SUPREME COURT OF QUEENSLAND

CITATION:	*Hood & Anor v State of Queensland & Ors* [2002] QSC 169
PARTIES:	**JUDITH JOYCE HOOD** (First Plaintiff) Applicant **AND** **GREGORY JOSEPH HOOD** (Second Plaintiff) **V** **STATE OF QUEENSLAND** (First Defendant) Respondent **AND** **THE MINISTER FOR FAMILIES, YOUTH AND COMMUNITY CARE** (Second Defendant) Respondent **AND** **THE CHIEF EXECUTIVE, DEPARTMENT OF FAMILIES, YOUTH AND COMMUNITY CARE** (Third Defendant) Respondent **AND** **UNITING CHURCH IN AUSTRALIA, PROPERTY TRUST (Q) – MERTHYR PARISH** (Fourth Defendant)
FILE NO/S:	8337 of 1996
DIVISION:	Trial
PROCEEDING:	Application
DELIVERED ON:	13 June 2002
DELIVERED AT:	Brisbane
HEARING DATE:	3 April 2002
JUDGES:	Ambrose J
ORDER:	**Application dismissed**
CATCHWORDS:	PRACTICE – Leave to proceed – application for leave to proceed with claim in negligence – delay – damages claimed for psychiatric injury resulting from anxiety as to outcome of police investigation – whether respondents under a duty to advise of outcome – unlikelihood of success.

Child Care Act 1991 (Qld), Part 5, Part 6, s 4, s 4(1), s 4(2), s 8, s 8(1), s 8(2), s 9, s 80, s 82(1)
Child Care (Family Day Care) Regulation 1991 (Qld), reg 30(1), reg 30(2), reg 30(3), reg 30(4), reg 30(5)
Rules of the Supreme Court (Qld), 0 90 r 9
Uniform Civil Procedure Rules 1999 (Qld), r 5, r 5(3), r 389(1), r 389(2), r 389(4)

Alcock v The Chief Constable of South Yorkshire Police [1992] 1 AC 310, considered
AMP v RTA & Anor [2001] NSWCA 186 (2 August 2001), considered
Bourhill v Young [1943] AC 92, considered
Brisbane South Regional Health Authority v Taylor (1996) 186 CLR 541, considered
Dempsey v Dorber [1990] 1 QdR 418, considered
General Steel Industries Inc v Commissioner for Railways (NSW) (1964) 112 CLR 125, considered
Jaensch v Coffey (1984) 155 CLR 549, considered
Lilyville Pty Ltd v Colonial Mutual Life Insurance Society Ltd [1999] QSC 372, considered
Morgan v Tame [2000] NSWCA 121, followed
Mount Isa Mines v Pusey (1970) 125 CLR 383, considered
Page v Smith [1994] All ER 522, considered
Rowe v McCartney [1976] 2 NSWLR 72, considered
Hancock v Wallace and the Nominal Defendant [2001] QCA 227 considered
Sullivan v Moody, Thompson v Connon (2001) 75 ALJR 1570, considered
Tyler v Custom Credit Corporation Ltd [2000] QCA 178, considered

COUNSEL: A M Daubney SC for the applicant
D O J North SC with J Rolls for the first, second and third respondents

SOLICITORS: Clewlett Corser Drummond for the applicant
C W Lohe, Crown Solicitor for the respondents

[1] This is an application by the first plaintiff ("the plaintiff"), pursuant to UCPR 389(2) for leave to proceed in this action which was commenced by writ of summons issued on 3 October 1996 and renewed by leave on 30 September 1997 and served on 28 September 1998. The cause of action is said to have arisen between November 1993 and May 1994 – probably about January 1994.

[2] The writ was issued by the plaintiff and her husband the second plaintiff against the State of Queensland, the Minister for Families Youth and Community Care, the Chief Executive, Department of Families Youth and Community Care (the "Department") and Uniting Church of Australia Property Trust (Q) Merthyr Parish (the "Merthyr Centre").

[3] The plaintiff and her husband (the second plaintiff) claimed against all defendants damages for –

(i) Negligence;
(ii) Breach of Statutory Duty;
(iii) Breach of Contract;
(iv) Defamation; and
(v) Injurious falsehood.

[4] On 25 May 2001, by consent, an application made by the Merthyr Centre to dismiss it as a party to the writ of summons was dismissed on condition that the plaintiff discontinue the proceedings against that defendant within 7 days of the date of the consent order. The plaintiff did discontinue her action against the Merthyr Centre.

[5] In the draft of her proposed statement of claim which is ex "JH2" to her affidavit filed in support of her application on 7 March 2002, the plaintiff alleges that Queensland through its officers and various instrumentalities from sometime in November 1993 to "mid-1994" was responsible for the acts/omissions pleaded in paragraph 9 of the statement of claim which resulted in psychiatric injury to her in respect of which she claims damages in the vicinity of $.5m.

[6] Queensland opposes the granting of leave to take any further steps in the action on a number of grounds the principal ones being –

(i) The unlikelihood on the facts canvassed in the material and pleaded in her proposed statement of claim of the plaintiff succeeding in establishing any breach of duty of care owed to her;
(ii) The lengthy delay between the time of the alleged breach duty (1993-1994) and the time of making the application for leave to take another step in pursuit of it (March 2002) – approximately eight years; and
(iii) The prejudice which would be occasioned to Queensland in now meeting issues relating both to liability for and quantum of damage in respect of a psychiatric injury allegedly suffered by the breach of duty allegedly owed to the plaintiff which occurred so long ago.

[7] It is convenient to outline very briefly the facts asserted by the plaintiff which she contends, if established, will give her an arguable cause of action against Queensland. Those facts must be considered against the background of the provisions of the *Child Care Act* 1991 ("the Act") with its objects specified in section 4 of it, and also against the background of the Regulations made under that Act to secure those objects.

[8] The objects of the Act listed in s 4(1) include –

"(a) to provide for an effective system of licensing child care services;
and

(b) to provide a statutory basis for the establishment of child care regulations that set standards for the provision of quality child care; and

> (c) to ensure that child care services provide care that is a safe, positive, nurturing and educational experience for children; and ……"

[9] Section 4(2) provides –

> **"(2)** The interests of children are to be regarded as the paramount consideration under this Act."

[10] Under s 8(1) of the Act a licence may be issued in relation to a prescribed type of child care service and under s 8(2) different types of childcare services may be prescribed by regulation.

[11] Under s 9 of the Act a person may not provide child care services of a prescribed type otherwise than under the authority of a licence or otherwise than in accordance with the terms and conditions of the licence.

[12] On the facts of this case the Merthyr Centre at material times held a licence under s 8 of the Act.

