SUPREME COURT OF QUEENSLAND

CITATION:	*Woodhead v Elbourne* [2000] QSC 042
PARTIES:	**WOODHEAD, Denise Anne** (plaintiff) **v** **ELBOURNE, Adrian** (defendant)
FILE NO:	11571 of 1997
DIVISION:	Trial Division
DELIVERED ON:	7 March 2000
DELIVERED AT:	Brisbane
HEARING DATE:	3 February 2000
JUDGE:	White J
ORDER:	**1. That the period of limitation for this action be extended to and include 23 December 1997.** **2. That the allegations in the statement of claim in so far as they refer to a breach of the defendant's fiduciary duty to the plaintiff owed to her as a child in his care (para 4(c), part of para 6 and para 8(b)) be struck out as disclosing no reasonable cause of action.**
CATCHWORDS:	Application to extend time – s 31 *Limitation of Actions Act* 1974 – material fact – alleged childhood abuse – psychiatric injury – striking out application – fiduciary duty. *Limitation of Actions Act* 1974 *Barker v Wingo* (1972) 407 US 514 *Breen v Williams* (1996) 186 CLR 71 *Brisbane South Regional Health Authority v Taylor* (1996-1997) 186 CLR 541 *Cubillo v The Commonwealth* (1999) 163 ALR 395 *General Steel Industries Inc v Commission for Railways (NSW)* (1964) 112 CLR 125 *M (K) v M (H)* (1992) 96 DLR (4th) 289 *Opacic v Patane* [1997] 1 Qd R 84 *Paramasivam v Flynn* (1998) 160 ALR 203 *Sola Optical Australia Pty Ltd v Mills* (1987) 163 CLR 628 *Sugden v Crawford* [1989] 1 Qd R 683 *Williams v Minister, Aboriginal Land Rights Act 1983* (1994) 35 NSWLR 497

Williams v The Minister, Aboriginal Land Rights Act (1983) and Anor [1999] NSWSC 843 (26 August 1999)
Wood v Glaxo Australia Pty Ltd [1994] 2 Qd R 432

COUNSEL: Ms C Holmes SC for the plaintiff
Mr D Rapoport for the defendant

SOLICITORS: Gilshenan and Luton for the plaintiff
Davidson & Sullivan for the defendant

[1] **WHITE J**: There are two applications before the court, one filed by the plaintiff and the other by the defendant. It is convenient therefore to refer to the parties as plaintiff and respondent. The first in time was filed by the defendant for orders striking out the statement of claim pursuant to R171(1)(a) and (2) of the UCPR that the pleading discloses no reasonable cause of action; alternatively that there be judgment for the defendant pursuant to s 293(2)(a) on the same ground; and the further alternative, pursuant to s 293(2)(c) that there be judgment for the defendant on the ground that the defendant has a defence to the proceeding; and the further alternative that the court decide *instanter* as a separate question whether the plaintiff's action is statute barred pursuant to the *Limitation of Actions Act* 1974 and if so, that the plaintiff's proceeding be dismissed or, alternatively, that there be judgment for the defendant.

[2] The plaintiff responded to this application by filing an application for an order that the period of limitation for her action be extended to and include 23 December 1997. The plaintiff's writ claiming

> "… general damages, aggravated damages and exemplary damages for personal injury, loss and other damage as a result of assault and battery and/or trespass to the person and/or breach of fiduciary duty together with interest …"

was taken out on 23 December 1997.

[3] It was convenient to hear submissions on the plaintiff's application to extend first. It became apparent that further submissions were required on whether the claim for compensation for breach of fiduciary duty could stand and counsel have provided them in writing.

[4] In substance the plaintiff alleges that the defendant, who was a friend of her adoptive parents, assaulted her in a sexual way on a number of occasions when she was a child and she now seeks damages for what she alleges are the psychiatric and subsequent economic consequences of those assaults. The issues for decision are

- Whether a material fact of a decisive character relating to the right of action was not within the means of knowledge of the plaintiff until a date after the commencement of the year last preceding the expiration of the limitation period.

