DISTRICT COURT OF QUEENSLAND

CITATION:	*Beer v State of Queensland* [2016] QDC 14
PARTIES:	**MICHELLE KAY BEER** **(plaintiff)** **v** **STATE OF QUEENSLAND** **(defendant)**
FILE NO/S:	D1952/2014
DIVISION:	
PROCEEDING:	Application
ORIGINATING COURT:	District Court at Brisbane
DELIVERED ON:	17 February 2016
DELIVERED AT:	Brisbane
HEARING DATE:	26 November 2015
JUDGE:	McGill SC DCJ
ORDER:	**Plaintiff's application dismissed.**
CATCHWORDS:	LIMITATION OF ACTIONS – Extension of time – whether material fact of a decisive character – mere enlargement of damages not decisive – whether evidence to establish right of action otherwise – application dismissed. *ABC v State of Queensland* 2015 QDC 321 – considered. *Dale v Scott*, ex parte *Dale* [1985] 1 Qd R 406 – cited. *GIO of NSW v Fredrichberg* (1968) 118 CLR 403 – cited. *Milling v Fraser Coast Regional Council* [2015] QDC 269 – cited. *Mummery v Irvings Pty Ltd* (1956) 96 CLR 99 – cited. *NF v State of Queensland* [2005] QCA 110 – cited. *Pilot v Commissioner of Police* [2008] QDC 41 – considered. *Roman Catholic Church Trustees for the Diocese of Canberra and Goulburn v Hadba* (2005) 221 CLR 161 – considered. *SB v State of New South Wales* (2004) 13 VR 527 – considered. *State of Queensland v Stephenson* (2006) 226 CLR 197 – cited. *Sugden v Crawford* [1989] Qd R 683 – applied. *Taylor v L, ex parte L* [1988] 1 Qd R 706 – cited. *TB v State of New South Wales* [2015] NSWSC 575 –

considered.
Wolverson v Todman [2015] QCA 74 – cited.
Wood v Glaxo Australia Pty Ltd [1994] 2 Qd R 431 – applied.

COUNSEL: R A I Myers for the plaintiff.

D J Kelly for the defendant.

SOLICITORS: Shine Lawyers for the plaintiff.

Crown solicitor for the defendant.

[1] This is an application under the *Limitation of Actions Act* 1974 ("the Act") s 31, seeking an extension of the limitation period in respect of the plaintiff's action for damages for personal injuries against the defendant to 26 May 2014. On that day the present proceeding was commenced by a Claim and Statement of Claim filed in the Court at Brisbane, though an amended Statement of Claim was filed on 21 November 2014. By that document the plaintiff alleged, essentially, that between 1971 and 1986 she was physically abused by her mother, and between 1983 and 1986 she was sexually abused by her father. The plaintiff alleged that as a result of this abuse she suffered post-traumatic stress disorder, anxiety and depression, as well as some physical injuries.

[2] The plaintiff's case against the defendant is that it negligently failed to take appropriate action in response of complaints received over the years in relation to the situation of the plaintiff and her siblings, and that, had appropriate action been taken, the continuation of the abuse of the plaintiff in this way, and hence the injuries, particularly the psychiatric injury, would have been avoided. The defendant in response has denied negligence, and among other things has pleaded that the entirety of the plaintiff's claim is statute barred.

[3] The application for the extension of the limitation period was filed on 29 April 2015, apparently in response to an application by the defendant on 10 April 2015 for summary judgment pursuant to r 293, on the basis that the plaintiff's claim was statute barred. The hearing proceeded with the plaintiff's application being considered first, since if it is successful the defendant's application will necessarily fail.

Basis of the application

[4] During the hearing the plaintiff's case was argued on the basis that the material fact of a decisive character relied on was that in June 2013 the plaintiff had suffered an incident at work which had the effect of aggravating her longstanding psychiatric injury, causing it to worsen and depriving her of any residual earning capacity. The plaintiff had been able to work intermittently prior to this incident, although there were periods when she was incapacitated, but this residual earning capacity had been lost in June 2013, as a result of her psychiatric condition being worsened at that time. It was submitted that up until then the prospect that the psychiatric injury might result in the loss of the whole of her earning capacity had not been within the means of knowledge of the plaintiff. This development materially enlarged the damages which would otherwise have been awarded to her.

[5] Under s 31(2)(b) of the Act one of the things that must appear to the court before an order can be made for the extension of the limitation period is that there is evidence to establish the right of action apart from a defence founded on the expiration of a period of limitation. During the hearing I raised the question of whether the plaintiff had in the material anything to satisfy this requirement, and invited further submissions in writing on this point, including specifically, in relation to the question of whether there was negligence in failing to remove the plaintiff from her parents, and the issues considered by the High Court in *Hunter New England Local Health District v McKenna* (2014) 89 ALJR 39. In supplementary submissions provided on behalf of the plaintiff on 18 January 2016, these issues of negligence were addressed, but the material fact of a decisive nature was said to be the fact of the occurrence of negligence or breach of duty on which the right of action was based, which was said to be not within the means of knowledge of the applicant prior to her consultation with her solicitors on 19 December 2013. This, it seems to me, put what is relied on as the material fact of a decisive character on an entirely different basis. As a result the defendant was allowed the opportunity to put in supplementary written submissions in response.

Background

[6] It appears from material disclosed in the proceeding,[1] and from material released to the applicant following a *Freedom of Information Act* request in July 2009,[2] that there were a number of complaints received by the department about the plaintiff's mother, effectively from soon after the plaintiff's birth. There is a file note dated 15 November 1971 which apparently records a telephone call to the mother who denied that the baby was ill-treated by her, though she suggested that her husband, who she said was trying to get a divorce, had ill-treated her. A welfare officer conducted an inspection on 13 December 1971, but found no bruising, scars or nappy rash on the plaintiff, or an older sibling, except for a red mark on the sibling's thigh which was able to be explained. Both children were said to be quite healthy and were said to be taken regularly to the health and welfare clinic. Inquiries at the clinic on 18 January 1972 confirmed that the two children attended and their records indicated no evidence of neglect.

[7] A further complaint by telephone was received on 5 February 1976, about the mother belting her then three children, and yelling and screaming. The file note records that similar complaints were made on two previous occasions but were not substantiated by evidence obtained on a home visit and no action was taken. However, there was a visit by a childcare officer on 9 March 1976 when the children were examined closely but no sign of bruising was seen. The mother complained that the plaintiff was a little hyperactive but this was said to be something she could handle. She was invited to contact the department if she had any serious problems in handling the children, but the childcare officer concluded that this complaint was without substance, like the two previous complaints which had been made.

[8] There is a note of a further visit to the family on 9 December 1976 when it was noted that the plaintiff had a bandaged leg, said to be a burn produced by the application to a boil of a cloth which was excessively hot. The childcare officer

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1 Affidavit of English filed 24 November 2015, Exhibit T1.

2 Affidavit of applicant filed 24 November 2015, Exhibit MB1.

also spoke to a welfare officer from the division of community medicine who had been visiting the family, and who had been contacted several weeks earlier when the plaintiff was badly bruised, supposedly through being mistreated by a visitor. It is evident that the welfare officer was maintaining frequent contact with the mother with a view to improving the relationship with the children.

[9] There was a file note made dated 17 December 1976 of more extensive investigations into the matter, which records that during this inspection the children appeared to be healthy and neatly dressed. A probation officer described the mother as manipulative and aggressive, but did not suspect her of abusing her children. The plaintiff's preschool reported that they found the plaintiff somewhat nervy and difficult to settle at pre-school, though they were able to get her to settle.

[10] There was a complaint to the department in January 1977 that the children were found locked in a house with no adult supervision. An intake officer recorded that there had been a bit of contact with the mother, and the assessment made that she was not neglecting her children, but her care of the children was often very casual and she was not concerned enough about them. Accordingly, the complaint should be investigated. It took three visits to find the mother at home. The plaintiff was seen on 3 March 1977 to be rather thin and pale and to have a very ugly scar on her right leg below the knee. A welfare officer at the local community health centre indicated that there were two occasions when bruising on the children (unspecified) was caused by the mother, though denied by her, but it appeared that the burn on the leg was caused accidentally. The childcare officer recommended that the case be referred to the Child Protection Unit.

[11] Further action was delayed by a move by the family, but there was a home visit on 19 May 1977 when the children appeared happy and adequately cared for, and another on 26 May 1977 when the children again appeared happy and adequately cared for, though there were reports about difficulties at school. A childcare officer minuted that the care of the children seemed to be adequate, though not as good as it could be, and the mother's behaviour was said at times to be tending to violent and erratic; there was a recommendation that there be further follow up. On 21 June there was a complaint from someone that the plaintiff's father had been hanging around, and her behaviour had become disturbed. The following day there was a report from a neighbour that the children had been sent to school in pyjamas and without shoes. Subsequently the mother was evicted from her accommodation and moved to Cannon Hill.

