the plaintiff was particularly naughty at either St Joseph's School or Orphanage, at least not initially. The common picture painted by those who remember her is of a quiet, compliant, some said sad, child. There was nothing that marked her out to the nuns. However, by early 1971 Mr McCormack was recording that she "literally craves affection and will do anything to obtain it" and that she was "somewhat of a behaviour problem" – see [159]. By 1973, as Mrs McGreal noted – see [167], she had become involved in petty shoplifting and was threatening to run away.

[254] Both Dr Crawshaw and Dr Marks were troubled by this apparent discrepancy in the plaintiff's behaviour. It was not psychologically plausible that she was disturbed by her experiences in her family of origin, became non-disturbed for a period showing no signs of distress, and then became disturbed again in her adolescence, Dr Crawshaw said.

[255] I accept his alternative explanation that she had some level of psychological disruption from her childhood experiences which persisted without recognition and was then aggravated by subsequent experiences.

[256] Obviously some children survived and even thrived in the orphanage environment. That is apparent from the evidence of Nicolla Nicolls, Eveleen Bon and Margaret Rangiwhetu.

[257] It was a very structured environment with a strict routine and rules – no doubt a feature of life in the religious order at that time, even after Vatican II. It may also have been a necessity, given the number of nuns living at the orphanage and the full-time commitments of those teaching at the school. Some were particularly busy. Up until the end of 1971 Sr Ligouri taught a full class of senior students as well as carrying the administrative responsibilities of Principal. Sr S combined full-time teaching with her child care and house duties and undertook extramural university studies and preparation for obtaining her teaching certificate. While the Mother Superior (Sr Denise O'Farrell and then Sr Agnes) had overall responsibility for the girls in the orphanage, much of the day to day running fell to older nuns who were in charge of the cooking, cleaning, and more manual duties. I was not told the background of these nuns. It is probable that they were not by training or inclination used to dealing with large numbers of young girls, particularly those with special needs.

[258] While I am sure that 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. It was an institution. And the rules that prevailed were those of the 1960s and 70s, not the present.

[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.

[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 Ligouri 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 Ligouri, a pupil would not have felt very good about themselves.

[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.

[265] Withholding food was cited as a form of emotional abuse and there were general criticisms of the 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.

[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.

[268] In fact, discipline was not mentioned at all in the reports prepared by Child Welfare Officers following inspections in 1967, 1972 and 1973.

[269] The 1967 report described the children at the orphanage as:

> a contented group, well groomed and cared for;

and said that:

> relationships appear to be warm between the Sisters and their charges;

and that:

> this institution is pervaded by an atmosphere of calm and unobtrusive organisation. The children reflect the happy atmosphere existing and appear to be well provided for in every sphere of care.

[270] Similar comments about "excellent relationships between the children and the Sisters" and the "happy" children were made in the 1972 and 1973 reports.

[271] The focus in these reports is on the collective rather than the individual needs of the children and the provision made for their physical, rather than their emotional well-being.

[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 Whatman 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.

[276] Most of the other girls at the orphanage, had someone outside who cared for them and took an active interest in them. Regular weekend and holiday contact with a father, an aunt or a grandmother was sufficient for most to provide the emotional support that they needed to survive or even flourish in the orphanage environment.

The plaintiff said they were "lucky girls". She and her sisters were different from them:

> The girls who had a cover – a parent, a relative, someone who cared for them, were treated differently to us girls who had no one and the difference was very, very noticeable in my eyes.

[277] I have no doubt that because of that difference, whether or not the plaintiff was actually picked on more than others, she felt that she was.

[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.

[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 Gerardine 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 Ligouri 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 Ligouri 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 Justina 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 Nicolls. 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.

[285] I have doubts about the plaintiff's account of the incident involving the cubby house. Sr S accepted that she could well have asked the children what they were doing inside it as they had to be in sight at all times, but denied that she would have accused the plaintiff of inappropriate sexual behaviour. It seems to me that this is

one of those instances where, with the benefit of hindsight, the plaintiff is reading more into a reprimand than was in fact intended by the person who gave it.

[286] The most serious allegation so far as Sr S is concerned, is that she hit the plaintiff on the side of her face so hard that she damaged her ear, rupturing the tympanic membrane. The plaintiff certainly sustained such an injury at some stage in her childhood. The question is whether it can be attributed to a slap or slaps to the side of the face which she says Sr S delivered.

[287] The medical records show that on 18 August 1977, while she was living with the Ds, the plaintiff's GP referred her to the ENT Outpatients' Clinic at Wellington Hospital. The covering letter said that she had a perforated right eardrum

> that may well antedate an otitis [infection] that she had in February 1976. It continues to give intermittent trouble.

[288] Dr Bruce Duncan assessed the ear and on 3 October 1979, having diagnosed "a large anterior perforation of the R tympanic membrane", operated to repair the damage. The operation involved a myringoplasty, a procedure where the perforation is repaired using an underlay graft technique.

[289] Expert witnesses called by the plaintiff and the third and fourth defendants reached different conclusions about the cause of the damage. Both are eminently qualified and experienced.

[290] Dr Phillip Nash was called for the plaintiff. He worked for over 40 years as an ear, nose and throat surgeon before retiring. He commenced major ear surgery in 1963 and thereafter practised predominantly in otology and rhinology. He was appointed to the Court of Examiners (Otolaryngology) of the Royal Australasian College of Surgeons in 1984 and was an examiner for 10 years. In the course of his career he examined and operated on the ears of thousands of patients. In particular, he regularly visited the Kimberly region of North Western Australia where he performed up to 20 ear operations per week for the Australian Health Department. The majority of these operations involved myringoplasty.

[291] Dr Peter Blake, who was called for the third and fourth defendants, currently practises in Wellington. After initially practising in the United Kingdom, he has practised in New Zealand as a registered otolaryngologist since 1983. Since 1984, has also worked as a clinical lecturer in the Wellington Clinical School of the University of Otago.

[292] Both doctors were provided with Wellington Hospital records concerning the plaintiff's ear problems, together with correspondence between her GP and Dr Duncan. They each also examined her ear: Dr Nash in October in 2003 and Dr Blake in December 2004.

[293] The only point of difference between them was their conclusion about the likely cause of the perforation.

[294] On the basis that Dr Duncan's surgical records indicated that the perforation was completely anterior to the handle of the malleus (the outermost of the three small bones in the middle ear), Dr Nash concluded that the damage had occurred due to a blow to the ear, rather than a middle ear infection, although he acknowledged that a perforation in the ear drum would predispose a patient to ear infections thereafter.

[295] In support of this conclusion he referred to four case studies involving physical trauma to the eardrum which he used as teaching aids in various Australian teaching hospitals, where perforations of the drum were regularly found in the anterior region, in front of the handle of the malleus.

[296] While he accepted that blows to the ear would be an uncommon cause of perforation and that statistically, infected ear disease is much more common than traumatic ear disease, his view was that infective ear perforations were much more likely to occur in the posterior inferior part (the back and lower portion) of the drum.

[297] In further support of his position, Dr Nash noted the disparity between the damage to the left and right ears. In his view, if the perforation to the right eardrum had only been caused by an infection, then, by comparison, the chronic ear disease in

the left ear must have been particularly mild, and queried the reason why the infection in the right ear would be so much more troublesome.

[298] Dr Blake, on the other hand, concluded, on the basis of his examination of the plaintiff's ears, that there was nothing to suggest that the right ear had been damaged by physical injury. Rather, he observed that:

> The lateralisation of the drum and graft from the tip of the malleus handle is a typical finding in an ear which has been subject to a sustained amount of chronic ear disease as was the postero superior retraction of the drum and the "attic pocket" within the ear.

[299] In his view, the "attic pocket" could not possibly have been caused by physical injury or a blow to the ear.

[300] Under cross-examination, Dr Blake accepted that a sudden forceful blow to the ear which sealed the external auditory meatus (the external opening of the ear) could result in a sufficient increase in the air pressure within the ear canal to rupture the tympanic membrane, that a blow with an open hand would be a common cause of such damage arising from external trauma, and that perforations due to air pressure changes most commonly occur in the anterior inferior quadrant of the tympanic membrane. He also accepted that the plaintiff's account of how her ear damage came about was prima facie consistent with a clinical account of a traumatic perforation contained in an otolaryngology textbook, where the subject had been slapped about the head by a school master. However, Dr Blake noted that the case example in that textbook involved damage to the antero inferior quadrant, whereas the plaintiff's eardrum sustained damage in the front half of the eardrum and not only in the antero inferior quadrant. The locations of the two perforations were therefore materially different, he said. The damage to the plaintiff's eardrum involved almost all of the front half of the eardrum, extending right up to the front top part. In his view, that was a most unusual place for a perforation caused by a slap on the ear. Moreover, he rejected the suggestion put to him that a small perforation could widen if it was left untreated and subsequently became infected, saying that he did not

> ... believe it's likely or even possible or probable. Traumatic perforations nearly always spontaneously heal. Even when they become infected, which

> is relatively uncommon and usually associated with perforations caused by water … they usually heal. When they fail to heal the residual perforation is usually fairly small, not sizeable.

[301] In conclusion, Dr Blake said that in 20 years of clinical experience he had not heard anybody except Dr Nash advance the view that an anterior perforation is more likely to be due to injury than disease and that a posterior perforation more likely due to disease than injury and reiterated that his own findings in this case did not support:

> ... a claim that the right ear had difficulties or problems which were directly attributable to an injury from a blow.

[302] Ms Cull was critical of the fact that Dr Nash was not asked to identify the precise location of the perforation in the anterior part of the drum, and that the evidence which Dr Blake relied upon to support his findings was not put to him to comment upon. She submitted that, consequently, Dr Blake's contention that location cannot be used to infer causation, could not be relied upon.

[303] I do not agree. It was apparent from the outset that the inferences to be drawn from the location and type of perforation was the central issue between the experts. There was no dispute about the nature of the perforation. Dr Nash relied upon its general anterior position; Dr Blake's view was that the evidence suggests that trauma injuries are confined to the antero inferior quadrant. This view is supported not only by the photograph which Dr Blake produced in cross-examination, but also by the authors of *Scott-Brown's Otolaryngology* (5 ed 1988), relied upon by Ms Cull, when they say, at 172:

> Perforations due to air pressure changes occur most commonly in the anterio inferior quadrant of the tympanic membrane.

[304] The physical findings of both doctors confirm that the plaintiff suffered ongoing ear infections. That would seem to be the probable cause of the damage in this case.

[305] The other evidence on this topic is also unpersuasive.

[306] The incident itself does not make sense. Why would Sr S call the plaintiff a thief and accuse her of stealing other people's information for looking at an exercise book belonging to another girl, especially as she was not in Sr S's class? There may well have been an incident; there may have been a slap, but whether it was a substantial beating causing serious damage is doubtful.

[307] No one seems to have noticed the massive bruising that the plaintiff talked about. Sr Theodore, who gave evidence, did not. Nor, significantly, did the plaintiff mention to either Mr or Mrs D or, it seems, her doctors, that her ongoing ear problem was caused by a blow. The allegation first arose in the course of counselling with Letitia Allan in the late 80s.

[308] In the end, I cannot be satisfied, on the balance of probabilities, that the plaintiff was hit on the ear by Sr S with a blow so hard that it caused the damage claimed.

Sexual abuse

[309] I am in no doubt that the plaintiff was sexually abused during her childhood and early adolescence. She displayed at least six of the behavioural indicators of child sexual abuse noted by Suzanne M Sgroi in her *Handbook of Clinical Intervention in Child Sexual Abuse* (1982), namely:

- Over-compliant behaviour;
- Poor peer relationships or inability to make friends;
- Seductive behaviour with males;
- Running away;
- Withdrawal; and
- Depression.

[310] There could well be others.

[311] But, once again, it is easier to reach a general conclusion than to state with any certainty when and where the abuse happened and who the perpetrators were.

[312] No complaints of abuse were made at the time. The allegations first emerged through counselling or therapy sessions. The plaintiff claims that she always knew that the various events occurred; it has simply taken some time to articulate what happened. She described the process of working through the effect of the various incidents in her past as like peeling back the layers of an onion. Some memories are buried deeper than others and have taken longer to emerge.

[313] The first was the allegation of abuse by her grandfather which came out in the course of group counselling facilitated by Letitia Allan some time between 1987 and 1990. Although Ms Allan no longer has her notes from the time, she also remembered the plaintiff mentioning sleazy or inappropriate behaviour by foster fathers, and the plaintiff herself mentioned both the alleged abuse by her grandfather and that men on holiday placements used to let her play with them, in a tape she sent to her mother during this time.

[314] Although Mrs A and her sister denied that their father either would have sexually abused the plaintiff or had an opportunity to do so, I am satisfied that it did occur.

[315] The fact the complaint was made so early lends credence to the allegation and, although I do not accept everything that LA said by any means, some support is given to the plaintiff's allegations by the fact that LA also claims to have been abused by her grandfather in very similar circumstances to those described by the plaintiff. She said that it happened when she was about nine years old. She was lying on the bed at his home. He lay down next to her and asked her to masturbate him, touched the outside of her clothes and then put his hands down inside her pants, whereupon she left the room. She did not tell anybody about the abuse.

[316] The plaintiff's allegations that men on holiday placements got her to touch them inappropriately could apply equally to the placement in Holly Grove or to the Ss, or both.