- Whether a cause of action based on an allegation of breach of a fiduciary duty owed by the defendant to the plaintiff "as a child in his care" is maintainable.

- If such an action is maintainable whether it is governed by any period of limitation.

[5] The plaintiff was born on 25 February 1974 and was thus 18 years old on 25 February 1992, the date upon which her disability ceased. By virtue of s 29(2)(c) of the *Limitation of Actions Act* 1974 she had three years from that date in respect of any action to recover damages in respect of personal injury, namely 25 February 1995. Ms C Holmes SC for the plaintiff submitted that an action to recover compensation for breach of a fiduciary obligation is not an action of that kind and that there is no limitation period for such an action.

[6] The plaintiff swears to the truth of the allegations of fact made in the statement of claim. The alleged wrongful acts by the defendant occurred when the plaintiff was aged between 7 and 11 years and

> "the defendant was an adult with, on the occasions referred to in paragraphs 3 and 5 hereafter the care and responsibility for the plaintiff" (para 2).

Paragraphs 3 and 5 describe the acts

> "3. Between July 1981 and December 1987, the Plaintiff was subjected by the Defendant to touching of a sexual nature on a number of occasions, particulars of which incidents are as follows:
>
> (a) In or about 1981, when the Plaintiff was aged seven, the Defendant:
>
> (i) instructed the Plaintiff to get into bed with him, where he:
>
> (A) pulled her, by placing his right hand on her chest, against him, so part of his body rubbed her buttocks;
>
> (B) tried to manoeuvre the Plaintiff's left leg over his leg;
>
> (C) rolled the Plaintiff over to make her face him, and endeavoured to make her place her right leg over his leg;
>
> (D) endeavoured to position his penis against the Plaintiff's body;
>
> (ii) on a journey by car, while the Plaintiff sat on his lap, placed his hands on her inner thighs;
>
> (b) In or about 1982, when the Plaintiff was eight years old, and was staying at the Defendant's farm at Millmerran, the Defendant:
>
> (i) moved a bathroom door slightly ajar and put his eye to it so as to observe the Plaintiff naked in the shower;
>
> (ii) while riding behind the Plaintiff on a motorcycle,
>
> (A) pulled the Plaintiff's body against his groin area;
>
> (B) put his right hand between the Plaintiff's legs, in the area of her vagina;

(C) moved his fingers over the Plaintiff's vaginal area.

(c) On a further three to five occasions between 1981 and 1985, the Defendant touched the Plaintiff as described in sub-paragraph (3)(b)(ii) above while riding a motorcycle with her at his farm;

(d) In or about 1984, when the Plaintiff was aged nine or ten years, the Defendant, while swimming with her and other children in a dam on his farm, put his hand between the Plaintiff's legs.

…

5. In or about 1985, when the Plaintiff was aged eleven and was alone with the Defendant at a shed at the Defendant's farm, the Defendant:

(a) instructed the Plaintiff to come over to him, while touching the front of his trousers;

(b) told the Plaintiff words to the effect that the incidents of the kind referred to at paragraph 3 above were between them alone;

(c) said words to the Plaintiff which were intended to, and did convey to her, a threat of harm if she revealed the said incidents to anyone.

On this occasion, the Plaintiff ran away from the Defendant."

[7] Each of these incidents is alleged to constitute an assault and battery and/or trespass to the plaintiff and/or a breach of the defendant's fiduciary duty to the plaintiff owed to her as a child in his care. As a consequence the plaintiff alleges that she

"7. …

(a) developed anxiety, depression and a post-traumatic stress disorder;

(b) has required extensive psychological and psychiatric treatment;

(c) has undergone and will continue to undergo pain and suffering and loss of many of the amenities of life;

(d) has been at times unable to earn income and has had her capacity to earn income impaired;

(e) has suffered and will in the future suffer special damages."