[13] Section 80 of the Act provides *inter alia* –

> **"80(1)** A licensee of a family day care scheme (*the Merthyr Centre in this case*) may approve a person to practice family day care within the scheme if the licensee is of the opinion that the person is an appropriate person to practice family day care.
>
> **(2)** The licensee must issue a certificate of approval to the person or endorse the person's name on the certificate of approval issued to another person who is authorised to practise family day care at the same place.
>
> **(3)** A licensee of a family day care scheme must not engage a person who is not a care provider to practise family day care within the scheme.

[14] Under s 82(1) of the Act the Chief Executive obliged to administer the Act may by written notice prohibit a person from providing day care of children on a regular basis for reward at the home of that person.

[15] The plaintiff under the Act and Regulations at material times was a "care provider" who held a certificate of approval issued by the Merthyr Centre as licensee.

[16] Under Regulation 30(1), if the licensee is satisfied *inter alia* that–

> "(b) the care provider is no longer providing appropriate care for children in a family day care or ……..
>
> (d) the behaviour of another member of the care provider's household is inappropriate for the care of children; or

(e) the care provider's home is no longer a safe place in which to provide care to children …….

the licensee may suspend the care provider's certificate of approval".

[17] Under Regulation 30(2) it is provided that –

"the licensee must not act under sub-section (1) unless –

(a) the care provider has been given a reasonable opportunity to make the necessary changes; or
(b) there is an immediate risk to the child".

[18] Regulation 30(3) provides –

"if a licensee acts under sub section (1) the licensee must give the care provider written reasons for the suspension; and

(a) …

(b) inform the care provider that the care provider has a right to make oral and written submissions to the licensee in relation to the suspension within 14 days of the suspension".

[19] Regulation 30(4) provides –

"**(4)** the licensee must consider any submissions made under s 3(b) by the care provider and may –

(a) remove the suspension; or
(b) …….
(c) continue the suspension for a specified period (not longer than the period for which the certificate of approval remains in force; or
(d) cancel the certificate of approval".

[20] Regulation 30(5) provides –

"the licensee must notify the care provider of the licensee's decision and if the licensee acts under sub-section (*sic regulation*) 4(b), (c) or (d) must give the care provider –

(a) written reasons for the licensee's decision within 30 days of receiving the submission; and
(b) inform the care provider that the care provider may appeal against the licensee's decision to the Chief Executive under regulation 32".

[21] Under Parts 5 and 6 of the Act an appeal may be taken from the Chief Executive to the Child Care Review Tribunal and there is a limited right of appeal from that Tribunal to a District court.

[22] I will turn now to the facts which the plaintiff contends give her an arguable cause of action against Queensland.

[23] At all material times the plaintiff was a care provider licensed by the Merthyr Centre to care for children in a dwelling house which she occupied with her husband at Hendra which was within an area in respect of which the Merthyr Centre was licensed to provide and supervise the provision of day care child minding facilities.

[24] In July 1993 the mother of one of the children to whom the plaintiff provided day care, complained to the plaintiff that the child had made statements to her of "an inappropriate sexual nature".

[25] The plaintiff forthwith notified the scheme-coordinator of the Merthyr Centre and on 27 July 1993 the scheme coordinator notified appropriate officers of the Department whose obligation was to administer the Act.

[26] On 27-28 July 1993 Departmental officers referred the matter to Police officers ("the Police") and to the Royal Brisbane Hospital Scan team ("Scan") for investigation.

[27] On 4 October 1993 – presumably some time after the investigations had commenced – on the advice or at least at the suggestion of the Department the plaintiff's care providers certificate of approval was suspended by the Merthyr Centre pursuant to regulation 30.

[28] Presumably the plaintiff was notified to this effect. There is no evidence as to whether the Merthyr Centre complied with the requirements of reg 30(2), (3), (4) and (5); I infer that it is the plaintiff's contention that it did not – hence the claim for damages for breach of statutory duty.

[29] It is contended that on 11 November 1993 (a little more than 5 weeks after suspension of the plaintiff's certificate of approval) the Police and Scan completed investigations and "closed their files".

[30] The Police (and perhaps Scan) advised the Department which had sought an investigation of the matter, that they were closing their files without, at that stage at least, taking any further action

[31] It emerges that in the course of the investigation of the matter, Police officers (and perhaps Scan) investigated whether any activities of the plaintiff's husband had been connected with comments made by the child "of an inappropriate sexual nature". There is no evidence as to the content of any report by the investigators which preceded "the closing" of their files, relating to their investigations on 11 November 1993.

[32] The plaintiff, whose certificate of approval had been suspended for about five weeks prior to the investigating teams "closing their files", was not informed by either of the investigating bodies (the Police and Scan) or by Merthyr Centre or by the Department which had asked the Police and Scan to investigate the complaint made to the plaintiff by the child's mother, that those investigations had been completed and, although it is not clear on the evidence, I infer that neither the Police nor Scan had recommended that any further enquiries or surveillance be undertaken with

respect to the complaint made by the child's mother of that child's "inappropriate statements of a sexual nature".

[33] It appears that it was in about May 1994 as a consequence of instructions they received from the plaintiff (and perhaps her husband) that their solicitors learnt that the Police and Scan had closed their files without apparently recommending that any action be taken against the plaintiff's husband.

[34] When the plaintiff learnt of this from her solicitors she eventually made a written complaint to the Department on 5 September 1994 concerning "its handing of the matter". This complaint set out at considerable length particulars, *inter alia*, of the alleged failure of the Merthyr Centre to comply with Reg 30(3)(b). The letter also complained of the Department's failure to advise her that the Police and Scan were "no longer actively investigating the matter" of the complaint.

[35] On 3 October 1994 the Department replied to the plaintiff advising that an "outcome planning meeting" was to be held with the coordinator of the Merthyr Centre and Departmental officers "in the near future" and also advising that her future status as a family day care provider would be determined, and she would be advised of her rights of appeal in relation to any decision or action that might be taken. It advised her that it was under no obligation to advise her or her family as to the outcome of Police investigations "or to intervene other than in an advisory capacity in a suspension process of care providers".

[36] The "outcome-planning meeting" was held on 22 November 1994 the minutes of which are Ex JH8 to the applicant's affidavit; the plaintiff was not notified of the result. A subsequent meeting was held on 30 November 1994 the minutes of which suggest that the Merthyr Centre had not in fact complied with Reg 30(3)(b) in suspending the plaintiff's certificate of approval.

[37] On 22 December 1994 the plaintiff lodged a complaint with the Ombudsman concerning the way the Department had "handled the matter" and the fact that she had not received notification of the outcome of the investigations conducted by the Police and by Scan.

[38] On 17 February 1995 the Director General of the Department advised the Merthyr Centre in the following terms –

> "In view of the need to ensure that young children are not at risk my advice is that children not be placed by the Merthyr Family Day Care Scheme within the Hood (*plaintiff's*) household. This advice confirms the oral information provided by Departmental officers at the outcome meeting of 22 November 1994".