[12] The next document is a minute of a home visit on 16 August 1977 when the family was living at Stradbroke Island, having moved there from Cannon Hill. The note of the visit on 16 August 1977, does not record any particular observations about the state of the children, but is concerned with a report by the mother that she thought that one of the daughters had been interfered with by a boarder at the property. The mother was reluctant to provide further information and it was noted that a medical examination found no signs of sexual interference. The officer expressed the view that the mother did care for her children but probably needed departmental involvement to define what was an acceptable standard of care.

[13] On 13 October 1977 the children were seen and appeared well presented, alert, clean and spoke positively about their mother. There was a further visit to the school in November 1977 which produced a minute indicating that there was

nothing to substantiate any concern about their welfare. There was a further visit in January 1978 when the children appeared physically well cared for, but often unsupervised and neglected. The school thought their physical care was adequate. At that stage the main problem seemed to be that the family was living in a tent on vacant land. On 19 January 1978 there was another visit when the childcare officer happened to arrive while the children were being bathed, and was particularly well able to confirm that, although they looked thin, their bodies showed no signs of physical abuse. Her conclusion was that they did not show sufficient signs of neglect to justify removal. They were moving to a house at Landsborough, and it was recommended that there be further inspections after the move.

[14] There is a file note of 21 November 1978 of a home visit when the plaintiff was found to have bruises on her arms and legs. The plaintiff claimed that these had been inflicted by someone the mother had left her with the previous weekend, a story that the childcare officer doubted, but noted that the plaintiff was reputed to have temper tantrums and had been caught stealing from other children at school, and that this might have led to excessive discipline by the mother, who may feel rather rejecting towards the plaintiff. She recommended continuing contact with the family by the department and a community health nurse. The mother was asked to take the plaintiff to a doctor or hospital and in fact took her to a doctor who noted multiple bruises of the forearms but no evidence of other injury. The child was noted to be pale and probably anaemic and not over clean, but not apparently afraid of the mother who admitted that she had hit the child, having lost her temper with her. On a further visit from a childcare officer the mother denied that she usually hit the children so hard. There is a rather cryptic note of an interview with the mother in February 1979 which again records that the children appeared well cared for, that the situation appeared satisfactory and that the community health sister was in touch with the children. In March 1979 a copy of the file was sent to the Ipswich office for follow up.

[15] There does not appear to be any further documentation in the material dating from then until 1984. The defendant's lawyer referred to perusing five departmental files, but the periods covered by each file are not identified.[3] She has however identified a number of people whose names are referred to in the documents, with the dates of the documents created by them, and there are no dates on the list between 1979 and 1984. The amended statement of claim in paragraph 7 refers to various complaints received by the department, but none between November 1978 and August 1984. It occurs to me that a possible explanation for this state of affairs is simply that some of the records of the department covering the intermediate period are missing, but there is no evidence of that and I suppose that in the circumstances the appropriate inference is simply that nothing happened to give rise to any basis for concern on the part of the department about the plaintiff and her siblings during this period.

[16] On 6 August 1984 an anonymous letter was received at the Nundah office of the department purporting to be from a neighbour who alleged that she had seen a male boarder at the house where the plaintiff's family was living indecently dealing with her youngest sister, and when she told the mother was told to mind her own business. She also said that she had been to parties at the house where the mother had made her children strip off and let the men play with them. Inquiries of the

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3 Affidavit of Mills filed 18 November 2015 at para 4.

Juvenile Aid Bureau officer revealed the plaintiff had given a statement and the father had been charged and was in prison, but there was a lot of tension between the mother and the father's sisters, and it was suggested that one of these had been the source of the anonymous complaint, with the inference that it was malicious.

[17] A home visit was arranged on 13 August 1984; an earlier visit was postponed because the Juvenile Aid Bureau officer who had been dealing with the family was ill. There was also a visit to the plaintiff's school. The plaintiff was said to be a very quiet girl, and the mother appeared to be very protective of the children and upset about the situation, but did not get on as well with the plaintiff as she did with the other children. The mother denied the allegations in the letter, and when they were put to the plaintiff, she also denied them, and laughed. The assessment was that there was a good relationship between the children and the mother. The school reported that the children were good school attenders, but the household seemed to be very busy with people coming and going. The plaintiff seemed to be upset by the fact that her mother had been telling other mothers at the school what had been going on. The childcare officer recommended a visit again in a few weeks' time.

[18] In November 1984 there was concern on the part of the school about the plaintiff being sent to school in spite of her being ill, and it was not until the school arranged for the plaintiff to see a doctor that her mother accepted that she really was sick. The mother seemed to be preoccupied with difficulties she was having with the housing commission about other people staying at the house. The following day the childcare officer was advised by the Police officer that the relationship between the plaintiff and her mother seemed to have improved. On 23 January 1985 the father was sentenced to three years imprisonment, presumably after a trial because there is a note that the plaintiff had broken down and cried while giving evidence.

[19] On 22 February 1985 during a home visit, in response to another complaint, the mother denied giving the children drugs or alcohol, except for a small glass of wine occasionally if the family had wine with the evening meal. All the children were said to be well fed. In December 1985 a file note recorded that although there had been a number of complaints made about the mother's management of her children no evidence had been found to support the allegations and it was believed that the complaints were being used as a tactic in arguments between the mother and her ex-partner/former de-facto's family. There had not been any contact with the family since April 1985 and a recommendation to close the case was accepted on 10 December 1985.

[20] In January 1987 there was contact with the department from the mother complaining that she was unable to control the plaintiff who had a boyfriend in Boonah and went to stay with the boyfriend when she wished. It is not at all clear what the outcome was, but it appears that the plaintiff was by then reluctant to live with her mother.

Evidence of the plaintiff

[21] There were two affidavits of the plaintiff read before me, and in addition she was called formally to verify her affidavits, and for cross-examination. The more recent of her affidavits merely exhibited documents disclosed by the Department of Child Safety in July 2009 following a *Freedom of Information Act* application. The

plaintiff in her earlier affidavit deposed that she suffered the physical abuse and sexual abuse set out in the Statement of Claim, without further detail.[4]

[22] The statement of claim in paragraph 4 alleged various physical abuse from the mother. Some of this involved asserting matters which were referred to in various complaints recorded in the departmental files, including the complaint in the anonymous letter about making the children strip off in front of men, which according to the file note the plaintiff had at the time denied: para 4(c). It also alleged that the mother frequently did things which are alleged or mentioned in the departmental documents, but most of the allegations are of various forms of mistreatment which are not mentioned in the departmental documents in evidence. Some of the allegations, of being always poorly dressed, and being thin and malnourished, are contradicted by statements recorded in departmental documents. The Statement of Claim also alleged sexual abuse by her father in the form of inappropriate kissing on a regular basis, and on one occasion, presumably the occasion the subject of the criminal charges, making the plaintiff touch his penis, touching the plaintiff's vagina, attempting to penetrate the plaintiff with his penis, and then making the plaintiff watch while he sodomised her foster brother.

[23] Her affidavit filed in May contained some information about the plaintiff's history: she was born on 12 October 1971, and left home in approximately 1986 after suffering physical abuse and sexual abuse set out in the Statement of Claim. She has four children born between 18 March 1992 and 7 January 2004; she had only one child until 1 September 2001. What happened to her between 1986 and 1992 was not disclosed.[5] She said she was a stay at home mother until approximately October 2005. She said in her affidavit that she is aware of having suffered depression and low moods on occasions since her childhood as a result of the abuse that she suffered. Her depression and low moods had always been intermittent and fluctuated in intensity up until the second half of 2013, and she was always able to overcome the symptoms and continue with her work and day to day life in the confidence that the symptoms would resolve.[6]

[24] At one point during cross-examination she said that her mother sold her to her boyfriend for $300: p 50. She stopped going to school when she was in year 9: p 50. She ran a coffee shop in Boonah for about a year, and subsequently worked in a clothing factory in Boonah: p 51. The plaintiff told Dr Steinberg that after she broke up with the boyfriend in Boonah she moved back to live with her mother until she was aged 18. The plaintiff said that if her mother knew that the Department of Child Safety people were coming to visit she would make sure that the plaintiff was home for that; afterwards she could go back to her boyfriend: p 51.

[25] She deposed that she did casual cleaning work from October 2005 until approximately mid-2008, which she said was not prevented by occasional periods of depression. In mid-2008 she began to work for a different employer. It appears that from mid-2009 her depression became more significant, and she consulted a general practitioner, but she says she was soon able to overcome this and work, and her condition improved to the point that in February 2010 she advised her GP she was not experiencing depression at all. Her symptoms returned in June 2010, but were a

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4 Affidavit of the plaintiff filed 1 May 2015 at para 3.