[317] I am prepared to accept that the plaintiff was abused in the way she claims on a holiday placement at Holly Grove in Maungarakei when aged nine or 10. However, I do not know who the perpetrator was or who arranged the placement. As other placements at this time (for example, with the Ws in Wainuiomata and with a relative of one of the sisters) were arranged through the orphanage, and Catholic Social Services' file for the plaintiff does not begin until late 1971, it is possible that this one was also arranged through St Joseph's.

[318] There is no dispute, however, that the S placement was arranged through Catholic Social Services.

[319] Mr S was shocked and distressed by the plaintiff's allegation that he sexually abused her. He has no recollection of these things happening and believes that if they had he would have retained a guilty memory of them. Both he and his wife said that such behaviour was completely out of character and suggested that if he had been attracted to teenage girls he would surely have offended against one of the many young woman they have had to stay with them on their farms over the years.

[320] At the time of the alleged offending Mr and Mrs S had been married for only three years. Mr S was 29 years old; his wife 24 or 25. They had two young children. They both readily acknowledged that they always slept without clothes and, at the time, did not wear togs when they went swimming either. Mr S remembered one occasion when he took the A girls swimming in his employer's pool and none of them wore togs. His employer's housekeeper's husband was also there but did not go swimming. Although he now acknowledges that it was inappropriate, he was sure that he would not have forced the girls to swim without togs; it was impromptu. And while he accepted that, in the event of an earthquake, both he and his wife would have checked the girls and also that he used to take each of them in turn as pillion passengers around the farm on his farm bike, he was adamant that nothing else untoward happened.

[321] In a note dated February 1973, on LA's file, Mrs McGreal recorded that the Ss had considered taking LA or the plaintiff, or both, in a permanent foster placement but that at the end of January Mrs S advised that they were having problems with the girls and had decided against it.

[322] The problem with the plaintiff was that she had developed an "adolescent crush" on Mr S. Mrs S remembered it manifesting itself in inappropriate behaviour like wanting to climb onto her husband's knee, as her young daughter did. Mr S professed to having no memory of this.

[323] In the circumstances the best that can be said about Mr S's behaviour in swimming in the nude with a 13 year old girl was that it was naïve and stupid. So too would it have been to go into her bedroom naked, or even with a dressing gown on, if it was not done up properly. At worst he could have been actively encouraging her attentions and grooming her for sexual contact. Allowing the plaintiff to ride pillion passenger behind him on a farm bike, with her arms around him to hold on, would certainly have given the opportunity for the physical closeness she was obviously seeking.

[324] Mrs McGreal's note that both girls thoroughly enjoyed their holiday, that they had an "excellent relationship" with both adults, particularly Mrs S, and that they wanted to return for another holiday would suggest that the complaint of abuse was exaggerated, if it happened at all. Against that, the promiscuous behaviour displayed by the plaintiff when she was with the Ms later in the year, the way she related to men, her relatively early general complaint that she had been abused by men in foster homes, and her clear recall of significant and accepted facts – the earthquake and the swimming in the nude – all support the allegations.

[325] On balance I am satisfied that there was some untoward touching on the farm bike.

[326] There is no one to answer the allegation that SN raped the plaintiff, as he is dead. The plaintiff said that she told the Police about it, although there is no mention of it in the formal statement which she signed. However, she certainly mentioned it

to Dr Crawshaw when they met in March 2003. Again, what she says is plausible, despite the lack of detail as to when the incident took place.

[327] The allegation against Mr L was made to the Police in 2001.

[328] It is undisputed that the plaintiff used to visit the Ls' home when she lived with the Ds in their own home. The Ds' house was Number 9; the Ls Number 4. The Ls were in their mid-20s with a daughter who was born in 1975. Mr L and a friend used to play the guitar at a folk mass at a nearby Catholic Church and local children used to come and listen to their practice. Mr L remembered that the plaintiff would sometimes come to the house on her own but would usually follow her younger brother, PA, who was a more regular visitor. He remembered an incident when she became drunk at their home and vomited on the floor. Her brother and a friend of his took her away. He denied that she ended up in a bed in his daughter's room and he and his wife denied that they would have been involved in a drinking game or, in Mrs L's case, going out drinking with PA and his friend. Mr L said that this was because he was a tow truck driver by occupation and could get called out in the middle of the night. Mrs L said that she was not a drinker and that, in any event, she would not have gone out and left her daughter on her own or with her husband.

[329] Notwithstanding that Mr L has criminal convictions for fraud and other dishonesty offences committed in 1987 or thereabouts, I have some difficulty in accepting the plaintiff's account of what is said to have happened at the L home. The only fact that is undisputed is that the plaintiff drank too much and was affected by what she drank. In that circumstance it is surprising that she was not simply taken home across the road. It is also surprising, if there was a possibility that Mr L did have to go out and drive his tow truck in the middle of the night, that Mrs L would go out and leave him with their young daughter who at the time would have been no more than four and possibly even younger. And in any event, why would Mrs L go out with the plaintiff's brother who at most would have been about 17? On balance I am not persuaded that the rape occurred. I am also quite clear that the numerous alleged incidents of masturbation did not. Mr L gave evidence of having a prominent scar in his groin area and a marked abnormality in his genitals. If the

plaintiff had masturbated him as often as she described, I am sure she would have been very much aware of these. She was not. I therefore reject the allegation of masturbation.

[330] Finally, there is the allegation against Peter McCormack. It was not pleaded. It was only articulated in the course of the counselling which followed the sessions with Dr Marks. The plaintiff said that she could not deal with the reality of it beforehand. However, she certainly hinted at it, telling Dr Marks that girls went into the parlour, that something happened there of a sexual nature and that when they came out they were upset. She said that when the reality eventually came out she re-lived it and reacted by dry retching and vomiting. In addition, her hair fell out and her body was covered in bruises. She was shaking, she was a mess. While she was aware that Mr McCormack has previous convictions for sexual abuse of a young girl, she denied that that had brought about the allegation. She also denied that it was somehow made up or fabricated in counselling. She said that they did not talk about specific abuse.

[331] The plaintiff claimed that the abuse happened when she was eight. That would have been in her first year at the orphanage.

[332] Mr McCormack was convicted in 1994 of eight charges of sexual abuse of the daughter of the housekeeper at the presbytery where he lived between 13 November 1986 and 13 June 1992, starting when the complainant was 13. Like the offending alleged by the plaintiff, it included oral sex. That Mr McCormack engaged in that offending would indicate propensity to engage in the type of offending alleged by the complainant. However, it is well established that evidence of other incidents is not admissible for the purpose of proving propensity alone. In this case, that evidence was adduced in relation to his credibility and in that regard it certainly did not help him, particularly his unwillingness to accept the young age at which the offending began. Having said that, however, I find it difficult to accept that this offending was able to take place. For one thing it is clear that the relationship between Mr McCormack and Sr Denise O'Farrell, who was the Superior at the time, was somewhat fraught. The nuns were protective of their organisation and their charges. While he, in his position as Director of Catholic Social Services,

was keen to get children out of institutions, he had little influence over what the nuns did.

[333] I find it hard to believe that he would have been left alone with a girl, particularly one as young as eight. Only one of the other girls – DS – remembered this happening. But ultimately, what influences my decision on this allegation is the huge discrepancy between the complaint in the amended statement of claim, that the second defendant visited the plaintiff only once in five years and her current allegation, and the way in which this allegation developed, through the sessions with Drs Crawshaw and Marks and subsequent counselling. The plaintiff clearly feels very strongly about Mr McCormack. That may be because there was some incident between them; he may have said something inappropriate about her apparent excessive use of sanitary products while she was at St Mary's, but in all the circumstances I cannot be satisfied that the complaint of sexual abuse by him has been proved on the balance of probabilities.

[334] Against the objections of the defendants' counsel, I allowed the plaintiff to adduce fresh evidence from LA about sexual abuse which she said she was subjected to by visiting priests and also about exorcisms which she claimed Mr McCormack conducted, because I thought that they might add weight to the plaintiff's allegations about the abusive climate at the orphanage.

[335] However, I reject both these claims. They were bizarre and not supported by the evidence. Mr McCormack denied the exorcisms and none of the other girls mentioned exorcisms or recalled being an altar girl. Fr O'Neill's evidence was that exorcisms were not permitted by the Church and that under the New Roman Missal issued by Pope John Paul VI in 1964, girls and women were prohibited from serving at mass. While rules could always be broken, I have no reason to believe that they were in this case.

Appreciation of symptoms of child abuse and treatment options available during the late 1960s to mid 1970s

[336] An important issue in this case is whether the second or third defendants should have been aware that the plaintiff was being abused, whether physically, sexually or emotionally, and have taken steps, through counselling, psychological assessment or otherwise to assist her in addressing her problems. That in turn raises questions about the general awareness of the indicia of abuse, within the social work profession, the support services available, and the public perceptions of acceptable behaviour, particularly in relation to physical abuse, during the late 1960s to mid 1970s.

[337] I accept the expert evidence given on various aspects of these issues by Drs Crawshaw and Marks, and Mr Lambie. Before he retired in 1988 Mr Lambie was Director at the Wellington office of the Social Welfare Department. He was a social worker all his working life.

[338] It is apparent that during this time there was a growing awareness among social work and health professionals of behavioural characteristics which could indicate child physical abuse. Awareness in this area was consolidated throughout the 1970s, particularly during the lead-up to the implementation of the Children and Young Persons Act 1974. In addition, Dr Crawshaw recalled, as a medical student in the mid 70s, learning about the effects of institutionalisation (the emotional impact on a child of being separated from its parents and placed in institutional care), which was a theme beginning to feature in attachment theory literature at the time. He was also taught how to identify signs of physical abuse, emotional deprivation and a failure to thrive in children.

[339] But despite these developments, societal attitudes towards the use of physical punishment towards children, either in the home or in an institutional context, were vastly different from those of today. Mr Lambie noted that during the 1960s and 1970s acceptable physical discipline of children extended to "occasional and moderate" use of a strap and a clip around the ear and that the strapping and caning of children in institutions was not uncommon.

[340] Both Dr Crawshaw and Mr Lambie agreed that unlike physical abuse, the symptoms of possible sexual abuse were not commonly recognised by social

workers until the mid 1980s. Before then there was no culture among those involved in social work, psychological or educational services of being sensitive towards the possibility of sexual abuse, recognising possible warning signals and taking steps which, today, would be considered appropriate. Moreover, even after a greater understanding of these issues had begun to develop within academic and professional circles, it took some time before this filtered down to the level of teachers and voluntary care workers.

[341] Even when problematic behaviour was recognised it had to be extreme before any further action was taken. Dr Marks identified two reasons for that. The first was because lesser "shades of problem behaviour" probably did not arouse great suspicion at the time and secondly because the services available were severely restricted. The proliferation in counselling services which has come about with the development of the Accident Compensation Scheme had not happened. Nor had the societal shift towards accepting such services as legitimate means of treatment. With limited staff and resources, only "the most severe presentations of disordered function and adjustment plus the more obligatory treatments of young people who were already mentally ill" were referred on.

[342] The agencies in Wellington which dealt with cases of that nature during the relevant period were the Psychological Services division of the Education Department and the child health clinics in hospitals.

[343] Dr Marks did not consider that any of the symptoms exhibited by the plaintiff, as identified by Mrs McGreal, would have justified a referral. He considered it likely that many of the children at the orphanage would have had some difficulty with relationships due to having lost families and living in an institution. Therefore, the fact that the plaintiff had an adolescent crush on Mr S and a poor relationship with Mr M would not have tipped the balance in favour of a referral, he said. Nor did the fact that, in 1973, she had an altercation with her class mistress and was threatened with expulsion from St Mary's, that she seemed to be institutionalised, was displaying inappropriate sexual behaviour towards men, had attempted to run away and was involved in petty shoplifting necessarily indicate that she was "at risk". In his view, what these behaviours showed was that she was a

very unsettled teenager and would probably have some personality problems and trouble in her personality functioning for years to come. But he did not think that they necessarily would have, or should have, resulted in her receiving one to one counselling.

[344] In any event, he considered that such therapy was not particularly effective for someone with the plaintiff's personality profile; it was more appropriate for cases arising from a one-off traumatic effect.

[345] One on one residential care was not necessarily the answer either. Dr Marks considered that as a treatment option, such care, like one on one counselling, might well have been an inappropriate or ultimately ineffectual means of dealing with the sort of innate personality and disposition problems suffered by children such as the plaintiff, whose psychological and behavioural problems arose from their backgrounds.

[346] Another practical problem was that while, by the early 1970s, institutionalised behaviour amongst children was becoming recognised, in fact, institutions such as St Joseph's Orphanage were still an accepted means of accommodating children where there were no other housing options.

Approach taken by Catholic Social Services

[347] Judged in the context of the knowledge, practice and resources of the time, I am satisfied that Catholic Social Services were alert to the plaintiff's needs and did everything they could, within their resources – both human and financial – to address them.

[348] In line with contemporary best practice, their preferred course was to return children to their own families, or if that was not possible, to place them with a substitute family, rather than in an institution.

[349] In this case several things prevented them from doing so. First there was the attitude of the plaintiff's parents.

[350] There is a letter on LA's file from Mr McCormack to Mrs A dated 4 December 1972 in which he talks of the need to move the plaintiff, LA, PA and AA out of institutional care and how they were each:

> ... 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 be appropriate that they could feel wanted by the right person.
>
> ...
>
> It would be 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. I have considered other possibilities but at present nothing would really seem to be satisfactory without hurting one or other of the children.