[39] The coordinator of the Merthyr Centre by letter dated 19 January 1995 had advised the plaintiff that it knew of no reason why she should not be allowed to renew her registration as a day care provider. I infer that by 22 November 1994 the certificate of approval had expired by effluxion of time; renewal was required every two years (vide para 8 of the minutes of the Merthyr Centre meeting of 22 November 1994 dated 30 November 1994). I assume that the letter of 19 January 1995 ought be construed as meaning that Merthyr Centre then knew of no reason why her certificate of approval as a day care provider might not be renewed under the Act and Regulations should she seek its renewal.

[40] However, on 17 February 1995 the Department advised the scheme coordinator of the Merthyr Centre that it considered placement of children in the plaintiff's household "may constitute an unacceptable risk". The basis of such advice emerges in the minutes of the meeting of 22 November 1994 dated 30 November 1994; it may have been the acceptance of the possibility that the complaint was well founded – although not supportable by convincing evidence – that led to the conclusion that the child may have been exposed to something while in the plaintiff's day care which led her to make the comments about which her mother complained to the plaintiff.

[41] It was on 14 March 1995 that the Ombudsman referred the plaintiff's complaint of 22 December 1994 to the Department. He advised the plaintiff that he would write again "in due course" advising the outcome of his enquiries.

[42] On 2 May 1995 the Department again advised the scheme coordinator of the Merthyr Centre that children should not be placed in the plaintiff's household.

[43] The Chief Executive of the Department did not then and has not subsequently purported to exercise his power under s 82(1) of the Act to prohibit the plaintiff from providing day care of children on a regular basis.

[44] It was on 3 October 1996 that the writ in this action was issued "to preserve the rights" of the plaintiff in the event presumably that she did not receive what she considered to be an adequate "*ex gratia*" payment to compensate her for what seems essentially to have been her complaint of the wrongful suspension of her certificate of approval on 4 October 1993.

[45] It seems on the material that the basis of this complaint was her assertion that she had never been served with written reasons for her suspension and given the information to which she was entitled under regulation 30(3) and that there had been non compliance by the Merthyr Centre with the requirements of regulation 30(4) and (5).

[46] On 7 November and 2 December 1996 the plaintiff's solicitors enquired of the Ombudsman as to the progress of his investigation.

[47] It must be remembered that the gravamen of the plaintiff's complaint to the Ombudsman seems to have been the failure of the Merthyr Centre to comply with the requirements of regulation 30 when at the suggestion of the Department it suspended the plaintiff's certificate of approval under regulation 30(1).

[48] The plaintiff then complained to the speaker of Parliament concerning the delay of the Ombudsman in completing his investigation.

[49] On 7 August 1997 the Ombudsman expressed to the Department his preliminary views on a variety of matters including "severe deficiencies" in the handling of the plaintiff's "case" and advising that she had suffered actual detriment because her case "was mismanaged". On 14 August 1997 the Ombudsman advised the plaintiff's solicitors of the stage his investigation had reached and of the fact that he had advised the Department of his preliminary findings.

[50] On 30 September 1997 leave was obtained to renew the plaintiff's writ issued on 3 October 1996.

[51] In January and March 1998 exchanges took place between the Department and the Ombudsman concerning his preliminary report and on 31 March 1998 he provided his final report to the Department in which he concluded that "the intervention involving the Hood family, the removal of children placed with Mrs Hood, and the decision not to place further children with Mrs Hood were not properly managed".

[52] He advised that the Department should enter into "meaningful negotiations with the plaintiff to achieve an acceptable compensation package by way of an *ex gratia* payment for loss of earnings, legal costs and for "personal suffering as a consequence of the inappropriate way in which the investigation was handled".

[53] On 8 May 1998 an officer of the Department advised the solicitors for the plaintiff *inter alia* that "I wish to dispel the Ombudsman's inferences therein that I have accepted all his findings or that I accept that the Department has a legal liability to compensate your client".

[54] I would remark merely at this stage that I did not understand it to be seriously contended that it was the function of the Ombudsman in considering the complaint made by the plaintiff to embark upon a consideration of all the facts, which the plaintiff now seeks to agitate in the action she proposes to pursue against Queensland.

[55] It is clear that her complaint in essence related to the wrongful suspension of her certificate of approval because she asserted that the requirements of regulation 30(2), (3), (4) and (5) had not been complied with. This assertion seems not to have been contested at the "outcome planning meeting" held on 22 November 1994.

[56] Undoubtedly her suspension would have caused the plaintiff financial loss because upon suspension she would have been unable to earn income from providing childcare lawfully as she could prior to that suspension.

[57] It is far from clear to me on perusing the material that the matters in respect of which the plaintiff seeks to recover damages against Queensland were ever raised before the Ombudsman to support her claim for compensation. I am unable to glean from the material the extent to which, if at all, reference was made to the psychological impact of the failure of anybody to notify her that her husband was not to be charged.

[58] To the extent that they were raised, in my view, it would have been quite outside the scope of his investigations to embark upon a consideration of them, least of all to make any recommendations concerning the appropriate compensation to be offered in respect of them.

[59] In any event between 8 May and 21 August 1998 correspondence passed and discussions took place between the plaintiff and the Department concerning her claims for compensation.

[60] On 14 September 1998 the plaintiff changed solicitors and this was recorded by filing a notice of change on 28 September 1998.

[61] On 28 September 1998 all defendants were served with the renewed writ of summons under cover of a letter stating "this writ has been served to preserve our client's cause of action in the matter. However as we are currently on negotiations

with the Department … we do not require you to enter an appearance at this stage. Written notice of 28 days will be given should an appearance be required".

[62] On 20 November 1998 the Ombudsman's investigation was "officially closed".

[63] On 30 April 1999 advice from counsel was obtained and efforts, apparently for the first time, were then made to obtain medical evidence relevant to the relief, which the plaintiff claims in her proposed statement of claim.

[64] On 30 May 2000 the plaintiff's new solicitors sought to have the plaintiff examined by Dr Alcorn at the earliest opportunity. This action was taken subsequent to receiving advice from counsel concerning the necessity for obtaining further medical evidence.

[65] The plaintiff was examined and interviewed by Dr Alcorn on 31 August 2000 and his report (dated 13 September 2000) was received by the plaintiff's solicitors on 12 October 2000.

[66] It was not until 13 September 2000 that a psychiatric report was obtained from Dr Alcorn concerning the alleged psychiatric injury sustained by the plaintiff as a consequence of the failure *inter alia* of Queensland through the relevant Department to notify her in a timely way between November 1993 and May 1994 that the Police and Scan had closed their investigations into the matter of complaint about "the inappropriate sexual comments by" a child of tender years, and that there was no intimation of any intention by the Police or Scan, at that time in any event, to take action against her husband.

[67] It was not until February 2001 that counsel was briefed to draft the proposed statement of claim exhibited to the plaintiff's affidavit.

[68] On 23 April 2001 the solicitors for the plaintiff notified the defendants of their intention to proceed with the action.

[69] Enclosed with this notice was a copy of Dr Alcorn's report received by the plaintiff's solicitors on 12 October 2000 (6 months earlier).