5 She said during cross-examination that she always worked up until she had her children, and then worked part-time: p 21.

6 Affidavit of the plaintiff filed 1 May 2015, para 6.

lot better by October 2010. In February 2011 her symptoms again started to worsen but again improved by August 2011.

[26] In December 2011 there was an incident involving the police, as a result of which she gave a notice of claim under *PIPA* and completed the pre-litigation process, though no proceeding has been commenced.[7] In July 2012 she was interviewed by a psychologist, Mr Smith in the offices of her then solicitors in relation to a criminal charge, as a result of which he diagnosed her as having post-traumatic stress disorder as a consequence of her childhood abuse: p 19. She claimed however that it had taken her a couple of years fully to understand his report, though she knew that the depression and low moods she suffered were the result of her abuse as a child: p 20.

[27] She also saw general practitioners complaining of increasing depression on 8 May 2012, 18 February 2013 and 21 March 2013, but her symptoms improved again and she had decided to return to work, obtaining a position as an industrial cleaner where she started on 27 May 2013. On her third day, while doing this work, a supervisor yelled at her, she experienced a panic attack and went and sat in her car until a friend who was working for the same employer was able to drive her home.

[28] It was after this incident that her condition deteriorated again and she has not been able to work since. She referred in her affidavit to symptoms of depression in more recent times which were said to be always "severe", and claimed her ability to sleep has deteriorated and she is plagued by nightmares about her childhood. She said that until her recent decline she always had some optimism about the future but that following that incident she has become concerned about her long term working career, and indeed the need for some domestic and personal assistance. In 2014 she obtained a disability pension, and on one occasion attempted suicide.

[29] The plaintiff claimed under cross-examination that in the year ended June 2006 the payment summaries issued by her employers did not cover all the money she earned during that year, and that the same occurred during 2007: p 23. It also appears that between mid-2008 and early 2012 her tax returns recorded no earned income, though she maintained she worked and had problems with her boss over paperwork for tax: p 25. One of the things that aggravated her depression was an incident in mid-2009 when her own daughter was molested by her former partner: p 29. In August 2009 when she went to see a doctor she was for a time unable to work: p 31. She was referred to a psychologist but did not go. She conceded at one point that in July 2010 she was not able to work because she was almost housebound, but later said that the depression never really stopped her from working until May 2013: p 34. She added that sometimes she could put it at the back of her head and go on, but other days she just could not cope with it.

[30] The plaintiff also read affidavits of two people who had known her for a while. One had known her for 11 to 12 years, having worked together for a particular employer, but said that the plaintiff left that employer at some unspecified time. When she first knew the plaintiff the plaintiff seemed to lead a normal life and they would work together and socialise together. She did not notice signs of depression. In approximately mid-2013 she obtained casual work with another cleaning company, and told the plaintiff about them since she knew that the plaintiff was looking for

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7 Transcript, pp 17, 18. The incident actually occurred on 1 December 2011: p 19.

work.[8] They worked together on two days during which the plaintiff seemed normal and seemed happy to be at work. The third day the plaintiff became very angry after being spoken to by a staff member, and went and sat in her car for the rest of the day. She said that the plaintiff was a completely different person after that last day at work. She did not want to go out and had become very depressed.

[31] The other deponent had only known the plaintiff for about two years, having begun to live at her house shortly before the incident at work.[9] She said that the plaintiff seemed to lead a normal life without signs of depression, and was excited about going back to work but on the third day at work she became very depressed and upset after something the supervisor said to her which caused a panic attack. She had not been the same person since then, has virtually no social life and has difficulty performing household chores. Neither of these witnesses was cross-examined.

[32] The various medical records attached to her affidavit indicate that at times prior to May 2013 the plaintiff was complaining to medical practitioners of "serious depression".[10] Some of the symptoms recorded seem to be inconsistent with a capacity to continue to work, and with the notion that for many years prior to 2013 the plaintiff was leading a normal life and was able to work and socialise satisfactorily without showing any signs of depression. Some of these notes record long standing problems: for example, a consultation note of 24 February 2011 on p 20 of Exhibit MB-2 states: "depressed for a long time has been on various medications in the past." On the first page of Exhibit MB-2 a general practitioner note for a surgery consultation on 20 August 2009 described a history of "depressed for a long time, has been on various medications in the past, had side effects with a long [sic; lot] of them."

[33] A psychologist who reported to a general practitioner on 20 September 2013, p 9, Exhibit MB1, noted that the plaintiff "reports at least a 10 year history of fluctuating depression and anxiety. She reported the current exacerbation of symptoms has been present for a few years". She referred to a childhood environment as alleged in the Statement of Claim and other pertinent stressors, but not including the incident at work earlier that year. On 18 February 2013 the general practitioner signed a form for a disability support pension which among other things certified the plaintiff had one or more medical conditions that had a significant impact on her ability to function, the condition diagnosed being post-traumatic stress disorder with depression.[11] Again this seems inconsistent with the proposition that, before the incident after she returned to work in May 2013, she was generally functioning well.

Medical evidence

[34] The plaintiff was seen by Dr Byth, a psychiatrist, on 10 February 2014 for the purposes of a report.[12] He diagnosed chronic post-traumatic stress disorder with associated anxiety and depression. Her symptoms for this condition were said to be of moderate to marked severity but her depressive symptoms had been more severe

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8 Affidavits of Azavedo, para 5.
9 Affidavit of Fung filed 13 May 2015, paras 1, 2.
10 Affidavit of the plaintiff filed 1 May 2015, Exhibits MB-1, MB-2.
11 Affidavit of the applicant, Exhibit MB2, pp 60, 61 and 68.
12 Ibid, Exhibit MB3.

than usually seen in post-traumatic stress disorder and warranted the additional diagnosis of major depression. There were also features suggestive of borderline personality disorder. Dr Byth thought that her depression and anxiety had marginally improved with the treatment so far, and he would expect her to make a partial improvement with specialist counselling and higher doses of anti-depressants over the next three years, but because of the duration of her depression and anxiety doubted she would obtain full remission with treatment. She was also likely to be left with chronic moderate to marked post traumatic stress disorder.

[35] Dr Byth linked her psychiatric condition to the incidents of her childhood when she was physically and sexually abused by her parents. Her condition was subsequently exacerbated by an assault by police in 2011, and she had been distressed by subsequent events, though it is not clear that Dr Byth thought they had impacted on the cause of her condition. He was of the opinion that her work as a cleaner would be moderately to markedly impaired by her current psychological state.

[36] When obtaining a psychiatric history Dr Byth noted that the plaintiff told him she had started counselling around 2004, but had not found it helpful. In 2005 she was getting more depressed and took an overdose of alcohol and tablets, but was found by her god-daughter and did not go to hospital.[13] She saw a psychologist by a GP's clinic for counselling. She was tried on a tranquiliser for anxiety but later switched to Valium, and after being assaulted stayed on another anti-depressant and continued seeing a psychologist. Some of this is difficult to reconcile with other evidence.

[37] Dr Byth provided a further report on 14 August 2014 after a telephone conversation with the plaintiff that day.[14] The diagnoses of post-traumatic stress disorder and major depression were confirmed, and in addition a diagnosis of borderline personality disorder was made. The further report contained the opinion that her whole psychiatric impairment had been caused by the child abuse which made her vulnerable to stresses in later life such as the assault in 2011, which was simply a triggering experience. Accordingly in his earlier report he had overestimated the impact of that incident. He now regarded that incident, and the work incident in 2013, as triggering factors which had been relatively minor and transient contributing factors to her longer term psychiatric impairment from childhood abuse. They made her psychiatric conditions more unstable but were not direct contributing factors to her permanent impairment.

[38] I note that in the record of the history from the plaintiff Dr Byth spoke of the plaintiff telling him she was feeling very weird like she was a nervous wreck at work before the incident when the supervisor swore at her. In oral evidence Dr Byth confirmed that after the assault in 2011 the plaintiff had said she was too tearful and too easily flustered at work for her to be able to work, and she had difficulty in meeting new people and could not handle the stress at work: p 68. Dr Byth put it on the basis that up until the incident at work in 2013 there was some slim chance of her holding onto a job part-time or intermittently at least, but that incident seemed to put an end to that chance: p 71. He expressed the view however that she had a tenuous hold on the work anyway. If this incident had not occurred

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13 Dr Steinberg also said he was told by the plaintiff that she cut her wrist at age 18.