[8] Matters, it appears, came to a head for the plaintiff when she was 12 or 13 years old. She deposes that when told by her mother that the family was to visit the defendant at Millmerran she refused to go and told her mother of the alleged incidents of sexual assault. The family did not thereafter visit the defendant's family. It seems that the plaintiff's mother spoke to a therapist, a Ms Penny Love, of these matters and the plaintiff had some counselling sessions with her which she cannot now recall. The plaintiff, her mother and the defendant were interviewed by police who have preferred no charges against the defendant.

[9] The plaintiff is not a clear historian in her affidavit and sequences and events have had to be gleaned from various reports which set out some of the plaintiff's history, presumably told to the writers by the plaintiff, but possibly by her mother as well.

The plaintiff appears to have had a troubled high school life as well as considerable difficulties with her brother at home. She left school after completing grade 12 in 1990 and entered the workforce. Dr Peter Meulman a general practitioner consulted by the plaintiff and her mother wrote a letter dated 24 November 1993 to Dr B McLeod, a psychiatrist. Dr Meulman wrote

> "She's 19 now and in a crisis. At age 8-9 she was sexually abused by a family friend. This was revealed at aged 13 and since then the family has been somewhat disturbed. Her brother is spiteful and she 'hates' him – he has a learning disability. She feels the father has distanced himself from her. Mother came with Denise and presented Denise as one of her own problems rather than in Denise's own right. Denise cried throughout and hardly spoke."

[10] The plaintiff saw Dr McLeod on 26 November 1993. She reported to Dr Meulman on 29 November 1993 that the plaintiff spoke freely about the "current crisis" which, it seems, related to some conflict at work and this "has triggered some of her past difficulties, the most important being the history of sexual abuse by a family friend which went on for a number of years; and secondly the very volatile home situation with Denise's brother".

[11] Dr McLeod noted that the plaintiff had

> "… never really been able to successfully talk through or deal with the history of sexual abuse and the way that that has impacted on her. She is very well motivated to start to work through this and I have talked with her about what this may entail."

[12] Ms Margaret McDonald clinical psychologist in her report of 26 November 1999 noted that the plaintiff's mother told her that the plaintiff's troubles at work at this time when she was seeing Dr McLeod were due to the defendant's assaults. The plaintiff did not herself relate her symptoms to these childhood events because she told Ms McDonald "this would have meant confronting the trauma she was avoiding in the hope that it would just go away".

[13] Dr McLeod prescribed some sleeping tablets for the plaintiff and informed Dr Meulman that she would see her "fairly soon for further assessment and ongoing care and will keep you in touch with any significant changes that occur with her". The plaintiff deposes to feelings of animosity towards Dr McLeod and the material would suggest only three consultations. There is no suggestion that any analysis of the plaintiff's symptoms or their cause was conveyed to her and in particular, relating them to the past sexual assaults.

[14] The plaintiff deposes to recommencing therapy with Ms Love in 1996 (Dr T Wild, psychiatrist, suggests 1995 but the first memorandum of fees from Ms Love in the statement of loss and damage is for 1 March 1996 which would support 1996). I infer from paragraph 21 of the plaintiff's affidavit that she regularly consulted with her general practitioner, Dr Noel Warren, but did not discuss the sexual assaults with him although he was aware, she deposes, of her distress after consultations with Ms Love.

[15] At some time (and it is not entirely clear when, but probably towards the end of 1996) the plaintiff was told by Ms Love that she could have consulted a lawyer

when she, the plaintiff, expressed anger at what had happened to her. By that I infer she is referring to the assaults alleged against the defendant. It seems that after discussion with her mother the plaintiff decided that she wished to consult a lawyer and saw her present solicitors on 26 March 1997 for the first time. Of this visit the plaintiff deposes

> "When asked about the nature of my injury or condition, my mother and I were unable to provide any details to Mr Weir except to say that I was attending therapy sessions with Penny Love."