[70] It was on 10 May 2001 that the plaintiff discontinued her action against the Merthyr Centre.

[71] It was on 8 March 2002 that this application was brought; it was argued on 3 April 2002.

[72] In considering an application for leave to take a new step in an action under UCPR 389 (2) I keep in mind the philosophy of the *Uniform Civil Procedure Rules* expressed in UCPR 5 which states –

> **"(1)** The purpose of these rules is to facilitate the just and expeditious resolution of the real issues and civil proceedings at a minimum of expense.
>
> **(2)** Accordingly these rules are to be applied by the courts with the objective of avoiding undue delay, expense and technicality and facilitating the purpose of these rules.

> **(3)** In a proceeding in a court a party impliedly undertakes to the court and to the other parties to proceed in an expeditious way".

[73] Under RSC 090 r 9 of the old Supreme Court rules which were replaced by the current *Uniform Civil Procedure Rules* 1999, on 1 July 2000 it was provided –

> "**(2)** where 3 years have elapsed from the time the last proceeding was taken no fresh proceedings shall be taken without the order of the court or a judge which may be made either ex parte or upon notice"

[74] It is relevant in my view to keep in mind that the current *Uniform Civil Procedure Rules* have reduced by one year the permissible period of delay in prosecuting an action without obtaining leave to proceed. Under the old rules leave of the court was required to take a new step only after a delay of 3 years.

[75] It is interesting to note that under UCPR 389(4) it is provided –

> "Until the end of 30 June 2000 sub rule (2) applies as if the reference to 2 years were a reference to 3 years".

[76] In my view it is permissible to infer from this rule that subsequent to 30 June 2000, under the *Uniform Civil Procedure Rules* a Court may regard delay in the prompt prosecution of a claim as a more serious matter than was formerly the case, consistent with the implied undertaking to the court, and to the defendants, to proceed in an expeditious way under UCPR 5(3).

[77] The onus in this case is on the plaintiff to show that there is good reason to make the order she seeks. In this respect I refer to the observations of Chesterman J in *Lilyville Pty Ltd v Colonial Mutual Life Insurance Society Ltd* [1999] QSC 372 where he adopted the approach of Connolly J in *Dempsey v Dorber* [1990] 1 QdR 418 at 420 when considering the obligation upon a plaintiff seeking leave to continue an action after a delay of 3 years under RSC 090 r 9.

[78] In *Tyler v Custom Credit Corporation Ltd* [2000] QCA 178 Atkinson J in a judgment with which the other members of the Court of Appeal agreed listed a number of factors to be taken into account when determining whether the interests of justice require leave to be given in an application of this kind.

[79] Those matters include how long ago the events alleged in the statement of claim are said to have occurred, the delay if any before litigation was commenced in respect of those events, how long ago the litigation was commenced, whether or not the course of litigation has been characterised by periods of delay and, importantly, what prospects of success the plaintiff has in the action.

[80] Other factors that must be considered include whether the delay is attributable only to the plaintiff or to both the plaintiff and the defendant, and whether the impecuniosity of the plaintiff has been responsible for the pace of the litigation, and whether the defendant could be said to be responsible for that impecuniosity.

[81] Further consideration should be given to whether litigation between the parties would be concluded if leave were not given to the plaintiff to take a new step.

[82] It is relevant also to consider just how far the action commenced by the plaintiff has in fact progressed.

[83] It is also relevant to consider whether the delay has been caused by the dilatory behaviour of the plaintiff's lawyers pursuing the cause of action now sought to be further pursued. The plaintiff's delay personally is regarded as more serious than delay by his or her legal advisors.

[84] It is relevant to consider whether there is a satisfactory explanation for the delay and of importance is the existence of any prejudice to which the defendant may be subjected as a consequence of the delay which might make difficult a fair trial of the issues the plaintiffs seeks to raise.

[85] On the facts of this case the plaintiff contends that her cause of action arose sometime between 11 November 1993 and perhaps the beginning of 1994 – approximately 8 years before she brought this application.

[86] Initially on 22 December 1994 the plaintiff complained to the Ombudsman concerning the way the Department had "handled the matter" and the fact that over a period of about 6 months she had received no notification of the outcome of the investigations conducted by the Police and Scan.

[87] This complaint to the Ombudsman was made approximately 12 months after the earliest date advanced by the plaintiff for the accrual of her cause of action. Thereafter during the year 1995 and until October 1996 the plaintiff pursued her complaint to the Ombudsman with a view apparently to obtaining some *ex gratia* payment of compensation for the suspension of her certificate of approval – it seems principally on the ground that that certificate had been suspended without her being given notice of the proposal by the Merthyr Centre to do so, to allow her the opportunity to appeal and to negotiate with the Department for an *ex gratia* payment of "compensation" resulting from the wrongful suspension of her certificate of approval. I would infer that her claim would have been principally against the Merthyr Centre; it seems the Department was under no obligation to her with respect to the suspension of her certificate of approval.

[88] The Ombudsman's investigations into the plaintiff's complaint did not conclude until 31 March 1998 – approximately 4 years after her alleged cause of action arose.

[89] It was on 3 October 1996 that the writ commencing this action issued "to preserve the rights of" the plaintiff in the event that she did not receive what she considered to be an adequate "*ex gratia*" payment to compensate her for the wrongful suspension of her certificate of approval on 4 October 1993.

[90] She did not attempt to serve that writ of summons on the defendants pending her attempts to obtain what she considered to be an appropriate *ex gratia* payment for loss she suffered as the result of the allegedly wrongful suspension of her certificate of approval.

[91] On 30 September 1997 – just before 12 months had elapsed since the issue of her writ of summons on 3 October 1996 the plaintiff obtained leave to renew her writ.

[92] On 31 March 1998 the Ombudsman gave his final report to the Department advising that it should enter into "meaningful negotiations" with the plaintiff to achieve an

acceptable *ex gratia* payment of compensation for her loss of earnings, legal costs and her "personal suffering".

[93] On 8 May 1998 the Department advised the solicitors for the plaintiff that it did not accept the conclusion of the Ombudsman that the Department was liable to compensate the plaintiff for any loss.

[94] It was not until 28 September 1998 that the defendants were served with the writ of summons renewed almost 12 months earlier.

[95] Even when service of the renewed writ of summons was effected on the defendants it was effected under cover of a letter stating that it had been served "to preserve" the plaintiff's cause of action, but that because the plaintiff was still negotiating with the Department in an effort to obtain an *ex gratia* payment for loss suffered as a result of an improper suspension of the certificate of approval, no appearance by the defendants was required.

[96] At this stage of course the former rules of the Supreme Court were in operation the *Uniform Civil Procedure Rules* coming into force on 1 July 1999.

[97] It was not until 30 April 1999 that steps were first taken to obtain medical evidence relevant to pursuit of the relief the plaintiff now seeks in her proposed statement of claim.