14 Affidavit of plaintiff filed 1 May 2015, Exhibit MB4.

she might have been able to hang on and do some work until another incident was another trigger.

[39] The incident might have affected her potential for work, but in every other way she was already very impaired: p 72. The problem is that, although the exacerbation to her emotional state from the incident was probably only temporary, because it occurred in the context of a triggering event at work, it was likely to cause permanent impairment of her earning incapacity by causing her to lose confidence in her own ability to work in the future: p 73. Dr Byth thought that given a fair chance the plaintiff may well have been able to be a productive person able to work consistently, so far as he could tell: p 77.

[40] One matter that was not discussed in Dr Byth's report was the possible effect of the plaintiff having been removed from her parents at any particular time, and whether that was likely to have had any effect on the ultimate outcome. When I raised this matter with him, he did mention that there seemed to be a worsening of the effect on her after her father had been released from prison and was allowed to come back into the family, and indeed had started abusing her again: p 77. That was said to have been particularly distressing, and if she had been removed before that second round of abuse occurred, that might have substantially reduced the effect on her. No doubt if such a thing occurred, it would have been very distressing. As to whether it occurred, all I can say is that it is not alleged in the current Statement of Claim. Paragraph 5 alleged sexual abuse by the father from the age of 12, that is from 1983. The documents in evidence from the Department's file indicate that the father was sentenced to three years' imprisonment on 23 January 1985, when the plaintiff was 13, and was presumably in prison for at least 18 months after that date. There is nothing in the documents from the Department which I have seen which indicates that he came back to the family after being released from that term of imprisonment while the plaintiff was still there.

[41] Paragraph 8 of the Statement of Claim alleges that the defendant was told in 1977 that the plaintiff's father had been living with the mother of the family, negatively impacting on the plaintiff's wellbeing, but at that stage the plaintiff was only five and there is no allegation of sexual abuse prior to the age of 12. I cannot see in the Statement of Claim an allegation that the plaintiff's father had been jailed for sexual abuse of her and, after he was released from jail, returned to the family and began to abuse her again. At the present time there is no indication that is any part of the plaintiff's case. Of course it is difficult for the plaintiff to prove up the question of causation in relation to the notion that at some stage something ought to have been done to protect her from the behaviour of her parents, in circumstances where there is no specific identification in the Statement of Claim of a particular incident to which it is alleged that the defendant ought to have reacted; rather there are a catalogue of incidents, and a whole series of complaints, referred to in the Statement of Claim, which proceeds to allege that, in relation to everything that came to the knowledge of the Department, the Department failed to respond appropriately.

[42] Dr Byth also expressed the opinion that he thought the plaintiff was being quite honest in terms of telling him things as she saw them and not trying to cover them up, and thought that she was reasonably reliable as an historian: pp 77, 78.

[43] The plaintiff was interviewed by Dr Steinberg, a psychiatrist on 23 June 2014 for the purposes of a report to the Crown Solicitor.[15] Dr Steinberg diagnosed post-traumatic stress disorder, along with borderline personality disorder, anti-social personality traits and chronic marijuana abuse and dependency.[16] Her lack of insight was said to make it unlikely that she would be compliant with any form of psychological therapy which might improve her condition. These conditions were caused by a combination of genetic vulnerabilities and a life-long history of trauma and sexual abuse, unstable parenting and neglect. More recent traumatic events would have caused exacerbations of her post-traumatic stress disorder and a perpetuation of this condition. The major cause of her post-traumatic stress disorder was the childhood sexual abuse.

[44] Dr Steinberg's opinion, based on the history he had been given, was that the plaintiff had had difficulty holding any jobs because of difficulty with authority figures, and because of her drug abuse which would cause her to be unreliable. He thought her psychiatric condition and personality disorders were permanent, and did not expect her drug abuse to resolve because she would not co-operate with treatment.

[45] In oral evidence Dr Steinberg confirmed his earlier opinions and expressed the view that the plaintiff's reaction to the incident in May 2013 may well have been greater than might have been expected because of her pre-existing psychiatric condition, but also because of her chronic marijuana usage; he did not expect any permanent increase in her psycho-pathology from the incident: p 55. Dr Steinberg agreed that prior to the incident in 2013 the plaintiff's working capacity was limited because of her pre-existing psychiatric problems, though they did not prevent her from working from to time: p 56. He was inclined to think that the 2013 incident had not permanently adversely affected her limited capacity for work: p 56. He said it was very speculative to say what the plaintiff's life might have been like had it not been for her traumatic childhood, but it would be common sense to say that she would have been a completely different person: p 63. He thought that she was generally honest and reliable in what she was telling him, though she was minimising her past psychiatric history: p 63. When she saw him in June 2014 she was more focused on the incident with the police in November 2011 than on the incident at work in 2013: p 64. He did not particularly investigate the details of her employment history, but his impression was that work was not as important for her as many aspects of her life: p 65.

Material fact of decisive character

[46] I shall analyse this issue by reference first to the material fact originally relied on, and then by reference to the material fact relied on in the written submissions.[17] The discretion to extend the limitation period is enlivened if a material fact of a decisive character relating to the right of action of the applicant was not within the means of knowledge of the applicant until a date after the commencement of the year last preceding the expiration of the period of limitation for the action: Act s 31(2)(a). The concept of material facts is explained in s 30(1)(a), and paragraph (b) indicates that such a fact is of a decisive character if, but only if, a reasonable

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15 Affidavit of Mills filed 11 June 2015, Exhibit JM01

16 She admitted to Dr Steinberg that she had smoked marijuana consistently since aged 22.

17 I am drawing on what I said recently in *Milling v Fraser Coast Regional Council* [2015] QDC 269.

person knowing those facts and having taken the appropriate advice on those facts would regard those facts as showing:

> "(i) that an action on the right of action would (apart from the effect of the expiration of a period of limitation) have a reasonable prospect of success and of resulting in an award of damages sufficient to justify the bringing of an action on the right of action; and
>
> (ii) that the person whose means of knowledge is in question ought in the person's own interest and taking the person's circumstances into account to bring an action on the right of action."

[47] A fact is not within the means of knowledge of a person at a particular time if, but only if, the person does not know that fact, and so far as the fact is able to be found out by the person, the person has taken all reasonable steps to find out the fact before that time: s 30(1)(c). Subsection (2) goes on to explain what is meant by appropriate advice. One of the facts identified as a material fact relating to a right of action is the nature and extent of the personal injury so caused. It is accepted that the extent of the award of damages that a court would make in response to such a claim can be a material fact, but it will only be of a decisive character if it satisfies the test of s 30 (1)(b), that is, it makes the difference between a claim which is really not worth pursuing and one which is worth pursuing and ought to be pursued.[18]

[48] In determining whether a material fact is of a decisive character it is relevant to take into account not simply the question of whether a right of action would have a reasonable prospect of success but also whether it would result in an award of damages sufficient to justify the bringing of an action on the right of action. This involves a practical analysis of the position as a matter of economic reality. In recent years legislative restrictions on awards of general damages, and compensation in respect of gratuitous care, impact on the economic viability of a cause of action, particularly in circumstances where there are now in the Acts restrictions on orders for costs which a court can make in a proceeding based on a claim for damages.

[49] The plaintiff's case is governed by the *Personal Injuries Proceedings Act* 2002 ("*PIPA*"), and the *Civil Liability Act* 2003. In relation to the former Act however I suspect that the effect of s 6(4) is that ss 40(2) and 56 do not apply to the plaintiff's injury. The former section is presumably now irrelevant; the latter section requires a court to limit the costs orders made in a proceeding in a court based on a claim if a court awards an amount equal to the upper offer limit or less in damages, something which could not apply anyway because the upper offer limit is defined in the *Personal Injury Proceedings Regulation* 2014, s 12(3) in terms which would mean it would not apply to an injury arising before 2 December 2002, which is the case with the injuries alleged by the plaintiff.

[50] In relation to the *Civil Liability Act*, the provisions dealing with breach of duty and liability of public and other authorities would not apply because any relevant breach of duty happened before 2 December 2002: s 4(2). Furthermore, ss 54 and 55

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18 *Watters v Queensland Rail* [2001] 1 Qd R 448 at [1], [11]. An enlargement of the damages which is not of a decisive character will not suffice: *Sugden v Crawford* [1989] Qd R 683 at 684.

dealing with future economic loss would not apply to the plaintiff's claim - s 4(4) – and ss 61 and 62, dealing with the calculation of general damages, would not apply because in terms they apply only to an injury arising after 1 December 2002. It follows that the plaintiff's claim for damages was at all times one which was unaffected by the considerations about limitation of awards of general damages, and limitations of awards of costs, under a statute, matters which I considered in some detail in *Milling* (supra). As I noted there, in my opinion that is relevant when determining whether a material fact is of a decisive character in making the difference between a claim which is not worth pursuing and one which is and ought to be pursued.