[351] But once again Mrs A declined.

[352] Secondly, the availability of families willing to take a foster child, either for a holiday placement, or longer term, was limited. Mrs McGreal's file notes repeatedly mention the problem both in relation to the plaintiff and to LA.

[353] Thirdly, when a placement was found, it had to work. As the interlude with the Ms showed, with the best will in the world by both the plaintiff and the caregivers, and the support of Catholic Social Services, that was not easily achieved.

[354] When the placement with the Ms broke down, the second defendant placed the plaintiff in St Mary's Boarding School. They were criticised for doing so on the basis that, by that stage, she was clearly institutionalised and that she should not have been placed in another institution. However, in the absence of other suitable foster homes and as the plaintiff was said to be enthusiastic about the move, that was rightly seen as the only option.

[355] Ms Cull suggested that Catholic Social Services should have turned to the State for assistance. But the proposition was not developed with witnesses, and there is no certainty that that would have produced a suitable home – and more importantly, that Mrs A would have agreed. Clearly she expected her children to be cared for within the Catholic system.

[356] I accept that the nuns did not provide much in the way of emotional support for the plaintiff while she was at St Mary's and that there appeared to be little communication between St Mary's and the second defendant. Obvious issues were dealt with. Behavioural problems at the school were addressed by a change in class teacher. Outside of school, provided she complied with the rules and routines of the boarding establishment, she was pretty much left to her own devices.

[357] No doubt the plaintiff did meet up with her father and go to the pub with him on Fridays after school, when the boarders were free to go into town. She may also have met up with boys and done some petty shoplifting – she was known to have done so before, and there is a note of her having extra unexplained clothing and money. I am less certain about whether she consumed so much alcohol that she became drunk as she claimed. I am satisfied that if she had, it would have been noticed on her return to the college. I am equally sure that any lateness or absence on Friday nights would have been noticed.

[358] It is apparent that Mrs McGreal was not aware of these behaviours, notwithstanding that she maintained a close contact with the plaintiff and saw herself as providing some stability for her. She obviously did "counsel" her when issues arose – listening to her and discussing options. She also endeavoured to ensure that, insofar as it was possible, the plaintiff had a "normal" upbringing and was not made to feel different from other girls, as evidenced by her letter to the plaintiff's grandmother – see [200]. However, I accept that generally it was a reactive, rather than proactive, system, focused on dealing with incidents that came to her attention rather than exploring underlying psychological issues. But as Dr Marks' evidence made clear, services to address those issues were not widely available at the time, and there is a very real doubt as to whether the plaintiff's particular issues would have responded to such treatment, in any event.

[359] Catholic Social Services' final act to assist the plaintiff was to place her with the Ds. The way that the family home was set up would have been an innovative step at the time.

[360] I am satisfied that Mr and Mrs D were experienced, perceptive and caring foster parents, who did their utmost to support and assist the plaintiff –within their limited financial resources. In order to make their large family function they imposed rules, and required a certain amount of give and take from all members of the household. However, there is nothing in the evidence which satisfies me that the rules they imposed were unreasonable, or that they applied them harshly. There is no foundation for the plaintiff's complaint that Mr D emotionally abused her.

Summary

[361] My key factual findings are as follows:

[362] Parental default and the troubled and intermittent contact between the plaintiff and her parents during her childhood were key contributors to the plaintiff's difficulties during her early years. These underlying difficulties likely exacerbated the effects of subsequent problems that she encountered, and as such, are a significant contributing cause to her current state of mental health.

[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.

[364] Corporal punishment was practised in both the school and orphanage to varying degrees. Verbal reprimands, including reference to religious themes, as well as some forms of isolation and removal of privileges were also used to discipline children. The physical discipline administered in the orphanage and at St Joseph's School was within the range of what was acceptable at the time. Generally, there was nothing in the way the nuns verbally, physically or emotionally related to the girls to indicate either a widespread or deliberate pattern of abuse, although the

behaviour of some nuns, notably Sr A and Sr Gerardine was at the borderline, and certainly unacceptable by today's standards.

[365] The plaintiff's allegation that she was hit so hard across the side of the head by Sr S that she sustained permanent ear damage has not been made out.

[366] The plaintiff shows several indicators of having suffered sexual abuse as a child. However, it is difficult to be satisfied, even on the civil standard, which events occurred.

a) I accept that the plaintiff was sexually abused by her grandfather in the manner she described.

b) I also accept that the plaintiff was abused at the placement in Holly Grove although the perpetrator is unknown, as is the organisation responsible for arranging the placement.

c) The plaintiff had an adolescent crush on Mr S. Mr S's own behaviour may have contributed to this. I am satisfied that there was some inappropriate touching on the farm bike.

d) In the absence of contrary evidence, the plaintiff's account of being raped by SN is plausible.

e) The evidence does not support the allegations of masturbation or rape by Mr L.

f) The allegations of oral sex made against Mr McCormack by the plaintiff are not supported by the evidence.

[367] During the 1960s and particularly into the 1970s there was a growing awareness of the behavioural indicia of childhood physical abuse. Although there was also some awareness of the effects of institutionalisation, institutions nonetheless remained an accepted and necessary means of housing children. The behavioural indicators of child sexual abuse were not well known until the 1980s.

Professionals in child-care, education and psychological fields were not attuned to recognising the features of child sexual abuse, nor was the issue of sexual abuse widely contemplated.

[368] Referrals to professional counselling and assessment agencies during that time were limited. This was partly due to the fact that lower-level problem behaviours may not have been recognised as indicating more serious issues and also because of the comparative paucity of such services at the time.

[369] Catholic Social Services were generally alert to the plaintiff's needs and made efforts to pursue what they believed to be the best options in terms of her welfare. However, the availability of suitable foster families was severely limited.

[370] Against that factual background I turn now to consider the legal issues.

THE CLAIMS

Negligence

[371] The plaintiff claims that the defendants, both jointly and severally, owed her a duty of care, which included duties:

- To provide an adequate and proper education;
- To provide a nurturing home and upbringing during her formative years, including her childhood and adolescence;
- To provide an environment both at the orphanage and at school which was safe and educationally stimulating and free from physical and emotional abuse;
- To provide appropriate holiday breaks and vacations;

- To check that her holiday placements with relatives, foster families or otherwise were safe and in her best interests, including her physical, emotional and mental wellbeing and her overall welfare;

- To provide a good education to enable her to carry out her responsibilities in life and undertake the normal duties of an adult in society. This included a duty to ensure that she was not institutionalised and was given sufficient guidance and life education;

- To ensure that at all times she was kept safe, secure, emotionally stable and physically well.

[372] The plaintiff claims that in carrying out these duties the second, third and/or fourth defendants were acting in loco parentis. They were her parents for day to day care, maintenance, education and upbringing. As such, they were required to provide a loving, nurturing and emotionally fulfilling home for her.

[373] The defendants are said to have breached these duties:

- When she was living at St Joseph's Orphanage, by perpetrating and/or allowing her to suffer verbal, emotional and physical abuse and by placing her in unsafe holiday placements with relatives or in foster homes or in other home placements where she was subjected to sexual and physical abuse;

- Throughout the time she was at St Joseph's and St Mary's by failing to:

    a) Ensure her emotional, physical and mental well-being:

        i) Against the second defendant the allegations include failing to:

            i) Monitor her well-being while she was at St Joseph's;

ii) Provide basic pastoral care, appropriate counselling or psychological assistance;

iii) Consider placements apart from St Joseph's;

iv) Ensure that holiday placements were safe and provided adequate care.

ii) Against the third and fourth defendants – failing to:

i) Obtain medical treatment for the injuries to her ear;

ii) Provide any nurturing, emotional support and guidance and adequate social education;

iii) Respect her basic human rights and rights as a child;

iv) Provide opportunities for her to develop emotionally or mentally, and for actively dissuading her from trying to develop socially, culturally or educationally. Nor was she encouraged to be creative or to play sport;

v) Provide pastoral care, appropriate counselling or psychological assistance.

b) Provide a safe environment in which to raise a child. In particular, the second defendant failed to take action to keep her sexually safe, and failed to investigate reports of sexualised behaviour and made inappropriate placements thereafter.

c) Act responsibly as a guardian towards her:

i) While at St Joseph's Orphanage the third and fourth defendants failed to;

   i) Ensure that she got an adequate and proper education;

   ii) Allow her to develop adequate social relationships with other girls;

ii) While she was at St Mary's the second defendants failed to:

   i) Provide adequate emotional and financial support;

   ii) Ask whether she needed anything;

   iii) Support her in any way;

   iv) Adequately monitor her emotional progress;

   v) Take action to address her failure to achieve academically;

   vi) Provide opportunities for her to develop sexually in an appropriate manner;

   vii) Take action when she demonstrated at risk behaviour;

   viii) Provide adequate personal care.

iii) The third and fourth defendants failed to ensure that she got an adequate and proper education.

iv) In relation to home placements, none of the second, third or fourth defendants:

i) Checked her safety;

ii) Asked her about her well-being there;

iii) Investigated her concerns about placements;

iv) Adequately monitored her placements.

v) None of the defendants offered a nurturing environment in which the plaintiff could disclose or deal with the abuse she was suffering or receive some accountability for the actions of the second, third or fourth defendants.

[374] The plaintiff asserts that the foster parents with whom she was placed also owed her a duty of care and that the defendants are jointly and severally vicariously liable for the actions of the third parties into whose care she was placed when she suffered sexual and/or emotional abuse – although she has made it clear that she does not pursue this claim against the third and fourth defendants.

[375] Finally, the plaintiff claims that as a result of the numerous breaches, she has suffered severe emotional, physical and mental damage and loss, for which she seeks compensatory damages of $350,000 and $100,000 each for aggravated and exemplary damages.

Breach of fiduciary duty

[376] The cause of action based on breach of fiduciary duty mirrors the allegations for the cause of action in negligence and the same damages are claimed.

What is not pleaded

[377] The plaintiff has not alleged assault and battery or any other intentional tort against any of those who allegedly physically or sexually abused her, notwithstanding that some of them – Sr S, Sr Ligouri, Mr S, Mr L and Mr McCormack – were available and, in fact, came to Court and gave evidence. Rather her claim was put forward on the basis that the pattern of abuse and course of conduct towards her constituted the breach and resulted in the damage that she suffered.

THE ISSUES

[378] Probably the only point in the plaintiff's claim which was not disputed is that she has suffered damage and loss. All the rest were hotly contested.

[379] The first, and crucial, issue is whether duties of care are owed in these circumstances at all, and if so, by whom. This raises questions about the relationship between the plaintiff and the various defendants, and also issues of public policy.

[380] Secondly, if duties are established, whether or not they have been breached raises questions of fact, which I have already addressed in general terms, but will return to, looking particularly at the required standard of care, and evaluating the findings of fact against those standards.

[381] Thirdly, there are issues of vicarious liability.

[382] Fourthly, there is the claim based on breaches of fiduciary duty.

[383] Then there are the positive defences raised by the first and second defendants about the application of the Accident Compensation legislation and the Limitation Act which need to be dealt with.

[384] Finally, if liability is established there are the damages claims, which raise issues of causation and contribution.

THE LEGISLATIVE CONTEXT

[385] Before addressing these issues it is appropriate to consider the statutory context in which these proceedings arose.

The Child Welfare Act 1925

[386] The starting point is the Child Welfare Act 1925.

[387] The long title of that Act stated that it was:

> An Act to make better provision with respect to the maintenance, care, and control of children who are specially under the protection of the State; and to provide generally for the protection and training of indigent, neglected or delinquent children.

[388] Part II of the Act dealt with the:

> Establishment of receiving homes and other homes for the purpose of child-welfare work.

[389] Section 7(1) empowered the Minister to establish and maintain institutions:

> for the effective carrying-out of the functions and duties of the Child Welfare Branch.

[390] That included homes where children were received until placed elsewhere, "probation homes", where they were kept for "special observation or disciplinary treatment", "training-farms and training-schools", "convalescent homes" and, pursuant to s 7(3)(e):

> any other institution the establishment of which is in conformity with and intended to promote the general purposes of this Act.

[391] Under s 10(1) certain private schools established under the Industrial Schools Act 1908, listed in the First Schedule to the Act, including "St Joseph's School, Upper Hutt", formerly known as "St Joseph's Industrial School, Wellington" were:

> deemed to be institutions established under and for the purposes of this Act.

[392] Under Part III, headed "Admission to institutions under this Act, and the guardianship and control of inmates", the Superintendent of Child Welfare could assume control of a child in one of two ways:

i) By agreement with either of the child's parents, their guardian, or any person having control of them – s 12; or

ii) Following a complaint that a child was neglected, indigent, delinquent or not under proper control or was living in an environment detrimental to his or her physical or moral well-being, the Children's Court could make an order for the committal of that child to the care of the Superintendent or place the child under the supervision of a Child Welfare Officer for a specified period and, in the latter case, could provide for the child to be detained in an institution for the whole or any part of that period – s 13.

[393] Section 16 provided that on the making of a committal order, the Superintendent assumed and could exercise sole guardianship powers and rights in respect of the child.

[394] The committal order was required to specify the religious denomination in whose faith and doctrines the child was to be educated, and, where that was the Roman Catholic Church, the Superintendent could transfer the child to a private institution. In that event, and subject to any agreement between the Minister of Education and the controlling authority of the institution, the child would thereafter be under the control and management of the manager of that institution.