[98] The *Uniform Civil Procedure Rules* had not come into effect when that step was first taken. More than 5 years had elapsed since the alleged cause of action arose and about 7 months had elapsed since the last step had been taken in the action to serve the renewed writ of summons.

[99] The first (and apparently only) psychiatric report obtained by the plaintiff concerning the cause of her alleged psychiatric injury was not prepared until 13 September 2000 – more than 12 months subsequent to the *Uniform Civil Procedure Rules* coming into effect.

[100] On 23 April 2001 the plaintiff notified the defendants of her intention to proceed with her action. This however, in my view, was not a "step" taken in the action. This application for leave to take a fresh step was taken on 8 March 2002 nearly 12 months after that notification was given.

[101] It could not be said that that application involved taking a new step within the meaning of UCPR 389(1) however, I regard the delay between the arising of the alleged cause of action and the seeking of leave to take a new step as commencing about the beginning of 1994 and continuing on until March 2002 – a period of about 8 years.

[102] The period of delay between the commencement of proceedings and the making of this application for leave to take a new step must be measured from the date of issue of the first writ of summons (but not served) on 3 October 1996 and concluding on 8 March 2002 – a period of approximately 5 ½ years.

[103] Although the plaintiff asserts that a reason for delay was her impecuniosity, in my view the material indicates quite clearly that the claim she now seeks to bring for damages for the negligent infliction on her of psychiatric injury is hardly consistent with all but one of the claims endorsed on the writ of summons which was first

issued. It was asserted by her solicitors when the writ was issued that its issue was designed to "preserve" her right rather than to pursue them which she chose to do by continuing to seek the assistance of the Ombudsman. The same intimation was given when ultimately it was served – two years after it was issued. Claims (iv) and (v) seem referable to the plaintiff's husband and the plaintiff does not seek to pursue them in her proposed statement of claim.

[104] Much of the relief sought in that writ of summons – which she no longer seeks to pursue – is more consistent with the complaint made of loss sustained as a consequence of the alleged failure of the Merthyr Centre to give her the appropriate notices and to advise of the avenue of appeal against the suspension which if established, would arguably make the purported suspension ineffective at law than it was with a claim for damages for the negligent infliction of psychiatric injury.

[105] Be that as it may, at some stage – I would infer at about the time Counsel was briefed early in 1999 – perhaps 5 years after the suspension of her certificate of approval – advice was given to her solicitors to obtain medical evidence relevant to the claim she now seeks to pursue. It seems clear that no medical evidence was then available directed to support her assertion that she suffered psychiatric injury at some time prior to May 1994 as a consequence of the failure of Queensland to give her a timely notification that the Police had closed their file on the investigation of her husband's involvement in the matters of complaint to which I have referred and well before she learnt through enquiries by her solicitors (and the solicitors for her husband) that the relevant files had been "closed" – on the ground that in the view of the Police "the case against Mr Hood is very weak" (vide letter Merthyr Centre to the Department dated 22 June 1995 – part of Ex JH29 to the affidavit of the plaintiff).

[106] Assuming that the cause of action in respect of which she now seeks, with leave of the court, to take a new step arose in say January 1994 more than 5 years elapsed before the first attempt seems to have been made to obtain any expert psychiatric evidence to support that cause of action.

[107] It is unnecessary to analyse at length Dr Alcorn's report of 13 September 2000 which is Ex JH20 to the plaintiff's affidavit. For the purposes of this application it will suffice to cite three paragraphs of that report.

> "The events proximate to her psychiatric diagnosis appear to be the outset of a number of anxiety symptoms in late 1993 after police involvement. This was largely a matter of agitation, although prior to Christmas she also recounted that she had severe fears and could not walk out the front stairs.
>
> It appeared diagnostic criteria sufficient for her Panic Disorder commenced in toto in early 1994. The Major Depressive Disorder evolved during the course of 1994. Rather than these symptoms remitting after she received word that the case had been closed in mid-1994, she moved from being anxious and depressed to additionally being angry. After this, it was recommended she have antidepressants and 1995 appeared, from her self-report, to have been a time when this condition intensified with near-melancholic features. It is of note that her asthma once again became unstable

> and that she did require prednisone treatment which may have exacerbated the mood disturbance. (The aetiology of the asthma attacks have been noted by Dr McKeon in his report)".
>
> "The chronology provided by the subject does suggest that although she did develop a lesser psychiatric condition (probably that of an Adjustment Disorder with Depressed Mood) as a consequence of the initiation of the police investigation in October 1993, from early 1994 there was a gradual evolution of psychiatric symptomatology such that by mid-1994 when she was notified of the police's lack of interest in the case, there was clearly established psychiatric illnesses of Major Depressive Disorder and Panic Disorder with Agoraphobic symptoms. After notification, there was also a significant increase in mood lability associated with anger".

[108] Subsequent to 1 July 1999 when the *Uniform Civil Procedure Rules* came into force, the steps taken to progress the plaintiff's action can be described only as dilatory. 2.75 years passed after these rules became operative during which time a single psychiatric report was obtained to support the plaintiff's cause of action. Approximately 1.5 years passed before Counsel was briefed to draft a statement of claim and approximately 2.75 years passed before this application to take a new step was actually brought.

[109] Although delay in progressing her action is of course, only one of the circumstances to be considered upon this application, in my view there have been very significant delays in the present case. The most likely explanation for delay seems to me to be the decision taken by the plaintiff to spend years pursuing compensation by way of an *ex gratia* payment as a consequence of her complaint to the Ombudsman. To my mind that is the more probable explanation for her failure for more than five years to make any attempt to obtain any expert psychiatric evidence to support such a cause of action rather than her impecuniosity which had obviously not prevented her from retaining a solicitor to assist her to obtain compensation from Queensland prior to the issue of the writ of summons in this action to "preserve her rights" should the processing of her complaint to the Ombudsman not lead to an acceptable offer of an *ex gratia* payment by Queensland.

[110] The first and apparently only psychiatric report obtained to support the plaintiff's cause of action was obtained nearly 17 months after advice from Counsel was received that it should be obtained.

[111] I think it more than likely that the decision to pursue this action for damages for negligence was not really made until the plaintiff had failed to persuade the Department to make an acceptable *ex gratia* payment for loss suffered as a consequence of the alleged failure of Merthyr Centre to comply with the regulations.

[112] It is not entirely clear that in fact, Merthyr Centre did fail to comply with those regulations. However that seems to have been the matter ventilated before the Ombudsman which he considered for so many years and which became the vehicle for unsuccessful negotiations conducted on the part of the plaintiff for compensation. I infer for the purposes of this application, that there was such a failure.

[113] I will turn now to one matter vigorously advanced by Queensland in opposition to the application.

[114] It is contended for Queensland that the plaintiff is quite unlikely to succeed on the only cause of action she now seeks to pursue.