[51] One other matter which I considered in some detail in *Milling* was the authorities in relation to the question of to what extent it was reasonable for a person to have investigated the long term effects of a person's injury on a person's ability to continue to work, establishing the proposition that whether an applicant for an extension of time ought to have taken more steps to find out a fact can only be answered by reference to what can reasonably be expected from the actual person in the circumstances of the applicant.[19] In all of those cases however there was a finding that there was a material fact of a decisive character, and the question was when it first came to be within the means of knowledge of the applicant.

[52] The material fact relied on in the present case was that the plaintiff had lost the relatively limited earning capacity that she had reasonably expected to enjoy up to the point of that deterioration of her condition. That there has been a change in the consequences to her of her injuries, in particular by increasing her future economic loss, is undoubtedly a material fact; the contentious issue in the present case is whether it is a material fact of a decisive character. It is established that a mere enlargement of damages which is not of a decisive character does not provide a basis for extending the limitation period: *Sugden v Crawford* [1989] 1 Qd R 683 at 684.

[53] As to the material fact of a decisive character originally relied on, that until June 2013 it was not within the means of knowledge of the plaintiff that an incident of the nature of what occurred at that time might result in a loss of the whole of her earning capacity, I accept that such a matter can be a material fact, but in my opinion it was not of a decisive character, because it was not a development in her position which made the difference between a claim that was not really worth pursuing, and one that had a reasonable prospect of success and of resulting an award of damages sufficient to justify the bringing of an action on the right of action, and that she ought in her own interest and taking her circumstances into account to bring an action on the right of action. The psychiatric evidence indicates that prior to 2013 the plaintiff had suffered post-traumatic stress disorder and depression, in each case to quite a significant extent, as the result of the events of her childhood, which had then been suffered for a period of over 20 years. Given that damages are to be assessed at common law, I would expect an award of general damages for such an injury easily to be of an amount sufficient to justify bringing an action on the right of action, even apart from any claim for loss of earning capacity. But it seems clear that the plaintiff's earning capacity was also significantly affected by the psychiatric problems that she had over these years.

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19 *NF v State of Queensland* [2005] QCA 110 at [29]; see also the other authorities I discussed in *Milling*.

[54] There have been awards in the past for damages in relation to sexual assault, which generally leads to psychiatric injury, and which provide some guidance in relation to the sort of damages which might be awarded. In *Bird v Bool* [1997] QSC, BC9705223, the plaintiff claimed damages against her stepfather for sexual assaults over a period of five years commencing when she was aged 11. The action was undefended. She was found to be suffering symptoms of post-traumatic stress disorder with severely impaired capacity for enjoyment of sexual activity, and mood swings. Derrington J awarded general damages of $40,000. In *Paten v Bale* [1999] QSC, BC9906872, the plaintiff claimed damages in respect of sexual assaults occurring over a two year period when she was aged between seven and nine, the defendant being then a family friend living nearby. She had frequently consulted a general practitioner about depression and had been referred at one stage to a psychiatrist. Another psychiatrist for the purposes of a report saw her and diagnosed a depressive illness, and subsequently diagnosed chronic post-traumatic stress disorder and chronic depressive disorder "due to the sexual abuse". General damages for pain and suffering and loss of amenities were assessed at $35,000; there was also an award of $15,000 for past economic loss and $120,000 for future economic loss.

[55] In *Webster v Yasso* [2002] QDC 206 the plaintiff claimed damages for injury, including some relatively minor physical injury and psychological injury, in respect of one incident when the defendant had raped the plaintiff. The plaintiff was found to be suffering from a generalised anxiety disorder which had for a time interfered with her capacity to work but there had been some improvement since then and there was a prospect of further improvement with treatment. I assessed damages for psychological injury at $15,000 but also allowed damages for violation of personal integrity in the sum of $20,000, and damages for future economic loss in the sum of $22,000. In *Arnold v Mid-West Radio Ltd* a plaintiff who had suffered sexual abuse when a teenager but who had generally been coping fairly well thereafter was severely verbally abused and disparaged by her employer as a result of which she suffered a major depressive disorder which had very severe consequences for her life. In respect of the abuse at work Cullinan J assessed general damages at $65,000, and also assessed substantial amounts for past and future economic loss.[20]

[56] In *K v G* [2010] QSC 13 the plaintiff had suffered sexual abuse from the defendant over a number of years while she was growing up. The plaintiff had severe depression and post-traumatic stress disorder, she had made a number of suicide attempts and experienced many admissions to mental health hospitals over the years. She had been medicated with anti-depressants and anti-psychotic agents and a mood stabilizer, and the reporting psychiatrist thought there was a significant risk of completed suicide. He expected her to make only a modest improvement with further treatment, and was at risk of developing major depression or schizophrenia. Damages were assessed under the Civil Liability Regulation, but despite that general damages were assessed at $80,900. In *P v R* [2010] QSC 139 the plaintiff claimed damages for psychiatric injury resulting from sexual assaults committed on her by the defendant when she was a child at various times in the course of one year. The plaintiff had been admitted to mental health facilities from time to time and had attempted suicide three times, she had self-harmed and suffered an eating disorder, and had been left with extensive scarring because of the self-harm. She

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[20] The judgment was set aside on appeal on the basis that the findings of liability was in error: *Mid-West Radio Ltd v Arnold* [1999] QCA 20.

was described as suffering a significant psychiatric illness with guarded prognosis. General damages were assessed at $80,000. Significant amounts were also assessed for economic loss.

[57] None of these cases is closely comparable to that of the plaintiff, but in my opinion they provide sufficient justification for the proposition that, had the matter been investigated prior to 2013, it would have been obvious that there were reasonable prospects of an action resulting in an award of damages sufficient to justify bringing an action, and that it was in the plaintiff's interest to bring such an action.

[58] The plaintiff's argument was that in 2013 she lost her residual earning capacity to do casual or part-time work during those periods when her psychiatric condition was in partial remission, but the psychiatric condition would for many years have plainly interfered with her earning capacity, and interfered with her capacity to hold down a full-time job. Indeed, it is clear from the evidence of the psychiatrists that her long-standing psychiatric condition would have made it more difficult for her to obtain, and to retain, employment, and those factors would have been present, and would have supported an award of damages for loss of earning capacity, even though she did retain some earning capacity at that time. Indeed, one of the factors which ought to have been covered by such an award would be the risk of the loss of the remaining earning capacity as a result of some incident in the future, such as what happened in 2013. It is clear from the psychiatric evidence that she was vulnerable to such an incident because of her long-standing psychiatric problems.

[59] In my opinion therefore all that happened in 2013 was something which enlarged her damages, but not in a way that made the difference between a case that was not worth pursuing, or perhaps of marginal value to the plaintiff, and one which was worth pursuing. It follows therefore that this is not a case where the first material fact relied on was of a decisive character, and the plaintiff cannot support an extension of the limitation period on that basis.

[60] The alternative basis advanced as the material fact of a decisive character, in the supplementary submissions provided in writing on 18 January this year, is not identified with particular clarity. Counsel for the plaintiff sought a finding that the fact of the occurrence of negligence or breach of duty on which the right of action was founded was not within the means of knowledge of the applicant until a date after the commencement of the year last preceding the expiration of the period for limitation for the action, prior to her consultation with her solicitors on 19 December 2013. As I understand the proposition being advanced however it is that prior to that date the fact that there had been negligence or breach of duty on the part of the defendant was not within the means of knowledge of the plaintiff.

[61] The argument was advanced by reference to my decision in *Pilot v Commissioner of Police* [2008] QDC 41. That was quite an unusual case. In May 2004 the applicant was standing beside a police vehicle remonstrating with the driver about her de facto husband having been placed in the vehicle when it was driven forward and a wheel passed over her foot, causing her significant injury. Plainly, she was aware of what happened at the time. The applicant did not see a lawyer about making a claim until 2007; she said that prior to this she did not know how to go about making a claim, and did not understand insurance: [8]. She ultimately came to consult a lawyer, not specifically with a view to obtaining compensation for her

injury, but because the matter came up when she was talking to a lawyer about something else: [33].

[62] My reasons record that the applicant had great difficulty in coping with cross-examination during the application before me, as indeed she had on an occasion when she gave evidence before a coroner, and her answers were frequently unresponsive, or were apparently given mechanically regardless of the true answer to the question. Although she knew that a vehicle had run over her foot, she did not know the identity of the vehicle or the identity of the licensed insurer; indeed she knew nothing about insurance. It would not in fact have been difficult for a solicitor to find out the identity of the licensed insurer, as indeed occurred once she consulted a solicitor, but the question was whether she had taken all reasonable steps to find out that fact before she in fact did.