She went on

> "On 26 March 1997, immediately following my consultation with Mr Bill Weir, I saw Penny Love and told her I had consulted a lawyer and had provided an authority for my lawyer to speak to her about my condition. Penny said she would not speak to my lawyer or get involved in the legal proceedings and she did not think I was strong enough to go through with legal proceedings at that time. …
>
> When I approached Penny as to why she would not speak to Mr Weir, she advised me that she did not want to get involved in any legal proceedings because she still did not think I was ready to deal with legal proceedings."

[16] Although authorised to do so Ms Love refused to discuss the plaintiff's condition with her solicitors who continued to seek instructions about instituting proceedings. The plaintiff deposes in paragraph 34 of her affidavit

> "… I was very confused and worried as Penny Love continued to stress that she did not think I was strong enough to go through with legal proceedings and warned me that I could return to the emotional state I was in prior to seeing Penny. However, on 15 December 1997, I instructed Mr Weir to institute proceedings on my behalf. On 23 December 1997, my solicitors issued a Writ of Summons."

[17] The plaintiff, with the assistance of her mother, decided that she needed to see a person "who was able to provide details to my solicitors as to the exact nature of my condition and how it related to the assaults". The plaintiff commenced treatment with Dr Tony Wild, a psychiatrist, on 19 January 1998. His report is dated 18 December 1998 and it was only after reading it after her solicitors gave it to her shortly after that date that the plaintiff said that she

> "… first became aware that I was suffering from 'post-traumatic stress disorder consequent upon childhood sexual abuse from a friend of the family …' and 'borderline personality disorder' when I received a copy of Dr Wild's report … Before this time, I did not know the nature of my condition, the extent of my condition or whether my condition related to the assaults by the Defendant."

[18] From Dr Wild's report it appears that he was asked by the plaintiff's solicitors to provide a medico-legal report on 18 February 1998. He consulted with the plaintiff on six occasions during 1998 but it was not until the end of the year that the report was forthcoming. He noted

> "When first seen by me on 19 January 1998, Ms Woodhead denied feeling emotionally distressed at that time. She said the main reason she had come to see me was to discuss whether she should proceed

> with legal action against the past abuser and to possibly ask me for a medico-legal report about her abuse. … And she was still not sure whether she could stand a possible future court case with her perpetrator."

The plaintiff told Dr Wild that

> "… she had recently called off further treatment from her psychotherapist, Ms Penny Love, because Ms Love would not agree to provide a legal report … [the plaintiff] said that as late as the end of 1997, Ms Love had advised her that she did not believe that she (Ms Woodhead) was emotionally fit to take legal action against the perpetrator (Adrian)."

[19] Dr Wild describes the plaintiff's conflictual relationship with her brother, that she was hard to handle at home and at school where she was asked to leave. Further, she had had numerous jobs, squabbling with her fellow-employees but had a close relationship with her adoptive mother. Dr Wild concluded

> "My diagnosis was that Ms Woodhead had a past history of post-traumatic stress disorder consequent upon childhood sexual abuse from a friend of the family named Adrian, which was not substantially resolved. Also, she probably met the criteria for borderline personality disorder in the past but now just had some residual borderline personality traits. Although I could not say that all of Ms Woodhead's behavioural, emotional, and academic problems in the past had been caused by the sexual abuse, it is likely that it was a major contributor.

He reported that his management

> "… was to explore Ms Woodhead's questions about whether to take legal action against Adrian or not, to discuss with her her rather abrupt termination of psychotherapy with Ms Love and to monitor her for any signs of relapse."

[20] It is a condition of making an order pursuant to s 31 of the *Limitation of Actions Act* 1974 in actions for damages in respect of personal injury that it appears to the court

> "(a) that a material fact of a decisive character relating to the right of action 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; and
>
> (b) that there is evidence to establish the right of action apart from a defence founded on the expiration of the period of limitation" (s 31(2)).

Section 30 defines the critical expressions used in s 31(2). Relevantly a material fact relating to a right of action includes

> "(iii) the fact that the negligence, trespass, nuisance or breach of duty causes personal injury;
>
> (iv) the nature and extent of the personal injury so caused;

> (v) the extent to which the personal injury is caused by the negligence, trespass, nuisance or breach of duty" (s 31(a)).