[115] Essentially the plaintiff contends that the Department (and not the Merthyr Centre) was under a duty to advise her that the Police and Scan had "closed" their file on the investigations into her husband's activities connected with comments "of an inappropriate sexual nature" made by the child.

[116] It is said that the Department owed a duty to the plaintiff to so advise her in a timely fashion because it (upon notification by the Merthyr Centre) had been instrumental in having enquiries by the Police and Scan made into the complaint made by the child's mother which led to them investigating *inter alia* the activities of the plaintiff's husband which in turn led to the Department recommending to the Merthyr Centre that it suspend the certificate of approval it had given to the plaintiff.

[117] It is contended that the Department through its officers ought to have foreseen that the plaintiff might become upset leading to consequent psychiatric injury, if she believed that Police and Scan enquiries involving the possibility of her husband's involvement in the matter complained of had not concluded by about January 1994. It is said that consequently as soon as the Department became aware that the Police proposed to close their books on the inquiries and to not take any steps with respect to the plaintiff's husband (whether at that stage or at all) it was under a duty to inform her and so relieve her of any anxiety she might have as to the outcome of the Police investigation.

[118] It is not contended that the Merthyr Centre was under such an obligation – in spite of the fact that it had in fact procured the Department to have the matter of the complaint investigated; the evidence does not disclose whether it was ever informed before May 1994 that the Police had "closed the books" on the investigation although having regard to the letter it wrote to the plaintiff on 19 January 1995 (vide para 39) I infer that it learnt of this "closure" at some time after 11 November 1993 and before writing that letter.

[119] It is not contended that there was any duty on officers of Police of the sort asserted to be on the Department to advise her of the "closure".

[120] The material before me does not indicate that the Department at any time had any direct contact either with the plaintiff or with her husband. It seems to have simply received the notification of the complaint by the child's mother from the Merthyr Centre and to have notified the Police and Scan of that complaint who in turn embarked upon an investigation of it.

[121] It is not suggested that the possible involvement of the plaintiff's husband was ever suggested by the plaintiff or by the Merthyr Centre or by the Department to the Police Officers or to Scan. There is no evidence from the plaintiff that the persons investigating the complaint considered only the possibility of the involvement of the plaintiff's husband and not that of any other member of or visitor to the plaintiff's house. On the material one can only speculate as to the content of the child's

statement of which the plaintiff informed the Merthyr Centre which was described as being "very clear" on 22 November 1994.

[122] However in the minutes of the "outcome meeting" held on 22 November 1994 recorded on 30 November 1994 (Ex JH8 to the plaintiff's affidavit) it is recorded in para 6 that an officer from the Police Department's Child Abuse Investigation Unit had advised that –

> "there was insufficient evidence to charge the family day care provider's husband … however this was not a statement of innocence. Such cases had to be very strong to be considered able to succeed in Court and therefore for the Police Department to lay charges".

[123] So far as the material before me indicates, the possibility of the plaintiff's husband being involved in any activity which led to the complaint being made, may have first emerged in the Police/Scan investigations.

[124] It seems clear enough on the material that some officer or officers of the Department learnt of this possibility during the course of the Police/Scan investigations and upon learning this suggested and/or recommended to the Merthyr Centre that it suspend the plaintiff's certificate of approval.

[125] No doubt it was open to the Chief Executive to prohibit the plaintiff from providing childcare for reward in her home but it did not do so.

[126] Had that course been taken by the Department instead of recommending that the Merthyr Centre suspend the certificate of approval, in my view it is clear that the plaintiff would have had no cause of action against Queensland because under s 4(2) of the Act it is provided that the interests of the children subject to the Act "are to be regarded as the paramount consideration under the Act".

[127] With respect to a similar legislative provision it has been held that it negatived any suggestion of a duty of care being owed by persons performing their obligations under the Act, to persons who may be the subject of some form of investigation. In *Sullivan v Mood, Thompson v Connon* [2001] HCA 59 at paras 60 and 62 the High Court observed –

> "similarly when public authorities or their officers are charged with the responsibility of conducting investigations or exercising powers in the public interest or in the interests of a specified class of persons the law would not ordinarily subject them to a duty to have regard to the interests of another class of persons though that would impose upon them conflicting claims or obligations".
>
> "the statutory scheme that formed the background to the activities of the present respondents was relevantly a scheme for the protection of children. It required the respondents to treat the interest of the children as paramount…..it would be inconsistent with the proper and effective discharge of those responsibilities that they should be subjected to a legal duty breach of which would sound in damages to take care to protect persons who were suspected of being the sources

> of that harm. The duty for which the appellants contend cannot be reconciled satisfactorily either with the nature of the functions being exercised by the respondents or their statutory obligation to treat the interests of the children as paramount. As the form of the functions of examination and reporting require for their effective discharge an investigation into the facts without apprehension as to possible adverse consequences for people in the position of the appellants or legal liabilities to such persons".

[128] The only material advanced by the plaintiff to explain just why the Police decided to "close their books" on the investigation generally into the complaint made by the child's mother which led to consideration of the possible charging of the plaintiff's husband with respect to matters giving rise to that complaint is that to which I referred in para [122].

[129] The explanation for closing the books on the investigation in November 1993 seems to have been that the investigators had not found evidence thought sufficient at that stage to commence proceedings of any kind – either against the plaintiff's husband or indeed against anybody else for that matter.

[130] It is clear from the material before me that in spite of the investigations having closed, the Department as late as 17 February 1995 (vide para 38) purporting to safeguard the interests of children within the ambit of the operation of the Act, still took the view that the plaintiff's certificate of approval should not be reinstated by the Merthyr Centre as it had suggested to the plaintiff it might do on 19 January 1995.

[131] On this application in my view it is necessary to consider what prospects of success the plaintiff has in her action upon the material upon which she proposes to rely. That in itself will not be determinative; however it will be a matter, which in my view on the cases is a relevant and important consideration upon this application.

[132] Counsel for the plaintiff was unable to refer to any authority which could be advanced to support the plaintiff's contention that Queensland through its Departmental officers owed her the duty which is critical to her cause of action – that is, the duty to advise her, although it had not at any relevant time had any direct contact with her, that the Police investigation had closed without the Police then proposing to take any action against her husband due to the insufficiency of evidence against him.

[133] I pause only to observe that the imposition of such a duty upon persons who have provided information about the possible commission of an offence to Police officers which leads to an investigation of events involving other persons, would impose an onerous obligation on such informants should they become aware of the identity of such other persons. No authority was cited for the existence of such an obligation or duty, owed to such persons let alone to members of their family.

[134] I will turn now to consider the prospects of success of the plaintiff's action on the factual material and proposed statement of claim canvassed upon this application.

[135] Upon an application of this sort it is unnecessary for a plaintiff to show that if her case be accepted it is likely that she will succeed in her claim.

[136] Equally however it is unnecessary for a defendant opposing the grant of leave to demonstrate that the plaintiff will certainly fail in her action should she be given leave to appeal.