[63] In that case it was submitted that the question of what it was reasonable for her to do had to be answered in the context of the very special and severely debilitating circumstances of her life. In practice once she consulted a lawyer this information could be easily obtained, so for practical purposes the question was whether it was reasonable for her to have failed to obtain legal advice in relation to her claim for damages for personal injury. I was ultimately persuaded in that case that that applicant's very unusual circumstances meant that she fell into a category where that was the case.

[64] At paragraph [38] I expressed the matter in this way:

> "There is a distinction between a person who chooses, for whatever reason, not to take action to enforce that person's rights, and one who, because of a psychiatric condition or other mental infirmity, or indeed for any other reason, lacks the necessary initiative to take appropriate steps to pursue a claim, or for that matter has so little understanding of the way society functions as not to be able to obtain legal advice in order to pursue a claim for damages in respect of personal injuries. It would be unsurprising if the *Limitation of Actions Act* did not prevent late claims from being pursued by them or on their behalf; such people are in a situation which is close to that of a person against whom time does not run because of a disability in the form of unsoundness of mind, pursuant to s 29 of the *Limitation of Actions Act* 1974."

[65] There are two difficulties in the application of the approach I adopted in *Pilot* in the present case. The first is that, having seen the present plaintiff in the witness box being cross-examined for a time, it was quite clear to me that her position and mental state, and general capacity to cope with life, were very different from that of Ms Pilot. The second difficulty is that in that matter I had evidence about what had actually happened, and had evidence to support the factual basis for the findings that I made, about the difficulties confronting the applicant, and about the matters of which she was unaware. There is simply no evidentiary basis made for this argument in the present case. There is indeed no evidence in the plaintiff's affidavit, or in the affidavit of her solicitor, as to when she first consulted a solicitor about this matter. It emerged during a cross-examination that she had given a notice of claim under *PIPA* in respect of the incident in 2011. It is not entirely clear whether she had legal advice in relation to that, but if she had one would expect that the solicitors she consulted about that matter, whenever she consulted them, would

have found out things which would have alerted them to the existence of a potential claim along the lines of the one now advanced. This is not a matter dealt with in any way in the material for the plaintiff. There is nothing in the plaintiff's evidence to the effect that prior to the time when she consulted her solicitors (on 19 December 2013 or whatever other day it in fact occurred) there was anything about a potential cause of action against the defendant because of the occurrence of negligence of which she was unaware.

[66] The plaintiff knew that she had been suffering from depression and low moods for a long time, and she knew that this was a result of the abuse she had suffered as a child: p 20. She was told in about December 2011 by a psychologist that she had post-traumatic stress disorders resulting from abuse: p 20. She said that she did not understand it at the time, not knowing what PTSD meant, but in circumstances where she knew she had depression the fact that she did not know in terms that she had also had post-traumatic stress disorder does not I think really matter. What she found out really was more information about the technical diagnosis of her condition, but she knew what her symptoms were, and she knew they were related to the abuse she had suffered. She also knew, from the fact that she was there, that various people from the Department of Children's Services had had contact with the family which involved checking up on her state, and once she became older, asking her about particular things, such as putting allegations of wrongdoing to her. She also knew that she had in fact not been removed from her mother's care by the Department, and would have had a reasonable idea of the extent of the Department's supervision of her mother. There is nothing in the material about her knowledge or ignorance at any particular time about the occurrence of negligence or breach of duty on which this right of action is founded.

[67] There is also the consideration that this matter was not raised prior to the time that the plaintiff was cross-examined. In those circumstances, counsel for the defendant has lost the opportunity to cross-examine the plaintiff about these matters. It would therefore be unfair to the defendant to allow this matter to proceed on this basis without at least giving the defendant the opportunity to cross-examine the plaintiff further. But in circumstances where in my opinion there is no evidentiary basis to support a finding that this material fact was not within the means of knowledge of the plaintiff at the relevant time, the application cannot be supported on this basis even without any question of cross-examination. It follows that the plaintiff has failed to show that there was any material fact of a decisive character not within her means of knowledge at the relevant time.

Evidence to establish the right of action

[68] Section 31(2)(b) also requires, for the power to extend the limitation period to arise, that there be evidence to establish the right of action apart from a defence founded on the expiration of a period of limitation. The leading exposition of the approach to this requirement is that of Macrossan CJ in *Wood v Glaxo Australia Pty Ltd* [1994] 2 Qd R 431[21] at 434-5:

> "If a general observation is permissible at this point it can be said that applicants for extension of limitation periods are not intended by the legislation to be placed in the position where they must establish an entitlement to recover on two occasions, first on the hearing of the

[21] Often applied, for example in *Wolverson v Todman* [2015] QCA 74.

> application and once more at the trial of the action. Although the requirements of the legislation must be complied with if an extension is to be granted, the extent to which an applicant must show a case on the hearing of the application to extend time will frequently depend on the impression on the judge's mind of the material which the applicant presents or the existence of which he demonstrates or points to. It is nevertheless recognised as wrong to place potential plaintiffs in anything like a situation where they must on the probabilities how that it is likely they will succeed in their actions. A judge may harbour a feeling that there is a strong chance that particular applicants will fail at trial but, in my opinion, he should not act on the basis of this impression both because that is a question reserved for another occasion and because he cannot know and should not insist on being able to see in all of its ramifications the full strength of the case which will eventually be presented at trial. There are some resemblances in this to the situation of a defendant who resists a summary judgment application. The Court should be cautious in shutting out a party from the opportunity to make his case at the appropriate time. In any situation where proof of a case is difficult and very far from straightforward, it would be very expensive to require a party applying to extend time to demonstrate his case with any high degree of elaboration. Fundamentally, the standard required on an application for extension of time under the Act comes from the literal words of s. 31(2)(b): "evidence to establish the right of action". These words will be construed according to the evident policy of the legislation.
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> A number of decisions in the past have endeavoured to make clear the onus which, under the formula just quoted, the applicant for extension must discharge: *Sugden v. Crawford* [1989] 1 Qd R 683 at 686, *Minoque v. Bestobel Industries Pty. Limited* [1981] Qd R 356 at 358, *Martin v. Abbott Australasia Pty. Ltd*. [1981] 2 NSWLR 430 at 443 and *Dwan v. Farquhar* [1988] 1 Qd R 234 at 239. One way in which the onus has been expressed is that the applicant must demonstrate something like a prima facie case. The evidence need not at the stage at which the application is brought be in a form which would be admissible at trial and it may indeed be hearsay. It will not be possible to predict whether the plaintiff's evidence will prevail at trial when it will be subjected to challenge and forced to confront the opposing evidence of the defendant, but it is probably accurate enough to say that an applicant will meet the requirement imposed by s. 31(2)(b) if he can point to the existence of evidence which it can reasonably be expected will be available at the trial and which will, if unopposed by other evidence, be sufficient to prove his case."

[69] In that case the appellant sought an extension of time with a view to running an action for negligence against the respondent which was responsible for the supply of a particular dye used in a medical procedure on the appellant. Davies JA, the other member of the majority said of this at p 444:

> "In order to satisfy s 31(2)(b) the appellant had to show that there was some evidence that in 1972 the respondent knew or ought to have known that the risk involved in the use of Myodil necessitated its withdrawal from sale or a more specific warning than that which was given in the printed information supplied by the respondent with Myodil."

The reference to "some evidence" suggests an approach essentially similar to that of the Chief Justice. As to the question of the policy of the legislation, in *State of Queensland v Stephenson* (2006) 226 CLR 197 Kirby J described the extension provisions in the act as remedial, and referred to other decisions where the same view of such legislation had been taken: [51]-[56].

[70] I am prepared to assume for the purposes of this application that, once the plaintiff came to the notice of the department, the department had a duty of care towards her, to take reasonable care to avoid her suffering harm, including relevantly harm in the form of psychiatric injury. The law in this area is quite complex, as shown by the detailed discussion *SB v State of New South Wales* (2004) 13 VR 527, *TB v State of New South Wales* [2015] NSWSC 575, and *ABC v State of Queensland* 2015 QDC 321. There was however no particular argument about this point in the course of this application, the concern that I raised being directed more to the question whether there was evidence of breach of duty, and the impact of certain statutory provisions.