[395] Section 19, however, provided that, except in exceptional cases, a child committed to the care of the Superintendent or in respect of whom control was assumed by agreement, should not be permanently maintained in an institution.

[396] Section 20 enabled the Superintendent or a Child Welfare Officer to place children in suitable homes or situations, subject to approved conditions.

[397] Section 12(2) provided that the Superintendent would have the same powers and responsibilities in respect of a child under his control pursuant to an agreement as if they had been committed to his care under a Court order:

> Save that the guardianship of a child shall not by virtue of such agreement be deemed to be vested in the Superintendent.

The Child Welfare Amendment Act 1927

[398] The 1927 Child Welfare Amendment Act expanded the compass of the principal Act to cover children's homes, which were defined as including:

> Any of the private institutions mentioned in the first schedule to the principal Act and also includes every orphanage, children's home, or other like institution (not being a foster home within the meaning of Part V of the Infants Act, 1908) where children are maintained apart from their parents or guardians, whether for payment or not, but does not include any institution conducted wholly for educational purposes.

[399] In addition to the controlling authority, the Act stipulated that a children's home would have a manager who was defined as:

> The person appointed by the controlling authority as the manager for the purposes of the Act.

[400] Significantly, for present purposes, s 13 enabled a manager to assume control of a child by agreement. That section stipulated that:

> **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 Guardianship Act 1968

[401] The Guardianship Act 1968, which came into force on 1 January 1970, established a "code" covering all proceedings concerning guardianship, custody and access and replaced the somewhat confusing variety of ways in which a guardian could be appointed before then: see Bromley and Webb *Family Law* (1974) Vol 2 at 498.

[402] Under s 3 "custody" was defined as meaning:

> the right to possession and care of a child;

and "guardianship" as:

> ... the custody of a child ... subject to any custody order made by the Court and the right of control over the upbringing of a child, and includes all rights, powers, and duties in respect of the person and upbringing of a child that were at the commencement of this Act vested by any enactment or rule of law in the sole guardian of a child; and "guardian" has a corresponding meaning.

[403] However, the Act expressly did not affect the provisions of the Child Welfare Act: see s 34.

The Children and Young Persons Act 1974

[404] The Child Welfare Act was superseded by the Children and Young Persons Act 1974 effective from 1 April 1975. This Act represented a radical change in the philosophy and approach to the provision of social work services for children and young persons in need of care. That was reflected in the objects of the Act, listed in s 3:

(a) To promote the well-being of children and young persons by assisting individuals, families, and communities to overcome social problems with which they are confronted:

(b) To promote the welfare of the family, to reduce the incidence of disruption of family relationships, and to mitigate the effects of such disruption where it occurs:

(c) To assist parents in the discharge of their parental responsibilities:

(d) To encourage co-operation between agencies (whether administered by the Crown or not) whose activities directly affect the well-being of the community and its children or young persons:

(e) To establish and promote, and to assist in the establishment and promotion of, services and facilities within the community designed to advance the well-being of children and young persons; and to co-ordinate the use of such services and facilities.

Crimes Act 1961

[405] Finally, in this survey of the relevant legislation in force at the time, I note ss 59, 194 and 195 of the Crimes Act 1961 relating to domestic discipline, assault on and cruelty to a child. Section 59, which remains in force today, permits a parent or someone in their place, to use such force which is reasonable in the circumstances in correcting a child.

NEGLIGENCE

Duty of care

The test

[406] To my knowledge this is the first case in which a Court in this country has had to determine whether charitable organisations such as the second and third defendants owed a duty of care to people like the plaintiff, for whom they cared either directly or indirectly, and whether they are vicariously liable for the actions of third parties into whose care she was placed.

[407] The test for determining whether a duty of care exists in novel circumstances was addressed by the Court of Appeal in *South Pacific Manufacturing Co Ltd v New Zealand Security Consultants and Investigations Ltd* [1992] 2 NZLR 282 in the following passages highlighted in the judgment of Heath J in *Hobson v Attorney-General* [2005] 2 NZLR 220 at [43]:

> (a) First, at p 294, Cooke P said the inquiry into whether a duty of care existed is undertaken by reference to two broad questions: namely (a) the degree of proximity or relationship between the alleged wrongdoer and the person said to have suffered loss and (b) whether other policy considerations existed tending to negative or restrict a duty of the type alleged. Cooke P continued, at pp 294 – 295:
>
> > "(i) A broad two–stage approach or any other approach is only a framework, a more or less methodical way of tackling a problem. How it is formulated should not matter in the end. Ultimately the exercise can only be a balancing one and the important object is that all relevant factors be weighed. There is no escape from the truth that, whatever formula be used, the outcome in a grey area case has to be determined by judicial judgment. Formulae can help to organise thinking but they cannot provide answers.
> >
> > (ii) Sometimes it is suggested that a certain formula, for instance that of Lord Wilberforce in *Anns v Merton London Borough Council* [1978] AC 728, 751–752, creates a prima facie presumption of a duty based on reasonable foresight. I am of the school of thought that has never subscribed to that view, largely because of Lord Wilberforce's reference to a sufficient relationship of proximity or neighbourhood. It would be naive, and I believe absurd and dangerous, to assert that a duty of care prima facie arises whenever harm is reasonably foreseeable. Even quite unlikely consequences may be reasonably foreseeable (compare the kind of

> issue in criminal law considered in *Chan Wing–Siu v R* [1985] AC 168). Naturally the degree of likelihood and the seriousness of the foreseeable consequences can be important factors in the balancing exercise." ...

(b) Secondly, at pp 305 – 306, Richardson J put the ultimate question as follows: In light of all the circumstances of the case, is it just and reasonable that a duty of care of the type alleged be imposed? His Honour continued:

> "... It is an intensely pragmatic question requiring most careful analysis. It has fallen for consideration in numerous cases in this Court over recent years and, drawing on *Anns v Merton London Borough Council*, we have found it helpful to focus on two broad fields of inquiry. The first is the degree of proximity or relationship between the alleged wrongdoer and the person who has suffered damage. That is not of course a simple question of foreseeability as between parties. It involves consideration of the degree of analogy with cases in which duties are already established and, as I shall develop shortly, reflects an assessment of the competing moral claims. The second is whether there are other policy considerations which tend to negative or restrict – or strengthen the existence of – a duty in that class of case." ...

Submissions

[408] Ms Cull submitted that the two step enquiry will necessarily lead to findings that each of the duties pleaded by the plaintiff is made out.

[409] Her argument was as follows:

i) Proximity is obvious. Indeed, there can be no closer relationship than that of a vulnerable child to those with the statutory and day to day responsibility for her care. In this case both the statutory framework of the Child Welfare Act 1925 and the real life framework (whereby the third defendant undertook the day to day care of the plaintiff under the ultimate direction of the second defendant) highlight the vulnerability of the plaintiff and the relationship of responsibility undertaken by the second and third defendants towards her.

ii) Secondly, there was reliance. Clearly the plaintiff, and her mother who placed her at St Joseph's, relied upon the

professed ability and willingness of the second and third defendants to care for her, as pleaded.

iii) Unlike the situation in *Attorney-General v Prince and Gardner* [1998] 1 NZLR 262, there are no countervailing policy considerations here. The imposition of legal liability for breach of the duties of care expressed and implied in an acceptance of children for care under the Child Welfare Act is completely consistent with the statutory purpose and policy of that Act to provide for the care of children such as the plaintiff, and to impose responsibilities upon those managing institutions under it.

iv) The imposition of duties in this case is analogous to the situations in *S v Attorney-General* [2003] 3 NZLR 450 (CA) and *W v Attorney-General* CA227/02 15 July 2003.

v) There is no moral argument against imposing liability for compensation for avoidable harm on the defendants. Their charitable status is irrelevant. Each of them held themselves out as available to undertake the care of children in various ways.

vi) The second defendant, as an agency of the first, held itself out as a caring Christian and religious organisation undertaking social work and caring for the welfare of members of the Catholic congregation and those seeking assistance through the social services which it offered. In its capacity as a social service agency, it accepted into its care and direction children from broken homes or orphans and undertook to provide for their proper maintenance and welfare. It also accepted in law (despite its denial in fact) the statutory responsibilities imposed under the Child Welfare Act.

vii) The duties owed by the third and fourth defendants, on the other hand, have their foundation in the constitution of the Sisters of Mercy, the 1970 interim version of which provided that:

> It is our privilege to assist parents in preparing the young to grow in faith and in personal love of God, to promote effectively the welfare of the earthly city and ... to serve the advancement of the heavenly kingdom ...

and:

> In all our dealings with youth, we have Mother Catherine [McAuley] as our model. She deeply loved young people, and met them on their own ground, trusting and accepting them, and matching their lightness of heart with her own youthfulness of spirit ...
>
> Children deprived of parental love have a double claim on the affection of the sisters who look after them. These sisters take the place of parents, and are responsible for helping them to live happy, well-adjusted lives.

viii) The second and third defendants accepted money from the State in the form of capitation grants and the plaintiff's Family Benefit, to carry out functions informed by the statute and their Christian standards.

ix) In carrying out those functions and by assuming the right of control over the upbringing of a child, the second defendant, and, to a lesser extent, the third, were effectively acting as the child's guardian or "in loco parentis". Implicit in that was a duty to "nurture", which, in the present context, would equate to providing the plaintiff with a listening ear; someone with whom she could talk to and confide in about the abuse she was suffering.

[410] Mr Thomas accepted that, to the extent that Catholic Social Services was involved in the plaintiff's care, it owed her a duty of care. But he strongly denied that it was under any statutory obligation to do what it did.

[411] In his submission, under the Child Welfare Act, immediate responsibility for her care rested with the third defendant as the controlling authority, and ultimate responsibility with the Crown.

[412] Different parties had different responsibilities, he said:

i) Mrs A had a role, as custodial parent;

ii) The Crown had a statutory duty to provide for the plaintiff's care, if her parents could not do so;

iii) The Sisters of Mercy, as the controlling authority for St Joseph's Orphanage and the group to whose care Mrs A had entrusted her daughter, had general responsibility for her day to day care and control;

iv) Then there were the agents of the third defendants, who included its own staff and persons with whom the plaintiff was placed during school holidays.

[413] On this scenario Catholic Social Services cared about the plaintiff and did what it could, as a volunteer, to improve her care arrangements. It even oversaw her care. But that did not make it her guardian or custodian.

[414] Nor was it vicariously responsible for the actions of those with whom the plaintiff stayed during holiday periods. A better description of the role that Catholic Social Services played was that of "facilitator", Mr Thomas said.

[415] The third defendant's position is that their duty to the plaintiff was limited to the obligation to provide her with food, shelter and clothing and to send her to school to be educated, and they accept responsibility for any defaults by particular nuns in

that regard. But like the second defendant, the Sisters of Mercy deny that they were in the same or a similar position in relation to the plaintiff as her parents. They did not fulfil a guardianship role and cannot be held to be under a wider duty to ensure that she was brought up correctly. Legal responsibility for her general welfare remained with her parents.

Impact of the Child Welfare Act

[416] The Child Welfare Act is the obvious starting point in any consideration of the nature and scope of duties owed by the second and third defendants towards the plaintiff. The responsibilities which the Act imposed on the Crown were a significant factor in the Court of Appeal's determination in *S v Attorney-General*. The defendants' statutory roles and responsibilities are not so easily identified – either in fact, or in law.

[417] The plaintiff claims that, in terms of the statute, Mr McCormack was both the controlling authority and the statutory manager of St Joseph's and that in his capacity as statutory manager he exercised powers under s 13 of the Amendment Act to assume control of the A children, including the plaintiff.

[418] The evidence as to who undertook the statutory functions in relation to St Joseph's Orphanage is confused. Undoubtedly Mr McCormack was the statutory manager and, in that capacity, applied for, received and distributed capitation grants from the Government for several residential institutions run by religious orders within the Catholic Church. These were not limited to institutions, such as St Joseph's, listed in the First Schedule to the Act, but also included Sunnybank in Nelson, and Marycrest in Te Horo.

[419] But that did not necessarily make him the controlling authority for the purposes of the Act.

[420] Correspondence and reports from the Child, Youth and Family files variously describe Mr McCormack, Sr Agnes and the Sisters of Mercy in that role.

[421] Mr McCormack said that he was appointed manager by the Bishop. However, that seems to have happened as a matter of convenience, rather than as a reflection of the Bishop's legal authority to do so. The evidence is clear that the third defendant jealously guarded its autonomy. Mr McCormack was manager because it suited the Sisters for him to assume that role. I am satisfied that the third defendant must have been the controlling authority in terms of the Child Welfare Act. It controlled the institution which was subject to the Act.

[422] The reality was that Mrs A handed over responsibility for the day to day care of the plaintiff to the third defendant and that at some stage thereafter Catholic Social Services assumed overall responsibility for her ongoing care, including holiday placements where needed and liaising with Mrs A concerning any changes. They also liaised with Child Welfare Officers and other agencies as appropriate and received her Family Benefit.

[423] No Court order or any formal agreement under s 13 of the Amendment Act has been produced and there is no evidence that any of the defendants or their representatives were ever appointed an additional guardian under s 8 of the Guardianship Act 1968, or that any relevant orders under the Children and Young Persons Act 1974 were made affecting the plaintiff.