[137] In my view it will suffice for the plaintiff on this application to show only that it is reasonably arguable that she will succeed; however it may be insufficient if she shows that it is only faintly arguable that she will succeed – particularly in the light of her delay and the consequent prejudice to the defendant.

[138] The prospect of her success in her action should she be allowed to proceed is only one of the factors for consideration (together with delay, prejudice to the defendant etc) which must be weighed in determining whether discretion ought be exercised in her favour.

[139] It is clear that the law relating to liability for psychiatric injury suffered by a person as a consequence of the act or omission of another where the injured person has not perceived that act or omission, has developed incrementally during the 20th Century.

[140] The Rules imposing current constraints on recovery of damages for nervous shock may be traced from *Bourhill v Young* [1943] AC 92 to *Mount Isa Mines v Pusey* (1970) 125 CLR 383, *Rowe v McCartney* [1976] 2 NSWLR 72, *Jaensch v Coffey* (1984) 155 CLR 549 and most recently to the New South Wales Court of Appeal judgments in *Morgan v Tame* [2000] NSWCA 121, and *AMP v RTA & Anor* [2001] NSWCA 186 delivered on 2 August 2001 and *Hancock v Wallace and the Nominal Defendant* [2001] QCA 227 where Davis J A reviewed extensively the case law on this topic as at 8 June 2001. More recently the High Court in a judgment dated 11 October 2001 referred to some of these authorities in *Sullivan v Moody* and *Thompson v Connon* (2001) 75 ALJR 1570 where the cause of action considered was more closely related to that which the plaintiff now seeks to pursue.

[141] I do not propose upon this application to undertake an in depth analysis of the development of the law on this topic. I merely observe that special leave has been given to appeal against the decision of the New South Wales Court of Appeal in *Morgan v Tame* (Supra).

[142] I propose merely to refer briefly to some aspects of *Morgan v Tame* and *AMP v RTA & Anor* relating to essential elements to be established to pursue successfully a cause of action for nervous shock – which the plaintiff does not seek to pursue in the present case. She seeks damages for psychiatric injury that evolved over a period of three months as a consequence of her anxiety as to the outcome of police investigations involving her husband.

[143] In *Morgan v Tame,* Spigelman CJ commented upon the distinction made between the test for liability for negligence for physical injury and that for psychiatric injury.

[144] In paras 11 and 12 of his reasons the learned Chief Justice adopted what Hoffmann L J held in the Court of Appeal in *Page v Smith* [1994] All ER 522 to be the elements requiring proof in a claim for damages caused by mental trauma.

[145] After analysing the judgment on the facts under appeal, His Honour observed at para 32 –

"There is however no proper basis for a conclusion that any reaction

> other than one of a qualitatively different and non compensable kind like grief, distress, worry, anxiety, anger, shame etc - was foreseeable in a person of normal fortitude.

[146] In *Morgan v Tame* the negligent act was that of a Police officer erroneously recording in a Police report of a motor vehicle accident that the plaintiff and the driver of a motor vehicle colliding with the vehicle she was driving had both been under the influence of liquor. This was clearly an error on the part of the person making out this accident report which was subsequently corrected. However, before it was corrected a copy of the uncorrected report was obtained by the plaintiff's insurer and subsequently the plaintiff learnt of this error. As a consequence of discovering the content of the negligently prepared report which had found its way to her insurer, the plaintiff developed a severe psychiatric condition.

[147] The learned Chief Justice concluded that the link between the error in the Police report (uncorrected before a copy had been sent to the plaintiff's insurer) was "too tenuous". He concluded that the psychiatric injury suffered by the plaintiff in that case was "too remote".

[148] He continued –

> "In each case where causation is established the question of fact is whether it was reasonably foreseeable by the defendant that his conduct might bring about a phenomenon the sudden perception of which by the plaintiff … might induce a psychiatric illness assuming the plaintiff … to be of a normal standard of susceptibility".

[149] His Honour observed that the trial judge had been concerned with the plaintiff's "continued obsessive reaction to the allegation. This evidence did not focus upon the respondent's initial reaction".

[150] Mason P at paras 86 and 87 observed that he had little difficulty in concluding that the Police service owed a duty of care to take reasonable steps to ensure accuracy if physical injury or financial damage had ensued to someone relying upon their accuracy. However, he distinguished that situation from the one before him which "related to pure psychiatric injury. Something more than reasonable foreseeability of such injury is required. Until recently the High Court described it as proximity. Whatever the label, special rules of uncertain scope apply to this corner of the law of negligence".

[151] His Honour observed that the respondent in that case had been told of the mistake made by the Policeman and did not perceive it directly. He observed that the respondent was not known to be vulnerable psychiatrically and that the Police officer concerned had no reason to expect that she would have any peculiar susceptibility.

[152] At para 128 he observes that –

> " "Foreseeability" involves the judge looking with hindsight at an event which has occurred and considering the perception of a hypothetical person placed generally in the position of the tortfeasor.

> Reasonable foreseeability must be something attributed to the person guilty of negligence …
>
> The reasonable man … is not a seer who can foretell future occurrences that are quite unlikely according to the natural and ordinary course of events … and knowledge after the event when it is easy to be wise cannot show that the event was foreseeable."

[153] He observed later at para 131 –

> "(131) Reasonable foreseeability is more than an issue of fact".

[154] At paras 138 and 139 His Honour applying the principles to which he referred observed –

> "I conclude that the respondent's psychiatric illness was not reasonably foreseeable whether or not the test requires reasonable foreseeability of psychiatric illness through "shock" …
>
> (139) The trial judge was correct to find that … the Police officer involved knew or should have known of the importance attached to … the content of the Police report. And it is clear that the officer ought to have foreseen that the particular report which he was completing could come to the attention of the respondent and of persons about whose opinions the respondent might be concerned. But nothing more of consequence was reasonably foreseeable".

[155] Page 141 he observed –

> "(141) The reasonable observer sitting at the Police officer's shoulder would conceive it likely that Mrs Tame would take umbrage or even be outraged to read that she had a high blood alcohol content; but it would I think appear equally likely that she would perceive that the entry was a mistake and a fairly obvious one".

[156] He later commented upon the fact that there was nothing to suggest that the Police officer who negligently completed the accident report might perceive that shock and psychiatric illness induced by it was a reasonably foreseeable consequence of his error.

[157] He observed –

> "(144) The risk that acting Sergeant Beardsley's negligent act might cause the respondent "shock" or a psychiatric illness induced by it was far fetched or fanciful. Regretfully it happened but liability does not ensue in what remains a fault-based system of negligence".

[158] He continued –

> "(145) I would also accept the appellant's submission that the

> respondent failed on a narrower basis in that a necessary element of the cause of action is missing. This is the requirement that the psychiatric injury stemmed from a sudden "shock".
>
> (146) The respondent (plaintiff) accepts that the traditional common law rule is that in the absence of negligently inflicted physical damage psychiatric damage must result from a sudden impact to the sensory system rather than a gradual deterioration in mental health".