[71] It was submitted for the plaintiff that there was prima facie evidence that proper investigation of the many complaints or the treatment of the plaintiff would have led to a conclusion that the plaintiff should have been deemed to be in need of care and protection for the purposes of s 46 of the Act. It was further submitted that adequate investigation at the time should have led to an application to the Children's Court for an order that the plaintiff be admitted to the care and protection of the director in accordance with s 49(1) of the Act. A reasonably careful Child Safety Officer who was aware of any of the matters referred to in the material would have formed a conclusion that the plaintiff was in need of care and protection. I am in effect being asked to draw from the available departmental documentation, and the plaintiff's allegations that she was mistreated in various ways pleaded in the Statement of Claim, that there was prima facie negligence on the part of the defendant. I do not consider that the material before me shows a prima facie case, or even some evidence of negligence on the part of the Department.

[72] I have summarised the effect of the various departmental documents that I have looked at, which record various contact the Department had with the plaintiff over the years. There were various complaints made to the Department, many of them anonymous, which were investigated by departmental officers who recorded the view that the complaints were without substance or did not indicate a need for care and protection. There is nothing that I can see in the documentation of those investigations and conclusions which leads me to the view that they were wrong. On the face of it the approach of the various departmental officers involved appears to have been appropriate. But the real difficulty is that I do not know what conclusions someone in the position of these various departmental officers ought to come to having seen, or having had reported to them, various things that are documented as having been seen or reported to them. All I know is that over the years a number, a fairly large number, of departmental officers formed the view that

the various complaints of specific wrongdoing were baseless, or that, although the mother's care was less than ideal, the case did not rise to a level which would justify doing more than continuing to monitor the situation.

[73] This is not a case where the plaintiff alleges that it was the defendant who actually inflicted the abuse on the plaintiff, or even one where it was alleged the defendant was vicariously liable for the acts of the person who actually inflicted the abuse, where it may not be difficult to conclude that, if the abuse happened in the way alleged by the plaintiff, it was wrongful and actionable. The fact that the plaintiff's parents might have been liable as a result of their abusive behaviour towards her does not mean that the defendant is liable; that involves an assessment of whether there was anything tortious in the performance by the departmental officers of their duties under the Act. I do not consider that the mere fact that the plaintiff suffered harm whilst in the care of her parents amounts to evidence that there was negligence on the part of the defendant because of a failure of the departmental officers to take steps to remove the plaintiff from those parents.

[74] The issue at trial would be whether, in relation to any particular failure to act, the plaintiff can show that any reasonably careful child care officer would have done more. That is not a matter of which I can take judicial notice. This is not a case where common knowledge or common sense might alone be sufficient to enable a court to perceive the existence of a real risk of injury, and to permit it to say what reasonable and appropriate precautions might appropriately be taken to avoid it.[22] Matters of this nature are necessarily to be judged by reference to the standard generally of parental care, so that it is not just a question of how the care of the plaintiff appeared in the abstract, but how it appeared to persons who do this sort of thing day by day and who, in that process, determine which children they come upon are children in need of care and protection. This is something I necessarily know nothing about, even if looking at the standards of today, though of course what must be applied is the standards applicable at the relevant times.

[75] In effect I am being asked to assume negligence simply on the basis that the plaintiff suffered an injury, if she had been removed from her mother's care that injury would not have been suffered, complaints had been made to the Department about the mother not caring properly for the plaintiff, and therefore there was negligence on the part of the defendant in failing to remove the plaintiff. That is tantamount to treating the fact of injury as evidence of negligence. I do not consider that the matter can be approached on that basis. Even in circumstances where a person suffers an injury whilst in a situation entirely under the control of the defendant, the mere fact of injury is not necessarily evidence of negligence by the defendant. This cannot be said in my opinion to be the sort of situation where an injury to the plaintiff is one where in the ordinary course of things an injury would not happen if those who have the management, in the sense of the departmental officers in the present case, used proper care.[23] My ordinary experience of life tells me nothing about the operation of the Department of Child Safety, and about whether, in a case such as the present, a failure to remove the plaintiff from her mother's care would occur only if there was negligence on the part of the Departmental Officers.

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22 Contrast *Neill v NSW Fresh Food and Ice Pty Ltd* (1963) 108 CLR 362 at 368.

23 Applying the test in *Mummery v Irvings Pty Ltd* (1956) 96 CLR 99 at 116. See also *GIO of NSW v Fredrichberg* (1968) 118 CLR 403 at 413.

[76] In my opinion the decision in *Roman Catholic Church Trustees for the Diocese of Canberra and Goulburn v Hadba* (2005) 221 CLR 161 is instructive. In that case a child suffered an injury at a primary school when pulled off a flying fox device by two other children during morning recess. There was a system of supervision of children in the playground during recess, including supervision of the area where the flying fox was, but the supervising teacher had to supervise other parts of the playground as well, and that teacher in fact missed the incident until it was too late to prevent injury to the plaintiff. The plaintiff's case failed at trial, an appeal to the Court of Appeal of the Australian Capital Territory was successful, but a further appeal to the High Court was also successful and the plaintiff ultimately failed. In that case there was evidence of a system which was in force at the school, so that some attempt had been made to respond to the risk of an injury of this kind. The majority in a joint judgment said at p 167 that it was open to the plaintiff to establish breach of the defendant's duty of care but to do so she had to demonstrate that there was some system of supervision which was an alternative to that which the school was using at the time which was free of the risk of which the plaintiff complained and which was available, not in a general or theoretical way, but in a practical sense.

[77] Their Honours continued at [14]:

> "On the question of whether there existed any normal or desirable practice in relation to the supervision of primary school children in playgrounds, the plaintiff called no school teacher from other schools or other person qualified by training or experience to give expert evidence, she tendered no industry standards or industrial awards, and she tendered no instructions or guidelines published by governmental authorities. It was acceptance on behalf of the plaintiff that the relevant onus in this respect lay on her. The question of what reasonable care calls for in supervising hundreds of young children at school recesses is a question which the parties to this case assumed could be resolved by taking account of the opinions of the persons who gave evidence on behalf of the first defendant and were persons of specialized training and experience."

[78] In short, the court held that the plaintiff failed because of an absence of an evidentiary foundation for the proposition that reasonable care required the school authorities to do more than they had done by way of supervision and other precautions to avoid the risk of injury to the plaintiff from the use of this equipment. The court held that the majority in the Court of Appeal had erred in concluding that a failure to provide more intensive supervision involved a want of reasonable care, and endorsed the dissenting judge's opinion that the majority approach was a requirement of unrealistic and impractical perfection: [26].

[79] Reference was made in the submissions for the plaintiff to the provisions of the *Children's Services Act* 1965.[24] Section 46 of the Act provided that for the purposes of the Act a child should be deemed to be in need of care and protection if any one of a long list of conditions was satisfied, but this includes if the child was neglected or exposed to physical or moral danger or falling in with bad associates, not having a parent or guardian who exercised proper care of and guardianship over

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[24] The *Children's Services Act* 1965 was repealed by the *Child Protection Act* 1999. I have referred to reprint 1, as at 3 April 1996, and to the 1965 Act as passed.

him or her.[25] An Officer of the Department authorised by the director could apply to the Children's Court for an order that a child be admitted to the care and protection of the director, which application if made activated the provisions for investigation, and for hearing objections, in subsection (3), and the power in s 49(4) that the Court:

> "(a) if it is satisfied that such child is in need of care and protection, may—
>
> (i) order a parent or guardian (other than the director) of such child to enter into a recognisance in such amount as the court fixes without a surety or with such surety or sureties as the court orders conditioned that such parent or guardian exercise proper care, protection and guardianship in respect of such child;
>
> (ii) order that the director shall have protective supervision over and in relation to such child;
>
> (iii) subject to section 52, order that such child be admitted to the care and protection of the director;
>
> (iv) make such order as to the costs of the application and of any investigation or assessment made in respect of such child pursuant to the court's order as the court thinks just … ."

[80] Section 52 provided that the court should not order that a child be admitted to the care and protection of the director unless the court was satisfied that such child was in need of care and protection, and was not satisfied that such care and protection could be secured to such a child by any other order it may make. The court was required to determine the matter in the way that appeared to the court to be in the best interests of the child. Plainly the fact that under s 46(1) the child was taken to be in need of care and protection did not necessarily mean that an order would be made by the Children's Court that such child be admitted to the care and protection of the director.

[81] I note that under s 58(1)(a) when a child was admitted to the care and protection of the director by order of the court it was the duty of the director to utilise the director's powers and the resources of the department so as to further the best interests of such a child in care, and in the performance of that duty and without limiting the director's discretion in that regard, the director may from time to time make use of such facilities and services as may be available or be made available by any parent of such child in care.