[424] That is confirmed by the fact that Catholic Social Services required Mrs A to sign notes saying that her daughters would be returning to St Joseph's in 1972 and Ms McKinley's evidence that, in 1977, she drove through the night to Taihape, where AA had been admitted to hospital, but was unable to authorise an operation for him because she did not have the legal status to do so and his mother could not be contacted.

[425] The one indication to the contrary is the sentence in Mrs McGreal's letter to St Mary's of 21 February 1974 – see [192] – in which she says that:

> The legal situation is that A's mother has the custody of the children, but they are in our care under order of the Court, and Mr A has limited access.

[426] When questioned about this, Mrs McGreal said that it was a mistake, and, although the error was only picked up late in the day, I am satisfied that it was. The true position is that set out in another of Mrs McGreal's notes, at [175] above.

[427] Given the amount of detail on the plaintiff's file and LA's, which was also before the Court, I am sure that if there had been either an agreement or a Court order, it would have been on one or other file.

[428] I accept, however, that despite the lack of formal documentation, Catholic Social Services acted throughout as if they did have a s 13(3) agreement, and, in accordance with s 13(2), maintained that stance after the plaintiff left the orphanage and moved into foster care and then St Mary's, neither of which were children's homes, as defined in the Act.

[429] But the second defendant always recognised that it did not have guardianship of the plaintiff; that stayed with her parents until she was 20 – as, indeed, it would have, even if there had been a formal s 13 agreement.

The duties in this case

[430] The fact that the plaintiff's parents remained her guardians is an important distinguishing feature of this case, compared with *S v Attorney-General* and *W v Attorney-General*.

[431] In both of those cases the department assumed complete control of the children – in *S* because his parents had abandoned him; in *W* pursuant to a committal order made by the Children's Court, following complaints of parental neglect. Accordingly, for all intents and purposes those children's parents were out of the picture. Here they were not. Mrs A could have stepped in at any time and ended the arrangement, and Mr McCormack actively encouraged her to do so. Although she did not, the result was that neither Catholic Social Services nor the Sisters of Mercy had full control over the plaintiff. They each, in their different ways, acted as Mrs A's agent in caring for her children.

[432] On the other hand, in the absence of parental input, the plaintiff was reliant upon the second defendant to protect her; to fill the gap which her parents left.

[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 the second defendant 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.

[434] The relationship between the plaintiff and the third defendant was also sufficiently proximate. Accordingly, the third defendant was 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. This meant that any discipline had to comply with contemporary standards concerning the administration of discipline in an institutional context.

[435] The real issue in both cases is whether the nature and scope of the duties should be extended further.

[436] In considering this, it is important to emphasise that this issue must be assessed in accordance with the standards of the day: *Blackwater v Plint* (2005) SCR 58 at [15].

[437] In this case the plaintiff claims that the defendants were acting as her guardian or in loco parentis, and therefore subject to what have traditionally been regarded as parental duties.

[438] A claim alleging this type of relationship and consequent responsibility was made in *Barrett v Enfield London Borough Council* [1999] 3 WLR 79. In that case the plaintiff submitted that a local authority, into whose care he was placed as a

baby, was acting in loco parentis, and, as such, was subject to a common law duty to provide him:

> ... with the standard of care which could be expected of a reasonable parent, including a duty to provide a home and education, to take reasonable steps to protect him from physical, emotional, psychiatric, or psychological injury and to promote his development.

[439] The Court of Appeal (England) upheld a strike out decision on the basis that as the defendant Council was regarded as being in the position of a parent to the plaintiff, and as a child could not sue her parents for bad parenting decisions, it would be unjust to impose this duty on a person or body acting in loco parentis.

[440] The House of Lords did not agree. Lord Hutton expressed the position as follows (at 112):

> My Lords, I agree that it would be wholly inappropriate that a child should be permitted to sue his parents for decisions made by them in respect of his upbringing which could be shown to be wrong, and I also agree with the observation of Sir Nicholas Browne-Wilkinson V.-C. in *Surtees v. Kingston-upon-Thames Borough Council* [1991] 2 F.L.R. 559, 583F:
>
> > "I further agree with Stocker L.J. that the court should be wary in its approach to holding parents in breach of a duty of care owed to their children. It is accepted that the duty owed by Mr. And Mrs. H, as foster parents, to the plaintiff was exactly the same as that owed by the ordinary parent to his or her own children. There are very real public policy considerations to be taken into account if the conflicts inherent in legal proceedings are to be brought into family relationships."
>
> But I do not agree, with great respect, 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 a position of a parent to the child.

[441] A similar approach was taken in *Phelps v Hillingdon LBC* [2000] 3 WLR 776.

[442] In that case, one of the claimants, who suffered from muscular dystrophy, claimed that the Council had negligently, and in breach of statutory duty, failed to provide him with a proper education, including appropriate computer technology and training to enable him to communicate and to cope socially. The claim, founded on the contention that the Council was in loco parentis to him, was struck out at first instance on the basis that it was clearly untenable. The Court of Appeal overturned the decision, determining that teachers had a duty to take care of pupils in a manner akin to a careful parent, and that decision was upheld by the House of Lords.

[443] Lord Slynn of Hadley held that whether such a duty could be imposed on teachers would ultimately depend upon what was fair, just and reasonable in the circumstances. Teachers were under a duty to exercise reasonable care and skill to the level expected of reasonable members of the teaching profession.

[444] However, Their Lordships were concerned to limit the duty to those exercising a particular skill or profession who made an identifiable mistake, rather than laying the foundation for a more generalised claim. Accordingly, Lord Nicholls said at 804-805:

> 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.

[445] It seems to me that, by seeking to have the Court impose duties requiring the defendants to provide an "educationally stimulating environment", holiday placements which are in the plaintiff's "best interests ... including her physical, emotional and mental wellbeing and ... overall welfare", and "a loving nurturing and emotionally fulfilling home", the plaintiff is seeking to set the standard too high and the obligations too wide. Such duties would be impossible to assess objectively.

[446] In *S v Attorney-General* (2002) 22 FRNZ 39, Ronald Young J emphatically rejected a duty that:

> "53. By virtue of the Superintendent's assumptions of the plaintiff's care and control, he and those acting with his authority, owed the plaintiff a duty of care to:
>
> "(a) Act with due expertise, skill and care in making any decisions which affected the plaintiff's wellbeing, care and development";

saying that such a duty:

> obliges the defendant to "ensure" the plaintiff was placed in a stable, secure and safe living environment. Of course no one can ensure such a thing. The duty pleaded in para 53 is so wide as in the context of this case to be almost meaningless."

[447] There is nothing in the Child Welfare Act which would support the imposition of the general duties claimed by the plaintiff, and in my view, significant public policy reasons militating against. Effectively they would require the defendants to protect the plaintiff's best interests in a situation where there was no legal obligation on her parents to do so, and they, or at least Mrs A, had not renounced control.

[448] The imposition of such a duty was considered and rejected by the Supreme Court of Canada in *KLB v British Columbia* [2003] 2 SCR 403 in the context of breach of fiduciary duty, but I am satisfied that the comments are equally apposite to negligence. McLachlin CJ said at 430:

> [44] Parents <u>should</u> try to act in the best interests of their children. This goal underlies a variety of doctrines in family law and liability law.

> However, thus far, failure to meet this goal has not itself been elevated to an independent ground of liability at common law or equity. There are good reasons for this.
>
> [45] First, an obligation to do what is in the best interests of one's child would seem to be a form of result-based liability, rather than liability based on faulty actions and omissions: such an obligation would be breached whenever the result was that the best interests of the child were not promoted, regardless of what steps had or had not been taken by the parent. Breach of fiduciary duty, however, requires fault. It is not result-based liability, and the duty is not breached simply because the best interests of a child have not in fact been promoted. Moreover, a wrong of this type would not be ascertainable at the time that it was committed, and a wrong must be so ascertainable if it is to found legal liability.
>
> [46] Second, the simple injunction to act in the best interests of the child does not provide parents with a workable standard by which to regulate conduct. It does not recommend particular courses of conduct that they must engage in or not engage in, to avoid legal liability. It is often unclear at the time which, among all of the possible actions that a parent could perform, will best advance a child's best interests. Different parents have different ideas of what particular actions or long-term strategies will accomplish this, all of which may be reasonable. And even once parents do sort this out, they may face the practical difficulty that what they can do for their children is limited by their resources, their energy, their abilities and the competing needs of their other children. All this suggests that a simple injunction to act in the best interests of the child, however laudable, does not provide a workable basis for assigning legal liability, whether in negligence or for breach of fiduciary duty. It simply does not provide a legal or justiciable standard.
>
> [47] The "best interests" of the child forms a guiding objective in family law. It is a guide to courts in making custody and other decisions respecting children, and it can function as a guide in part because of the limited number of alternatives in these contexts. Deciding which of two home environments would be better for a child is very different from attempting to decide which of an almost infinite number of combinations of potential actions toward one's child would best advance the child's interests. The guiding objective of furthering the best interests of the child also informs the content of various legal duties that parents owe their children, whether statutory, at common law (negligence) or at equity (breach of fiduciary duty). However, this objective is not to be confused with the legal obligations themselves. Although it is a laudable goal, it does not constitute a justiciable standard for determining liability in damages. Moreover, the goal of promoting the best interests of the child is larger than the concerns of trust and loyalty central to fiduciary law. It is true that breach of parental fiduciary duty is unlikely to further a child's best interests. However, the converse proposition that everything that is not in a child's best interest constitutes a breach of fiduciary duty does not hold. The list of parental fiduciary duties is not closed. But it does not include a broad and unspecified duty to act in the child's best interests.

[449] This issue has also been addressed in New Zealand. In *Attorney-General v Prince and Gardner* the plaintiff, who had been adopted, claimed that he suffered an

appalling childhood as a result of his adoptive parents' poor parenting skills, and that, as a direct result of the negligent manner in which social workers prepared the reports recommending the adoptive parents, he was deprived of a home and an education and suffered impairment and emotional abuse.

[450] In declining to impose a duty of care on social workers carrying out functions under the Adoption Act 1955, Richardson J said, at 277:

> If a principal cause of the child's problems as they emerge over the years can be ascribed to bad parenting, it is incongruous to allow a suit against a secondary party but not against the parents, whether adoptive or natural – and it is not suggested that the Court could bring such a suit in negligence against parents.

[451] These dicta underscore the view that insofar as those having the care of children are acting in the position of parents, there are strong policy reasons for holding that they should not be held liable for errors of judgment, omissions or even bad parenting, except where those acts or omissions cross the line into identifiable behaviour, such as sexual abuse, or physical abuse going beyond that which would have been regarded at the time as reasonable discipline.

[452] The remedy in such situations does not lie in imposing an objective duty on parents or caregivers to be determined by tort action, but in the care and protection procedures of the Child Welfare Act and the subsequent Children and Young Persons Act. I accept Mr Finlayson's submission that to impose a general duty in this case in tort law would be to over-reach the Court's legitimate role.

[453] I therefore decline to extend the duties imposed on the second and third defendants beyond those set out in [433] and [434] respectively.

The first and fourth defendants

[454] The first and fourth defendants are in a different position from the other two defendants. In my view there is no basis for finding that either the first or the fourth defendant owed the plaintiff a duty of care.

[455] No doubt the first defendant was named as a party as the alter ego of the second defendant. However, there is no evidence that it had any direct or independent involvement with, or responsibility for, the plaintiff.

[456] The position of the fourth defendant is even more unsatisfactory. In opening submissions Mr Finlayson made clear his view that the fourth defendant should never have been joined as a party to the proceeding. It merely owns the land on which the orphanage was situated. It played no part in the running of the orphanage and as such could not be liable in negligence for what happened there. I agree.

[457] While I accept that care of any "inmate" at St Joseph's Orphanage was subject to the provisions of the Child Welfare Act, it is apparent that responsibility for the day to day running of the institution rested with the third defendant. There was no evidence that the Trust Board assumed, or was ever asked to assume, any responsibility for the children. Their responsibility was for the buildings and the grounds.

[458] The claims in negligence against both these defendants are dismissed accordingly.

Breaches

Catholic Social Services

[459] Although Mr McCormack was obviously well aware of the needs of the plaintiff and her siblings, I am satisfied that until the disputed custody case between their parents was resolved, the extent to which he could make decisions about their care was severely limited. In practical terms, the situation did not change markedly after the Decree Absolute. As guardian and custodial parent Mrs A retained ultimate control. Mr McCormack was also hamstrung, insofar as his day to day involvement was concerned, by the rift between the second and third defendants, and the Sisters' concern to maintain control over their institution. However, as statutory manager he was obliged to generally monitor the care of all the girls in the orphanage and to take

steps to address any significant problems that became apparent. And I accept that he did that in the plaintiff's case.

[460] Unlike the nuns, both Mr McCormack and Mrs McGreal recognised that the plaintiff was not thriving in the orphanage environment. They did not necessarily see what individual nuns did when alone with a group of girls. But they did have enough contact to see the effect of orphanage life on the plaintiff. When the plaintiff took things into her own hands and made it clear to Mrs McGreal how unhappy she was at St Joseph's, Mrs McGreal promptly set about trying to find a suitable alternative placement for her, which she did. The Ms seemed ideal. They were a professional couple with a young family, motivated out of a sense of Christian charity. They did their utmost to make the placement work as, I think, did the plaintiff. But in the end it collapsed for a variety of reasons, not least of which was the involvement of other members of the plaintiff's family.