[159] He held that the plaintiff's/respondent's depressive illness did not come about as a result of a sudden sensory perception in the sense required by the authorities to which he had referred.

[160] He observed also that the risk of psychiatric injury was not reasonably foreseeable whether or not one assumed a potential victim of normal fortitude.

[161] Handley JA agreed essentially with the judgments of the Chief Justice and the President observing merely that the Police officer concerned –

> "owed no duty of care to Mrs Tame to avoid exposing her to the risk of psychiatric injury. She was a person of ordinary fortitude and the risk of her suffering psychiatric injury as the result of learning about the contents of the Police accident report was not reasonably foreseeable. The risk in my view was "far fetched" or "fanciful" (*Wyong Shire Council v Shirt* (1980) 146 CLR 48 per Mason J).

Hendley JA also agreed that the fact that the plaintiff/respondent had not suffered a "sudden affront or assault on her psyche from the perception of a horrifying event which is a necessary precondition for liability for psychiatric damage in a case such as this" also led to her action failing.

[162] In the more recent case *AMP v RTA & Anor* [2001] NSWCA the learned Chief Justice again applied the tests to which he referred in *Morgan v Tame* – I refer in particular to para 115.

[163] In analysing the facts disclosed in the material including the draft statement of claim I will assume that evidence the plaintiff calls will, if accepted, be capable of establishing that –

(1) Had she been informed by the end of December 1993 that the Police had closed their files without intending to take any proceedings against her husband with respect to the complaint that she had relayed to the Merthyr Centre in July 1993 she would not have developed the psychiatric condition she alleges she had developed by May 1994 when she first learnt of these facts.

(2) She developed the psychiatric condition in respect of which she claims damages between 1 January 1994 and May 1994 as a consequence of her concern during that period about the prospect of proceedings being taken against her husband as a consequence of Police investigation of the complaint of the mother of the child which the plaintiff had related to the

> Merthyr Centre. Had she been informed of the decision reached by the Police not to take proceedings against her husband in November 1993 shortly after it was made known, it is probable that she would not have developed the psychiatric condition which she had by the time she learnt of it in May 1994.

[164] Having regard to the nature of the psychiatric injury the plaintiff claims she suffered eight years ago and her delay in obtaining a psychiatric report to support that claim in my view Queensland would suffer significant prejudice should it now be called upon for the first time to meet it. I refer and give weight to the observations of McHugh J in *Brisbane South Regional Health Authority v Taylor* (1996) 16 CLR 541 at 554-5.

[165] In my view having regard to the constraints expressed in *Morgan v Tame* and in *Sullivan v Moody, Thompson v Connon* (2001) 75 ALJR 1570 to which I have referred the plaintiff would upon her case, probably be unable to establish –

(1) That the psychiatric condition she developed resulted from "a sudden affront or assault on her psyche" from any relevant perception she had of any act or omission of Departmental officers for which Queensland is liable.

(2) That any psychiatric condition in respect of which she claims damages, whether it first developed before or after the beginning of the year 1994, did not result from a gradual deterioration of her mental health resulting from anxiety as to the outcome of police investigations commencing in October 1993 leading to a "gradual evolution of psychiatric symptomatology from early 1994".

[166] It is clear on the material that the Department which received the complaint from the Merthyr Centre and arranged for the Police and Scan to investigate that complaint had no contact whatever with the plaintiff (personal or otherwise). There is no evidence that it had any contact with the plaintiff's husband.

[167] In *Sullivan v Moody, Thompson v Connon* (2001) 75 ALJR 1570 at p 1580-81 it is observed:-

> "**[62]** The statutory scheme that formed the back-ground to the activities of the present respondents was, relevantly, a scheme for the protection of children. It required the respondents to treat the interests of the children as paramount. Their professional or statutory responsibilities involved investigating and reporting upon allegations that the children had suffered and were under threat of serious harm. It would be inconsistent with the proper and effective discharge of those responsibilities that they should be subjected to a legal duty breach of which would sound in damages to take care to protect persons who were suspected of being the sources of that harm".
>
> "…the interests of the children, and those suspected of causing their harm, are diverse, and irreconcilable. That they are irreconcilable is evident when regard is had to the case in which examination of a

> child alleged to be a victim of abuse does not allow the examiner to form a definite opinion about whether the child has been abused, only a suspicion that it *may* have happened. The interests of the child, in such a case, would favour reporting that the suspicion of abuse has not been dispelled; the interests of a person suspected of the abuse would be to the opposite effect".
>
> "The logical consequence of the appellants' argument must be that a duty of care is owed to anyone who is, or who might become a suspect... Ultimately, their case rests on foreseeability and that is not sufficient".

[168] It is clear that the Department had contact with the Merthyr Centre. It is unclear whether at any material time the plaintiff was aware of the part the Department played in having her certificate of approval suspended in October 1993. Upon this application however, I will assume that she was so aware.

[169] Whether the Department was under a duty of care to the plaintiff to advise her that the Police had "closed their books" on the investigation without recommending that proceedings of any kind be taken against the plaintiff's husband, will at least depend upon whether it was reasonably foreseeable that failure to notify her would expose her to a real risk of psychiatric injury as distinct from it being reasonably foreseeable that she might be "worn down by worry" concerning the possible outcome of the investigations being conducted by the Police or that it might cause her grief, distress, worry, anxiety, anger, shame etc of a kind with which persons of normal fortitude cope from time to time without psychiatric injury.

[170] In my view on the present state of the law (reflected in the decisions in *Morgan v Tame* and *Sullivan v Moody, Thompson v Connon*) the plaintiff would have very slender if any prospects of succeeding in the cause of action she now seeks to resume pursuing. Pursuit of her action if within her means, which on her material seems doubtful, would involve Queensland incurring costs which it would have little if any prospect of recovering from the plaintiff in the likely event of its failure.

[171] If this were an application to strike out her proposed statement of claim Queensland could argue strongly that applying the test in *General Steel Industries Inc v Commissioner for Railways (NSW)* (1964) 112 CLR 125 at 129, the plaintiffs case is one which cannot succeed. However upon this application the onus is on the plaintiff to show good reason why discretion ought be exercised in her favour and the apparent weakness of her case on the state of the current authorities is significant.

[172] While it may be impossible on the state of the current authorities to say that she would have no prospect whatever of successfully extending the ambit of tortious liability for psychiatric injury, on my analysis of them it is quite unlikely that she would succeed in doing so.

[173] In all the circumstances taking into account her quite unlikely prospects of success and her delay which is really attributable to years spent pursuing a different sort of remedy altogether from that which she now seeks leave to pursue and the fact that

dismissal of her application will conclude this litigation which has been pending for so long I exercise my discretion against the plaintiff and dismiss her application.

[174] I order that the plaintiff pay the defendants' costs of and incidental to the application to be assessed on a standard basis.