Such facts are of a decisive character

> "… if but only if a reasonable 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 the 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 interests and taking the person's circumstances into account to bring an action on the right of action."

[21] The respondent submits that at least by 1993 when the plaintiff saw Dr Muelman and certainly no later than 1995 (in all probability 1996) when she recommenced therapy with Ms Love she had knowledge of many if not all of the material facts. It seems that although the plaintiff's mother expressed an opinion that the plaintiff's symptoms were linked to the childhood sexual assaults, the plaintiff, on the material, either did not understand that to be the case or did not, consistently with her condition subsequently diagnosed by Dr Wild, accept that to be the case. There is no evidence to suggest that Dr Muelman or Dr McLeod told the plaintiff that in their opinion there was such a causal link and their correspondence to each other was most unlikely to have been shown to the plaintiff.

[22] The plaintiff had experienced a range of problems at school, at home and subsequently at work as well as the childhood sexual assaults and any of those or a combination of them could have been the cause of her symptoms. It seems that the assaults were a focus of the two years of therapy with Ms Love which, from the memoranda of fees mentioned at p 12 of the statement of loss and damage, extended from early 1996 until the end of November 1997. Nonetheless, exploring events in her life of that kind and how she felt then (if that is what occurred) is not, in my view, knowledge sufficient for the statute. She may have been led to think that possibly the alleged sexual assaults were the cause of her symptoms but that is insufficient.

[23] From the plaintiff's affidavit and there is nothing to contradict it, it appears that the plaintiff continued to be distressed and troubled through 1997 having been told by Ms Love that she was not strong enough to contemplate legal proceedings. Her solicitors were, it seems, unable to explore

> "… the nature of the Plaintiff's psychological disturbance, the extent of her problems and the likely cause of those problems including any link with the childhood sexual abuse" (para 3(c) of the affidavit of David Davies filed 3 February 2000).

[24] I think it reasonable to conclude that it was not until Dr Wild made his diagnosis disentangling, as it were, all of the adverse influences in the plaintiff's life and that

opinion was conveyed to her that she could be said to have been in possession of the material facts of a decisive character which, if properly advised, would lead a reasonable person to institute proceedings. What that diagnosis did was to raise the prospect of success from a mere possibility to a real likelihood, *Sugden v Crawford* [1989] 1 Qd R 683 per Connolly J at 686; see also *Sola Optical Australia Pty Ltd v Mills* (1987) 163 CLR 628 at p 7 and *Wood v Glaxo Australia Pty Ltd* [1994] 2 Qd R 432 per Davies JA at pp 441-2. That the plaintiff's solicitors instituted proceedings on her behalf outside the limitation period but before she came into possession of this knowledge does not disentitle her to the relief sought, *Opacic v Patane* [1997] 1 Qd R 84 per Davies JA at pp 86-7.

[25] The defendant submits that even if the plaintiff satisfies the requirements of s 31, in the exercise of the residual discretion of the court an order ought not be made because there would be significant prejudice to the defendant, *Brisbane South Regional Health Authority v Taylor* (1996-1997) 186 CLR 541. The defendant has sworn an affidavit in the briefest terms mentioning his age (62) and that he and his wife and daughter (during her childhood) lived on a property at Millmerran for approximately 30 years. The plaintiff makes no reference to prejudice in her affidavit. Mr Rapoport, who appeared for the defendant, contended that the prejudice was the inherent prejudice of the passage of time referred to by McHugh J in *Taylor* at pp 551 *et seq*. Ms Holmes has submitted that there can be no prejudice because these were acts of their very nature where there would be no witnesses. But that is not, in my view, a complete answer. The plaintiff is unable to be specific as to dates but there would appear to be no likelihood of dispute that visits occurred between the families, that there were rides on the motorbike with the defendant and swimming in the dam on the property. The actions will depend on the view that the tribunal of fact takes of the truthfulness of each of the parties. Although the earliest of these alleged incidents occurred nearly 20 years ago and bearing in mind "where there is delay the whole quality of justice deteriorates" it should not be overlooked that the plaintiff was entitled to bring her action as of right up to 25 February 1995.