[461] Clearly Mrs McGreal maintained good communication with both the plaintiff and her caregivers. The other long term placement, with the Ds, was also monitored, although not to the same degree – mainly, it seems, because the plaintiff herself rejected it.

[462] I accept that the plaintiff was not offered formal counselling. The second defendant was aware that the plaintiff was institutionalised and took steps to address that by providing care, with a family, and, when that was not available, by placing her at St Mary's. The fact that she was displaying at risk behaviours which indicated that she might have been sexually abused was not picked up. But, given that the indicia of abuse were not widely recognised until the 1980s or thereabouts, even among social workers, the second defendant cannot be criticised for not providing counselling or taking other steps to address this. In the light of Dr Marks' evidence, it is also questionable whether counselling, if available, would have assisted the plaintiff.

[463] The final significant criticism of Catholic Social Services concerns the steps that they took to check and monitor holiday placements. There are several points to be borne in mind.

[464] First, Catholic Social Services is and was a voluntary organisation. It was small. Its resources were limited. It was different from a government department. Unlike the social workers who oversaw the care in *S v Attorney-General*, the second defendant did not have an operating manual. The organisation was evolving in response to apparent needs within the Catholic community and its policies and practices were ill-defined. It seems to have been left to individual social workers to do what they thought best in the circumstances. While lack of resources or expertise can not be an excuse for organisations which hold themselves out as providing a social work service – they must act with due skill and care in accordance with their professional standards – the nature of the organisation and the workloads of its staff are practical considerations which should be taken into account in the overall assessment.

[465] Secondly, it needs to be borne in mind that the placements in issue were not long term placements, but rather short term, holiday placements. They could have even been weekend visits. There is no certainty as to who organised the Holly Grove visit or how long it was for. It is therefore impossible to say whether the second defendant should have checked it and did not.

[466] Even in the case of the S visit, which the second defendant definitely did organise, in the absence of records, it cannot be said with any certainty what Mrs McGreal did. She and Mr McCormack relied upon their general practice. This involved a recommendation from the parish priest, at least a telephone call to the mother and sometimes independent checks of the family. It sometimes also involved a home visit. It is apparent from the correspondence on the plaintiff's file that Mrs McGreal or another social worker also kept in touch with the plaintiff during holiday visits, and that the plaintiff made it quite clear if she was unhappy in a particular home. Often Mrs McGreal also collected the plaintiff at the end of a visit, which gave her an opportunity to find out how it went. This happened after the holiday with the Ss.

[467] There is nothing in the evidence to suggest that the N placement was inappropriate (the plaintiff's sister lived there).

[468] Given the length of the holiday visits, I am satisfied that Mrs McGreal did all that was reasonably expected at the time to check the placements beforehand and to monitor them as they progressed.

[469] Nor do I think the second defendant could have been expected to monitor the plaintiff's contact with her grandfather. In fact, in the absence of any contraindications such as criminal convictions for sexual abuse or other serious crimes, it could have been seen to be failing in its duty if it did not encourage and assist the plaintiff to maintain contact with her extended family.

[470] The situation with regard to the Ls is in a different category. The second defendant could not reasonably have been expected to monitor who the plaintiff spent time with when she was living with the Ds.

[471] On balance, the plaintiff has failed to satisfy me that the second defendant breached its duties of care towards her.

The third defendant

[472] I reach the same conclusion in relation to the third defendant.

[473] It fed, clothed and housed the plaintiff, and ensured that she attended school. By the standards of the time St Joseph's Orphanage provided an excellent standard of care, as evidenced by the glowing Department of Social Welfare annual inspection reports referred to in [268]-[270] above. The 1972 report on the standard of education and general atmosphere at St Mary's was similarly laudatory. It concluded:

> The inspectors have been impressed by the tone in the school, the mutual respect between staff and pupils, the sound scholarship and earnest endeavour evident at all times. Emphasis placed upon christian [sic] ethics and morality and on human dignity combined with forward-looking teaching have produced girls with natural poise, friendliness and social confidence. The college can be justly proud of its educational standards in the broadest sense.

[474] The plaintiff did not thrive at either place. It would be fair to say that she "survived" them.

[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. 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. The evidence was that both schools enjoyed good reputations. The fact that the plaintiff did not pass School Certificate, despite two attempts, does not mean that St Mary's failed her. The system at the time was premised on the basis that half would fail. Mrs McGreal expressed the view that the plaintiff was of limited intelligence. That may or may not be the case. Mrs McGreal was not an educationalist. But certainly there was nothing to indicate that, at the time, the plaintiff would have been treated any differently at other primary or secondary schools teaching the State curriculum.

[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.

Vicarious liability of second defendants for sexual abuse by caregivers

[478] It must be accepted on the basis of *S v Attorney-General*, that foster parents, although volunteers, can be held liable in negligence for the sexual abuse of a child in their care. That would cover the alleged abuse by the man at Holly Grove and Mr S. It would not extend to SN. He was like the foster brother referred to in *S*. Nor would it cover abuse by the plaintiff's grandfather or Mr L. There was no evidence of any relationship between the second defendant and either of those men.

[479] The issue for determination here is whether Catholic Social Services should be held vicariously liable for the breaches of care by those two men.

[480] Vicarious liability can be imposed whether or not the person or body held liable is themselves at fault.

[481] The learned authors of Todd, *The Law of Torts in New Zealand* (4 ed 2005) at 23.1 identify three questions to ask to determine whether a defendant should be fixed with vicarious liability:

> First, has a tort been committed? Secondly, what is the nature of the relationship between the person who committed the tort and the person who is alleged to be vicariously liable for it? Thirdly, what connection exists, if any, between the tort and the relationship in question?

[482] In overseas jurisdictions, in particular Canada and England, the proximity of the relationship in situations such as the present has generally been assessed in terms of employment relationships – was the tort feasor an employee of the defendant or an independent contractor? See, for example, *Bazley v Curry* [1999] 2 SCR 534 and *Lister v Hesley Hall Limited* [2002] 1 AC 215.

[483] The majority of the Court of Appeal in *S v Attorney-General* (Tipping J dissenting on this point) eschewed that analysis, preferring instead to characterise the relationship between the Crown and foster parents in terms of agency. Relevantly, at 468-469 Blanchard J said that there are:

> [64] ... two obvious differences between the situations in *Bazley* and *Lister* and the facts in this case and in *W v Attorney–General*. The first is that we are concerned with an "enterprise" conducted in accordance with powers conferred on the superintendent by a statute which in effect, directed him not to maintain children coming into his care in state institutions on a permanent basis "save in exceptional cases" and consequently obliged him to arrange for the placement of such children with suitable persons as foster parents. The second difference is of course that the foster parents were not employees and were not remunerated. At most, they received sums intended to offset their expenditure on the foster children.
>
> ...
>
> [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* at para [29].

[73] There is one qualification. In considering whether the abuse occurred in the performance of Mr and Mrs S's agency duties we have been speaking only of abuse committed by them. There is also the abuse committed by their adult son, MS. In relation to that we take a different view. His conduct cannot be regarded as that of an agent of the Crown. He was not appointed as a foster parent. He was living in the same house but his assaults on BS had no apparent connection with the parenting roles of Mr and Mrs S. There was no evidence, for example, that his sexual abuse of BS occurred on occasions when he had been asked by them to assist them with the care of BS.

[74] Subject to that qualification, in agreement with the Judge we conclude that the respondent is vicariously liable for the negligence of the foster parents of BS.

[484] After the decision in *S* was released, the Supreme Court of Canada in *KLB v British Columbia* [2003] 2 SCR 403 (SCC), reached a contrary decision on similar facts, holding (at 421) that:

The fact that foster parents must operate so independently in managing the day-to day affairs of foster children and in resolving the children's immediate problems, and the fact that they exercise full managerial responsibility over their own household are indications that, in their daily work, they are not acting on behalf of the government. It is also important to note, in this connection, that they do not hold themselves out as government agents in the community; nor are they perceived as such. Although foster parents are indeed acting in the service of a public goal, their actions are too far removed from the government for them to be reasonably perceived as acting "on account of" the government in the sense necessary to justify vicarious liability.

This conclusion finds confirmation in the fact that imposing vicarious liability in the face of a relationship of such independence would be of little use. Given the independence of foster parents, government liability is unlikely to result in heightened deterrence. Exacting supervision cannot prevent abuse when the supervising social worker is absent, as must often be the case in a private family setting. Nor is stricter monitoring a real option. Governments can and do provide instruction and training to foster parents. They can and do put in place periodic monitoring. They can and do encourage social workers to develop communication between social workers and foster children. These are now standard practice and are encouraged by direct liability. But given the nature of foster care, governments cannot regulate foster homes on a day-to-day basis. Imposition of vicarious liability can do little to deter what direct liability does not already deter. Not only would imposing vicarious liability do little good, it could do harm. It might deter governments from placing children in foster homes in favour of less efficacious institutional settings.

[485] While accepting that he was bound by the Court of Appeal's decision in *S v Attorney-General*, Mr Thomas submitted that the circumstances in this case are distinguishable. He argued that in *S v Attorney-General*, the imposition of vicarious liability upon the Crown was appropriate as, due to the statutory relationships between the parties, the Crown was "truly principal". In this case, on the other hand, the second defendant was not a principal; it acted as an intermediary placement agency only. He therefore challenged whether a relationship of agency existed between the second defendant and the foster parents. In his submission, the relevant relationships were with the Crown, which had an obligation under the 1925 Child Welfare Act to provide for the protection and training of children in children's homes established by statute. It delegated its functions under the 1927 Amendment Act to private institutions like St Joseph's, and controlled them by way of registration and inspection.

[486] Those homes were the agent of the parents whose children were placed there. The Sisters of Mercy received a capitation grant, which paid, at least to some extent, for the care they provided. As the Sisters could not care for the girls during the holidays they were placed with volunteer families during those periods. Therefore, the holiday caregivers were the agents of the Sisters of Mercy.

[487] In the present case they were also the agents of Mrs A, who retained ultimate legal control of the plaintiff.

[488] Within this framework, Mr Thomas said, Catholic Social Services simply recommended and facilitated placements on behalf of either the parents or the Sisters of Mercy. It was a facilitator rather than a caregiver. It was a volunteer, which endeavoured to make a role for itself in a practical sense to help children and their families. The situation of Catholic Social Services was analogous to that of a social worker at a family group conference convened under the Children, Young Persons and Their Families Act 1989. It facilitated an outcome for a parent and child to make a child's life better. It was like a Barnados' worker who arranges access. It was allowed to assist. But it was never the principal to whom the holiday families were agents.

[489] As a matter of policy, Mr Thomas said, vicarious liability should not be imposed in these circumstances. In this regard, he emphasised that:

i) The second defendant was a non-profit agency. By comparison, the Crown was the ultimate deep pocket.

ii) The economic burden of accepting responsibility for children whose parents could not look after them should rest with the State.

iii) The second defendant had no control over what went on in holiday homes. In *S*, by comparison, the Department supervised the parenting. There was a departmental manual, a right of inspection and a right to remove a child at any time.

iv) The second defendant was a volunteer. It arranged placements with other volunteers. These families were not paid anything whatever. The foster families in *S* were paid for food and clothing.

v) Catholic Social Services no longer facilitates holiday home placements. Accordingly there is no need to impose liability as a means of deterrence.

vi) If placement agencies had known, in 1970 or thereabouts, that they could be held vicariously liable for abuse by holiday caregivers, the Sisters of Mercy might have kept children at St Joseph's during the holidays – thereby denying them the opportunity of the benefits of being removed, even for a short time, from an institutional setting.

vii) The plaintiff has chosen not to sue either the Crown or the alleged wrongdoer/s.

[490] I accept that ultimate responsibility for the care of children under the Child Welfare Act rested with the Crown. However, by accepting responsibility for the plaintiff's care in terms of s 13(2) of the 1927 Amendment Act, albeit informally, the second defendant clearly had a direct responsibility to the plaintiff for the oversight of the care provided by others. That is properly recognised in the imposition of a duty of care to carry out that function with due care and skill. But that, in itself, is insufficient to justify the imposition of vicarious liability.

[491] In my view the necessary relationship between the second defendant 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*. The second defendant 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 the second defendant is a charitable organisation. That in itself is not a bar to imposing liability – see *Blackwater v Plint* at [39] to [44]. However, the consequence is that imposing liability upon the second defendant, 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 the second defendant vicariously liable for the actions of holiday caregivers. It follows that the first defendant, whose relationship with both the Crown and the caregivers is even more removed, should not be held liable either.

BREACH OF FIDUCIARY DUTY

[495] The plaintiff's equitable claim against defendants was that:

- They jointly and severally held themselves out as trustees and/or persons in a position of trust, with "a responsibility of raising the plaintiff";

- That the plaintiff was placed in the care, control and/or guardianship of the second and/or third and fourth defendant as they owed a fiduciary duty of care to nurture and provide for her;

- The defendants are vicariously liable for the acts and omissions of the family members and third parties into whose care the plaintiff was placed;

- The defendants jointly and severally breached their fiduciary duties to the plaintiff by perpetrating and/or allowing her to be verbally, emotionally and physically abused and placing her in unsafe placements in which she was subject to sexual and physical abuse.

[496] In support of these claims the plaintiff repeated the factual allegations relied upon in support of the negligence claims.