[82] It was further submitted that the facts pleaded supported a prima facie view that the plaintiff's parents had committed an offence pursuant to s 69(1) of the Act. Section 69(1) made it an offence for a person having a child in his or her charge to ill-treat, neglect, abandon or expose the child in a manner likely to cause the child unnecessary suffering, or to injure the child's physical or mental health. If the plaintiff's parents behaved in the manner alleged in the pleading then I suspect they had committed one or more offences against s 69(1), but the proposition that that required the defendant to report the relevant offences to a Justice pursuant to s 71(1) of the Act seeking authority to take the plaintiff into custody depends on an officer of the Department knowing the facts constituting the offence.

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[25] The section was a deeming provision, not an exhaustive definition: *Dale v Scott*, ex parte *Dale* [1985] 1 Qd R 406 at 414.

[83] The submissions for the plaintiff do not direct attention to any particular document which demonstrates that an officer of the Department knew of facts constituting an offence under s 69(1) at any relevant time, but in any event s 71(1) is a permissive provision, and does not require an officer of the Department to report such facts to a Justice with a view to seeking a written authority to take the child concerned into custody. Again there is the difficulty that there is no evidence that reasonable care in the administration of the Act would have led to such a step being taken in the light of such facts as were known to the departmental officers. I do not accept that the evidence in this case demonstrates a prima facie case of liability on the basis that there was a contravention of this provision of the legislation.

[84] It is clear from the legislation that whether a child such as the plaintiff would have been removed for any length of time from the care of her mother would ultimately have to be made by the Children's Court. I have simply no idea of the circumstances which that court at the relevant time would have required to justify an order that the director have the care and protect of a particular child, and in that situation I cannot assess whether, if such an application had been made, it would probably had led to such an order being made by that Court.[26] I note that guidelines which are included in the material before me refer to the proposition that the removal of a child from its parents is regarded as a step to be taken as a matter of last resort, and that a decision to make an application for a care and protection order was to be taken by a senior officer, so that a case where it was thought such an application should be made had to be referred to such an officer.[27]

[85] This suggests a degree of departmental caution in making such applications, presumably because of a degree of caution exercised by the Children's Court in acceding to such applications. It is not enough to say that an application to the Court should have been made. To be of any real benefit to the plaintiff, the application would have to result in her being removed from her mother's care. Accordingly it would be insufficient to prove that it was negligent not to make an application, without also proving that, if an application had been made, it would probably have had such a result. Again there is no evidence to suggest that at a trial the plaintiff will be able to show that.

[86] Counsel for the plaintiff relied on decisions in New South Wales and Victoria, but in my opinion those decisions involved quite different situations. In *SB v New South Wales* (2004) 13 VR 527 the plaintiff was made a ward of the State when she was three and was placed with a foster family the following year. Nine years later she complained of sexual abuse by her foster father, and shortly thereafter she was removed from that home and the following year sent to live with her natural father. However he also began to abuse her sexually. As a result of this history the plaintiff suffered psychiatric injury, of some severity. Ultimately it was conceded by counsel for the plaintiff that the evidence did not establish any breach of duty prior to the plaintiff's restoration to her father. The question whether there was a duty of care, and its content, was considered at some length, in a number of other cases involving common law duty in the context of child welfare protection were reviewed.

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26 In *Taylor v L, ex parte L* [1988] 1 Qd R 706 at 714 the Full Court cautioned against making such a finding, even in a case of suspected sexual abuse, without convincing evidence and a firm satisfaction; but that was after the relevant period.

27 Affidavit of English filed 24 November 2015, Exhibit TE-1, pp 63, 68, 70.

[87] It was held that the Department was not in breach of its duty in restoring the plaintiff to her father, but that there was a breach of duty in relation to the supervision of the situation of the plaintiff in the care of her father. The father concealed the plaintiff and was refused the departmental officers access to her, recommendations made at the time of or after her restoration to the father had not been met, and it appeared from the departmental records that officers were of the belief that she was being sexually abused by him: p 596. Significantly, the finding of breach was made after accepting expert evidence called on behalf of the plaintiff: [483]. The fact that in that matter a finding of breach of duty was made, supported by expert evidence, does not justify a conclusion that there is in the present case evidence of negligence. The circumstances in *SB* were so different from the circumstances in the present case as to point up the absence of the relevant material in the present case.

[88] *ABC v State of Queensland* [2015] QDC 321 was also a very different case from the present. In that case the department had the care of a particular child for a long time, and was aware of sexualized and inappropriate behaviour on his part, and of the fact that his behaviour was very difficult to control. There had also been reports of pervious sexual assaults by him. Nevertheless he was placed in a foster home where there were three young girls, all of whom he proceeded to abuse sexually, causing them psychiatric injury. In that case it was held that there was breach of duty in placing the child with the particular foster family which included these girls, in circumstances where his earlier behaviour was known, where there had been a failure to provide recommended counselling and sex education identified as appropriate by a particular officer, and in circumstances where the department had failed to provide all of the relevant information to the foster parents to enable them to make an informed decision to accept him.

[89] It is not clear from the reasons that there was any expert evidence called in support of the plaintiff's case, but the case does seem to have been mounted on the basis of documentation of the behaviour of the foster child which was quite detailed, so that it was not difficult for the Court to conclude that, given the information the department had available, it should have been apparent that, if he was placed in a foster home where there were girls, there was a risk of inappropriate sexual behaviour towards them. The decision demonstrates that it may be possible to show negligence without the benefit of expert evidence, which is why I went through the available material as to the information available to the department at the relevant times in such detail, to see whether such a conclusion is appropriate in the light of that evidence.

[90] I was also referred to the decision in *TB v State of New South Wales* [2015] NSWSC 575, where there was a finding that there was negligence on the part of the relevant New South Wales department in relation to two sisters who had been subjected to sexual abuse at the hands of their stepfather. Again however that case was very different from the present. The crucial issue in that case was the question of whether there was negligence because the department, once it had been made aware of credible complaints of sexual abuse, failed to pass on this information to the Police to enable them to investigate and to prosecute the stepfather. In that case there was little contemporaneous documentation available, the relevant file having been apparently mislaid, but the trial Judge accepted that the department knew from a particular date of the stepfather's serious record of sexual offences, and of the information received from the plaintiffs and their mother that there had been abuse

of the plaintiffs, so that it was apparent that there was a high degree of probability that the abuse would continue if care was not taken: [105].

[91] There were well established guidelines which the department had under which it was mandatory for such cases to be reported to the Police, which procedure was regularly and normally used. In that matter there was no documentation to demonstrate either the existence of a decision not to report the matter to the Police, or a report to Police and a decision by the Police not to take the matter further, but ultimately the Judge was prepared to draw the inference that the matter had not been reported to the Police, and found that that was a breach of the department's duty. That finding was made in the context of a particular statutory power to report such matters, and the existence of an established practice of such matters being reported. As a result the plaintiffs were exposed to further contact with and potentially further abuse from the stepfather, which would probably have been avoided had the matter been reported to the police, but ultimately the plaintiffs failed because the trial Judge was not persuaded that there had been further abuse of them after the time when it would have been reasonable to expect that the stepfather would have been removed from them had the matter been reported to police at the time when it was found it ought to have been reported.

[92] In that case the issue was not whether the department had information which justified action, but whether the inference from what had occurred was that there had been no report to the police, or that there had been a report but the police had decided not to take action. That is quite different from the issue in the present case. I do not consider that these decisions provide any assistance for this plaintiff. They certainly do not justify a conclusion that the requirement of s 31(2)(b) has been satisfied.

Conclusion

[93] The discretion to extend the limitation period does not arise unless a plaintiff can satisfy both paragraphs in s 31(2) of the Act. For the reason I have given, I find that the plaintiff has failed to satisfy either limb of that subsection. In those circumstances the discretion to extend the limitation does not arise, and it is not necessary for me to deal with the substantial material put forward on behalf of the defendant as to whether it is now possible to have a fair trial. There was no particular challenge to the detailed factual assertions in that material, nor is there any contentious issue of fact relevant to the question of prejudice, though there was argument before me as to the significance of that material, directed on behalf of the plaintiff principally to the proposition that the existence of the available documentation demonstrated that this was not a case where personal recollection of individual departmental officers would be of importance. On that basis it was argued that the fact that many of the people mentioned in the files had disappeared, and that the ones who could be located had little or no personal recollection of the mater and could say no more than that they had prepared the documents attributed to them, was not a matter of great significance.

[94] Ultimately however I do not think it would be helpful or appropriate for me to say anything on a precautionary basis as to the exercise of the discretion if I had reached the conclusion that the discretion arose. In the absence of any contentious questions of primary fact, an Appeal Court would be in as good a position as I am to exercise the discretion if it concluded that I had erred in finding that it did not arise.

[95] In those circumstances the plaintiff's application is dismissed. I suspect that it follows that the defendant's application should succeed and there should be summary judgment for the defendant in the proceeding, but I will receive further submissions about that when these reasons are published, and about the question of costs.