[497] Ms Cull did not attempt to explain how this claim could be made out if that in negligence failed. I am satisfied that it cannot.

[498] Even if I accept that the second and third defendants were in a fiduciary relationship with the plaintiff, it seems to me that she faces the same difficulty as that faced by the appellant in *S v Attorney-General* (at 471), namely:

> ... the absence of proof that any breach of a duty which can properly be characterised as fiduciary was committed. The breaches put to us as failures by the department to act in BS's best interests ... were in reality no more than alleged breaches of the duty of care. ... Negligent conduct by a fiduciary will render the fiduciary liable in negligence but is not a breach qua fiduciary, notwithstanding that the fulfilment of the role of a fiduciary is the setting for the negligent act or omission. Nothing in the evidence in this case suggests that the department was attempting to act other than in what it believed to be

> the best interests of BS ... It was not in any way disloyal to BS nor did it act in bad faith or dishonestly. And, of course, the allegations of negligence on the part of the officers of the department have failed.

[499] Accordingly, the claims of breach of fiduciary duty are not made out.

ACCIDENT COMPENSATION DEFENCE

[500] Quite apart from the issue of vicarious liability, the first and second defendants claim that the plaintiff has cover under the Accident Compensation legislation, and is therefore statute barred from seeking compensatory damages, in respect of any acts of sexual abuse committed after 1 April 1974. That would cover the alleged abuse by her grandfather, SN and Mr L. She will also be covered under the present compensatory scheme for sexual abuse suffered before that date, they say, if she first received treatment for the particular abuse after 1 July 1999.

[501] The plaintiff, on the other hand, contends that damage for personal injury suffered by her prior to 1 April 1974 is not covered by the Accident Compensation legislation at all and that, because her proceedings were filed, but not heard, before s 21A of the Injury Prevention, Rehabilitation and Compensation Amendment Act (No 2) 2005 came into force on 11 May 2005, she is not precluded from pursuing her claim in this regard, no matter when it relates to.

[502] The current Act governing the Accident Compensation Scheme is the Injury Prevention, Rehabilitation and Compensation Act 2001, s 317(1) of which provides a blanket bar on civil proceedings for situations covered by the Act and its predecessors. It states:

> **317 Proceedings for personal injury**
>
> (1) No person may bring proceedings independently of this Act, whether under any rule of law or any enactment, in any court in New Zealand, for damages arising directly or indirectly out of—
>
> (a) personal injury covered by this Act; or
>
> (b) personal injury covered by the former Acts;

and goes on to provide in subs 7(a) that:

(7) Nothing in this section is affected by—

(a) the failure or refusal of any person to lodge a claim for personal injury of the kinds described in subsection (1).

[503] To determine what this means in practice, it is necessary to briefly review the background to the Accident Compensation Scheme and the successive statutes governing the scheme, since its inception.

[504] The Accident Compensation Scheme was introduced into New Zealand by virtue of the Accident Compensation Act 1972, which came into force in April 1974. That Act provided compensatory cover for personal injuries by accident.

[505] In 1975 the definition of "personal injury by accident" was amended by s 6 of the Accident Compensation Amendment Act 1974 by inserting a new s 105B into the principal Act. That section extended the definition to include "actual bodily harm" arising from an act or omission committed by another person after 1 April 1975, that fell within the description of specified Crimes Act offences, including rape, incest and indecent assault, and provided that "actual bodily harm" included mental or nervous shock.

[506] Similar provisions covering mental injury as a result of criminal acts have been included in all subsequent Accident Compensation Acts, although over the years the range of criminal offences covered has been increased significantly.

[507] The current Act defines personal injury in s 26(1)(d) to include mental injury suffered by a person in the circumstances described in s 21. Section 21, in turn, provides cover for mental injury in respect of criminal acts, as follows.

21 Cover for mental injury caused by certain criminal acts

(1) A person has cover for a personal injury that is a mental injury if—

(a) he or she suffers the mental injury inside or outside New Zealand on or after 1 April 2002; and

(b) the mental injury is caused by an act performed by another person; and

(c) the act is of a kind described in subsection (2).

(2) Subsection (1)(c) applies to an act that—

(a) is performed on, with, or in relation to the person; and

(b) is performed—

(i) in New Zealand; or

(ii) outside New Zealand on, with, or in relation to a person who is ordinarily resident in New Zealand when the act is performed; and

(c) is within the description of an offence listed in Schedule 3.

(3) For the purposes of this section, it is irrelevant whether or not the person is ordinarily resident in New Zealand on the date on which he or she suffers the mental injury.

(4) Section 36 describes how the date referred to in subsection (3) is determined.

(5) For the purposes of this section, it is irrelevant that—

(a) no person can be, or has been, charged with or convicted of the offence; or

(b) the alleged offender is incapable of forming criminal intent.

[508] Under this provision, a person is entitled to cover for mental injury arising out of any act performed on or in relation to that person, if the act falls within the description of the offences listed in Schedule 3 of the Act, which include sexual violation, incest, indecent act on a young person under 16 and indecent assault.

[509] A key feature of s 21 is that a person is entitled to cover for any act falling "within the description" of these offences. Cover is not dependent upon whether or not a person has been charged or convicted of that offence. The section clearly envisages situations where the perpetrator of the act or acts in question cannot be identified or located, or otherwise charged with the offence. It also extends to situations where there has been an acquittal, or where the offence is not capable of proof beyond reasonable doubt, but may still be proven to the civil standard for the purposes of the Act: see *CLM v ACC* HC AK CIV-2005-485-000893 12 May 2006 covering the parallel provisions under the 1992 Act.

[510] The first and second defendants argue that as the plaintiff qualifies for cover under the 2001 Act and one or other of its predecessors, s 317 bars her from seeking compensatory damages.

[511] The reasons they say that she is covered are:

- She suffered a mental injury as defined in s 27 of the 2001 Act, namely:

  > a clinically significant behavioural, cognitive, or psychological dysfunction;

  – and both Drs Crawshaw and Marks agree that she falls within that definition.

- Mental injury is included within the definition of personal injury – s 26(1).

- For the purposes of s 21, she suffered a personal injury (or injuries) before 1 April 2002 and had not lodged an ACC claim before that date. Accordingly, she is covered by the 2001 Act if:

  > 2(a) [she] would have had cover under the Act if the injury occurred on or after 1 April 2002, and
  >
  > (b) [she] would have had cover under the Act that was in force at the time that [she] suffered the injury.

- Pursuant to s 36(1), the critical factor for determining when a person is regarded as suffering from a mental injury in terms of s 21 is:

  > the date on which the person first receives treatment for that mental injury as that mental injury.

- "Treatment" for the purposes of s 36(1)

  > means treatment of a type that the person is entitled to under this Act or a former Act.

  – see s 36(3).

- The phrase, “for that mental injury as that mental injury” in s 36 envisages situations where the claimant may have sought treatment for some form of mental trauma, but at the time, the connection was not made between the trauma and the particular sexual act. Therefore, the focus is upon the date of treatment for the mental injury that is recognised as arising from the criminal act.

- While it is necessary that the criminal act occurred in New Zealand, the claimant does not have to be resident in this country when the mental injury occurred: see s 21(1)(a) and *Bryant v Attorney-General* WN CP44/00 7 August 2000 per Heron J.

- The focus on the date on which the claimant first received treatment for the mental injury arising from the criminal act means that ACC cover under the 2001 Act can encompass historical sexual abuse occurring prior to 1 April 1974: see *Brookers Commentary* – Personal Injury in New Zealand at IP21.06A.

- Whether the plaintiff is, in fact, covered for pre 1974 abuse will depend upon the date she received “treatment” for that abuse.

[512] While similar provisions existed under the 1998 legislation, the first and second defendants acknowledge that the position pre July 1999 was different.

[513] In both *S v Attorney-General* and *W v Attorney-General* the abuse in issue occurred prior to the commencement of the first Accident Compensation Act.

[514] In both cases, the Court of Appeal held that there was no indication that the 1992 Act was intended to provide retrospective cover for mental injury or nervous shock stemming from acts that occurred before the accident compensation scheme even existed. Therefore, the compensatory bar did not apply in respect of such mental injury.

[515] Accordingly, the first and second defendants submit that the plaintiff is covered under both the current legislation and the 1998 Act (by virtue of ss 40 and 44) in respect of mental injury arising from events occurring prior to 1974. However, they accept that cover will not be provided for pre-1974 injuries if treatment was received for the mental injury prior to 1 July 1999, which is the date that the 1998 Act superseded the 1992 Act. They accept, on the basis of *S* and *W*, that such coverage is not available in respect of the 1992 Act.

[516] Nor do they believe those conclusions are affected at all by the amendments to the present Act, which came into force in May 2005, and in particular, s 21A, which is relied on by the plaintiff.

[517] That section states:

> **21A Cover under Accident Rehabilitation and Compensation Insurance Act 1992 for mental injury caused by certain criminal acts**
>
> (1) This section applies to persons who suffered personal injury that is mental or nervous shock suffered as an outcome of any act of any other person, which act—
>
> (a) was performed on, with, or in relation to the claimant (but not on, with, or in relation to any other person); and
>
> (b) was within the description of any offence listed in the Schedule 1 of the Accident Rehabilitation and Compensation Insurance Act 1992 (the 1992 Act); and
>
> (c) was performed before 1 July 1992 (including before 1 April 1974) and was performed—
>
> (i) in New Zealand; or
>
> (ii) outside New Zealand, and the claimant was ordinarily resident in New Zealand within the meaning of the 1992 Act when the act was actually performed.
>
> (2) For the purpose of subsection (1),—
>
> (a) the personal injury is deemed to have been suffered on the date of the first treatment that the claimant received for that personal injury as that personal injury; and
>
> (b) that first treatment must have been received on or after 1 July 1992 and before 1 July 1999; and
>
> (c) the treatment must have been of a kind for which the Corporation was required or permitted to make payments either

directly under regulations made under the 1992 Act or under an agreement or contract or arrangement under section 29A of the 1992 Act, irrespective of whether or not it made any payment in the particular case.

(3) For the purposes of subsection (1), it is irrelevant—

(a) that no person can be, or has been, charged with or convicted of the offence; or

(b) that the alleged offender is incapable of forming criminal intent; or

(c) whether or not the person who suffered the personal injury was ordinarily resident in New Zealand within the meaning of the 1992 Act when the personal injury is deemed to have been suffered.

(4) Persons to whom this section applies are deemed to have had cover under the 1992 Act for the personal injury described in subsection (1) ...

...

(5) However, the following provisions apply to civil proceedings brought before or after the commencement of this section seeking general damages for mental or nervous shock suffered by a person as an outcome of any act described in subsection (1) (the proceedings):

(a) if the plaintiff received judgment in the proceedings, in his or her favour, before the commencement of this section, the plaintiff does not have cover under this section for the injury or injuries to which the proceedings relate:

(b) if the proceedings were filed, but not heard, before the date of introduction of the Injury Prevention, Rehabilitation, and Compensation Amendment Act (No 2) 2005, nothing in this section prevents the proceedings from being heard or prevents a court from awarding the plaintiff general damages for the mental or nervous shock:

(c) if the plaintiff continues the proceedings, the plaintiff must declare to the court any payments and entitlements received from the Corporation for the personal injury for which damages are sought, and the court must take those payments and entitlements into account in awarding the plaintiff any damages:

(d) on the date judgment is given in the proceedings, the plaintiff—

(i) does not have cover under this section for the injury or injuries to which the proceedings relate; and

(ii) must advise the Corporation of the judgment:

(e) if the plaintiff loses cover by virtue of paragraph (a) or paragraph (d), the Corporation may not recover any part of an

> amount that is deemed by subsection (4)(a) to be an entitlement paid to the plaintiff under the 1992 Act.

[518] While the first and second defendants accept that s 21A(5) leaves the door open to the plaintiff to pursue these proceedings in respect of mental injuries arising from acts occurring prior to 1974, if treatment for them was initiated prior to July 1999, they submit that this does not affect cover in respect of abuse occurring post 1 April 1974, as this has always been covered.

[519] The plaintiff takes a wider view of s 21A.

[520] Ms Cull submitted that:

> all of the previous acts and arguments in relation to the previous acts have been superseded by ... s 21A.

[521] She argued that:

- Section 21A(5) preserves the right to seek general damages for mental or nervous shock where proceedings were filed but not heard at the time at which this amendment came into force.

- Section 21A(5) applies to the plaintiff.

- Subsection (5) preserves the right to seek compensatory damages in respect of mental or nervous shock suffered by a person as an outcome of any act described in subs (1).

- Subsection (1) only refers to acts prior to 1992. Subsection (1) itself does not say anything about the time of treatment.

- Accordingly, s 21A preserves the right to sue for mental or nervous shock suffered as a result of any act occurring before July 1992, including the period pre 1 April 1974.

[522] This argument clearly overlooks the plain language and purpose of s 21A. Subsection (5), while making direct reference only to subs (1), is clearly concerned

with mental injury for the purposes of the compensatory scheme, not solely the criminal acts giving rise to that injury. Although subs (5) only refers back to subs (1), the latter is clearly qualified by, and must be read in conjunction with, subs (2). Subsection (2) provides that:

> for the purposes of subsection (1) … the personal injury is deemed to have been suffered on the date of the first treatment that the claimant received for that personal injury as that personal injury.

[523] Moreover, subs (1) is further qualified by the requirement in subs (2) that the first treatment must have been received on or after 1 July 1992 and before 1 July 1999. It is impossible to look at subs (1) in isolation. The term "mental or nervous shock" as described in subs (1) can have no meaning divorced from its context as set out in the section as a whole.

[524] Therefore, the effect of s 21A(5) is not, as the plaintiff contends, to preserve a right to sue in respect of all mental injuries stemming from acts occurring prior to July 1992. It is the date of the "injury" which is crucial, not the date of the criminal act.

[525] The express purpose of s 21A, as set out in the explanatory note to the Injury Prevention, Rehabilitation and Compensation Amendment Bill (No 3), headed "ACC cover for sexual abuse claimants for whom sexual abuse occurred before 1974", was to address the lacuna in coverage for mental injuries arising from historical abuse under the 1992 Act. However, in the interests of fairness, Parliament left a circumscribed exception allowing for parties to continue to seek damages when they had already filed proceedings on the assumption that they would not be statute barred under the 1992 Act. Section 21A does not, however, create some new general rule preserving an overarching right to compensatory damages for mental injury.

[526] In the alternative, Ms Cull argued that as, under the 2001 Act:

- The date upon which a person suffered personal injury is the date upon which the first treatment was received;

  and

- Treatment includes:

  i) the giving of treatment and

  ii) a diagnosis of a person's medical condition: s 33(1)(a) and (b);

  and

- The plaintiff first received treatment for nervous shock in 1987, when she was diagnosed with post traumatic stress disorder and thereby began treatment for her mental injury claims,

  therefore

- The diagnosis cannot fall within the ambit of the 1998 or 2001 Acts;

  and, as such,

- Section 21A(5)(b) preserves her right to sue for compensatory damages.

[527] Although the reliance upon the definition of treatment in s 33(1) is clearly incorrect (that section defines "treatment injury" as injury incurred in the course of a particular treatment), I accept that the argument is not affected if the definition in s 6 of the Act, which includes "physical" and "cognitive rehabilitation", is used.

[528] Ms Cull submitted that it is artificial to seek to distinguish separate mental injuries arising from separate acts of sexual abuse. Rather, the mental injury should be treated as a whole. In practice, compensation, if granted, would be for "the damage that has occurred as a result of the act for [sic] acts which fall within the First Schedule", without purporting to itemise or separate compensation for each different act of abuse.

[529] I do not accept that argument. Compensation can only be awarded on the basis of established criminal acts giving rise to mental injuries suffered during the statutory timeframe.

[530] Section 21 provides coverage for mental injuries caused by an act performed by another person. The phrase "another person" indicates that it specifically contemplates a particular, identifiable act, rather that some amorphous harm. While there will, no doubt, be situations where a claimant has suffered numerous incidents of sexual abuse, or abuse from more than one perpetrator, it is not sufficient for them to cite one such act, after which all subsequent acts of a like nature necessarily qualify, without further consideration.

[531] Moreover, the criminal act in question must be one falling within those listed in Schedule 3. Although coverage under s 21 is not dependent upon a conviction or criminal proof of one of the offences outlined in Schedule 3, the Court is nonetheless required to be satisfied on the balance of probabilities that such an act did occur. In each instance, the basic elements of the offence must be made out. Accordingly, in order to qualify in respect of mental injury in these circumstances, a claimant must be able to point to identifiable acts committed by discrete individuals.

[532] While I accept that it may appear contrived to attempt to attribute "parts" of a mental injury or psychiatric condition to their respective causes, and while a more holistic approach could well be justified at the financial assessment stage, it would seem to be completely contrary to the clear intent of Parliament, in listing specific sexual crimes in Schedule 3, to accept that mental injury can be defined in some global manner, without reference to the relevant qualifying acts.

[533] In many cases, this will not be an issue. Where a claimant has suffered from sexual abuse over a long period of time, even at the hands of numerous perpetrators, it may well be that treatment for this ongoing abuse will be sought simultaneously, therefore all the criminal acts will form part of the same mental injury for the purposes of coverage. However, where, as here, treatment was sought (at different points in time) in relation to distinct and separate criminal acts, the issue of coverage in respect of mental injury must be assessed at each distinct stage, in light of the relevant legislative provisions in operation at that time. Qualification for cover can hardly be determined in advance, in relation to abuse which has not yet been disclosed.

[534] There is also another practical difficulty with the plaintiff's argument in relation to Post Traumatic Stress Disorder. The exemption in s 21A only relates to mental injury arising as a result of certain criminal acts. Although Post Traumatic Stress Disorder could constitute a form of mental injury as defined in s 27, in order to qualify as a mental injury for the purposes of the compensatory scheme relating to criminal acts, and hence attract the exemption under s 21A, the injury needs to be specifically linked to one of the criminal offences listed in the relevant Act. At the time the diagnosis of Post Traumatic Stress Disorder was made in this case, the primary focus of the plaintiff's counselling was on parenting issues and crisis management. Although some mention was made at that time of her sexual abuse, the treatment was not "for" the sexual abuse in any specific sense; it was for parenting issues. This distinction is critical, given that, for the purposes of s 21A (in line with the parallel requirement in s 36 of the 2001 Act and s 44 of the 1998 Act) the treatment must be "treatment for that mental injury as that mental injury" – in other words, in respect of the mental injury, which has arisen as a result of the specified criminal act.

[535] Accordingly, the mental injury cannot have arisen at that stage. Therefore, the plaintiff's contention that all mental injury thereafter could also be exempt "on the back of" this initial mental injury must necessarily fail. Moreover, if the treatment in 1987 was, in fact, in relation to mental injury arising from sexual acts, the timing of this treatment would fall outside the period for which s 21A preserves the right to seek compensation: s 21A(2)(b).

[536] Finally, the plaintiff suggested that the first and second defendants have erred in their overall approach to this defence, given that they have overlooked s 359 of the 2001 Act, which states:

> **359 Injuries suffered before 1 April 1974**
>
> (1) This Act does not confer cover in relation to an injury suffered before 1 April 1974.
>
> (2) Subsection (1) applies subject to section 30(6) and (7).

[537] But this submission, in turn, overlooks the use of the word "suffered". "Suffer" is specifically defined in the interpretation section (s 6) of the 2001 Act.

That definition states that in the context of mental injury, the meaning of "suffer" is to be read in conjunction with s 36 and cl 55 of Schedule 1 of the Act. Section 36 specifically delineates how the date upon which a person is to be regarded as suffering a mental injury is to be calculated. As already noted, that section provides that a person shall be deemed to suffer a mental injury for the purposes of s 21 from the date on which that person first receives treatment for that mental injury as that mental injury. This is entirely consistent with s 359. So long as the treatment sought in respect of the mental injury occurred after 1 April 1974, it will prima facie not be excluded by virtue of s 359.

[538] In the absence of counselling notes, it is difficult to pinpoint exactly when specific allegations of sexual abuse were first made and when the plaintiff received treatment for that abuse.

[539] The allegation of sexual abuse by her grandfather was first mentioned to Letitia Allan, during a weekend in the bush. At that time, the plaintiff had been seeing Ms Allan for counselling for postnatal depression. However, the support provided at that time was not specifically tailored to sexual abuse; the therapy primarily related to the provision of skills to cope with parental pressures. It can not be described as treatment for the effects of sexual abuse specifically.

[540] It seems that the plaintiff first underwent counselling targeting sexual abuse in 1999. She had individual sessions with Dee DuCrow in February, March, May and June of that year and also took part in a group therapy course. She had further one on one sessions with Ms DuCrow in 2001.

[541] Ms DuCrow herself was unable to recall details of what was discussed during these sessions. The plaintiff said that the first time that she gave detailed evidence relating to specific incidents of abuse was when she talked to the Police. She was unsure whether she named the alleged offenders during the course of her therapy with Ms DuCrow.

[542] However, given that the plaintiff sought counselling for childhood sexual abuse and met with Ms DuCrow at least three times in the first half of the year for

counselling in respect of that abuse, I accept that in this time she would have outlined, in as much detail as she could manage, her beliefs as to what happened to her in her childhood. At that point she remembered abuse at Holly Grove, during her time at the Ss, and by her maternal grandfather. She said that reading her sister's file and her file respectively had triggered the recollection of the first two incidents. She received her own file in March 1999. It is not clear when she first saw her sister's. But she had mentioned abuse by male caregivers in a general way in 1987 or thereabouts. I therefore accept that the treatment that the plaintiff sought from Ms DuCrow can be taken as relating to these three alleged incidents, and that it occurred prior to 1 July 1999. Therefore, s 21A governs the mental injury arising from these alleged acts of abuse. As these proceedings were filed prior to the introduction of the Injury Prevention, Rehabilitation, and Compensation Amendment Act (No 2) 2005, the plaintiff would not be statute barred. This is the effect of s 21A notwithstanding that the abuse by the plaintiff's grandfather occurred after 1 April 1974.

[543] There is no suggestion that the alleged abuse by Mr N, Mr L or Mr McCormack was addressed in counselling before 1 July 1999. Accordingly, each of those events, if established, would be covered by the Accident Compensation Scheme.

LIMITATION ACT DEFENCE

[544] The third and fourth defendants submitted that the plaintiff's claim based on the alleged beating by Sr S about her head and ear was time-barred because she first became aware of the connection between the alleged assault and damage some time between 1987 and 1991. However, this argument fails to address s 24 of the Limitation Act 1950 which provides that for the purposes of that Act the right of action accrues on the date on which a person ceases to be under a disability. As both Dr Crawshaw and Dr Marks agreed that the plaintiff would have had difficulty in bringing her claim prior to the mid to late 1990s, I am satisfied that this defence would not prohibit the plaintiff from pursuing this claim and recovering against the defendants, if it were otherwise established on the facts.

DAMAGES

[545] As the plaintiff has not succeeded in establishing liability against any of the defendants in either negligence or breach of fiduciary duty and the first and second defendants are not vicariously liable for the wrongdoing of caregivers with whom the plaintiff was placed, it is not necessary to address her claims for damages, whether compensatory, aggravated or exemplary.

SUMMARY OF FINDINGS IN RELATION TO THE PLAINTIFF'S CLAIMS

[546] The second and third defendants owed duties of care to the plaintiff.

[547] The second defendant, through its contact staff, was required to carry out social work with due care and skill, according to the standards of the time. It was under a duty to monitor the plaintiff's residential placements, check new placements, oversee her progress generally and take reasonable steps to address any significant problems that became evident to its representatives.

[548] The third defendant was under a duty to feed and clothe the plaintiff and send her to school. It was also required to provide for her physical needs and protect her safety.

[549] In exercising day to day care of the plaintiff, the third defendant was under a duty to discharge its functions, including disciplining the plaintiff, in a manner consistent with accepted practices at the time, in the context of an institutional environment. Physical, verbal or psychological forms of discipline that exceeded accepted practice or could otherwise be categorised as abuse would be in breach of this duty of care.

[550] However, neither the second or third defendant owed duties akin to duties of optimal parenting. They were not required to provide the most favourable and stimulating environment possible. Nor were they under a positive duty to provide an emotionally fulfilling home, a loving support network or to ensure that the plaintiff thrived.

[551] The first and fourth defendants did not owe duties of care to the plaintiff.

[552] The second defendant was only able to exert limited control over the care of the plaintiff while she was at the orphanage. She was placed in what appeared to be appropriate foster and holiday placements, which the second defendant's social workers checked and monitored with due care, given the length of the placements. They also took adequate steps to address the plaintiff's apparent needs. However, given the lack of knowledge of the indicia of sexual abuse at the time, they cannot be criticised for failing to recognise that she may have been abused. Nor was it realistic to refer her to professional counselling. The second defendant did not breach its duty of care to the plaintiff.

[553] In the late 1960s to mid 1970s St Joseph's Orphanage was seen as providing an excellent standard of care. The means of disciplining and controlling the girls, while unacceptable by today's standards, did not go beyond what was accepted practice in an institutional environment at the time. The third defendant did not breach its duty of care to the plaintiff.

[554] The second defendant is not vicariously liable for any sexual abuse of the plaintiff by caregivers on holiday placements. The necessary element of control was lacking in the relationship between the second defendant and the caregivers. In addition, compelling policy factors, which were present in *S v Attorney General*, do not feature in this case.

[555] Nor is the second defendant vicariously liable for sexual abuse of the plaintiff by family members.

[556] The claim for breach of fiduciary duty mirrored the claim in negligence and must also fail.

[557] As treatment in respect of mental injury arising from the alleged abuse by Mr N, Mr L and Mr McCormack did not occur until after 1 July 1999, this injury would be covered under the Accident Compensation Scheme, if the allegations were made out. On the other hand, treatment for mental injury arising from alleged abuse

at Holly Grove, at the Ss and by the plaintiff's grandfather falls within the scope of s 21A of the Injury Prevention, Rehabilitation and Compensation Act 2001. So that the right to sue for compensatory damages in respect of that abuse is preserved.

[558] The plaintiff's claim of personal injury arising from the alleged beating by Sr S, if it had been made out on the facts, would not be barred by the Limitation Act, given that the plaintiff was under a continuing disability.

[559] It is unnecessary to consider damages, as none of the causes of action has been made out.

COSTS

[560] If counsel are unable to resolve the issue of costs among themselves, counsel for the defendants are to file memoranda within 21 days of the release of this judgment, with counsel for the plaintiff to file a response 14 days thereafter.

M A Frater J

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