[26] The rationale for extending the limitation period is to eliminate the injustice a plaintiff might suffer by reason of the imposition of a rigid time limit, *Sola Optical* at 635. But as McHugh J observed in *Taylor* at 553-4

> "The discretion to extend should therefore be seen as requiring the applicant to show that his or her cases is a justifiable exception to the rule that the welfare of the State is best served by the limitation period in question. Accordingly, when an applicant seeks an extension of time to commence an action after a limitation period has expired, he or she has the positive burden of demonstrating that the justice of the case requires that extension."

The plaintiff, as the evidence now stands, has allegedly suffered serious psychological consequences as a result of the alleged assaults in her childhood. Apart from the loss of the protection of the limitation period, which is no small matter, and the dimming of memory as to dates, no particular witness, document or circumstance appears to be lost, although I note McHugh J's warning, quoting from *Barker v Wingo* (1972) 407 US 514 at 532 "what has been forgotten can rarely be shown". There has been no great delay by the plaintiff in instituting these proceedings against the background of the long passage of time when the alleged

acts took place. Not without some anxiety, I have concluded that the discretion ought to be exercised in favour of the plaintiff.

[27] I now turn to the application with respect to the plaintiff's cause of action based upon the breach of a fiduciary duty. There is nothing in the pleadings or the plaintiff's affidavit or any other material which sets out how the fiduciary relationship arose, what duties and obligations were imposed on the defendant by the relationship or how, apart from the allegation of assault, the defendant breached the duties and obligations imposed on him by virtue of that relationship. Without more the action in so far as it is based upon a fiduciary obligation might be struck out, but that alone would invite repleading, so the nature of the cause of action needs consideration.

[28] Mr Rapoport contends that the principles expressed in *Paramasivam v Flynn* (1998) 160 ALR 203 show that such a cause of action is not maintainable and ought, on that ground, to be struck out. Ms Holmes submitted that following the decision of O'Loughlin J in *Cubillo v The Commonwealth* (1999) 163 ALR 395 it would be premature to determine the question of whether a case of a fiduciary relationship had been made out on the pleadings. The accepted test for striking out a cause of action pursuant to R171 is that the action must be found to be "clearly untenable", *General Steel Industries Inc v Commission for Railways (NSW)* (1964) 112 CLR 125 at 130. In *Paramasivam* the plaintiff alleged a ward/guardian relationship between himself and the defendant who had taken him, with his mother's consent, from Fiji and provided for his education and accommodation in New South Wales and in the ACT. This relationship was alleged to give rise to an unspecified fiduciary obligation towards the plaintiff which was breached when the defendant engaged in sexual assaults against the plaintiff over many years. The trial judge, Gallop J, on an application to extend the limitation period, when considering the strength of the plaintiff's case concluded that the claim under Australian law was novel and not attended with any prospects of success. While there was no doubt that a relationship of guardian and ward may give rise to duties typically characterised as fiduciary, for example, not to allow duty and interest to conflict or to exert undue influence in transactions, the Full Court of the Federal Court had no hesitation in concluding that such a claim as was pleaded was unable to be justified in terms of conventional legal reasoning. At p 219 their Honours (Miles, Lehane and Weinberg JJ) observed

> "Of course, conduct such as that alleged against the respondent in this case can readily be described in terms of abuse of a position of trust or confidence, or even in terms of the undertaking of a role which may in some respects be representative and, within the scope of that role, allowing personal interest (in the form of self-gratification) to displace a duty to protect the appellant's interests. But it should not be concluded, simply because the allegations can be described in those terms, that the appellant should succeed in an action for breach of fiduciary duty if the allegations are made good. What the apparent applicability of the descriptions illustrates is not only the incompleteness but also the imperfection of all the individual formulae which have at various times been suggested as encapsulating fiduciary relationship or duty. The principles can be understood only in the context of the way in which

> the courts have applied them. In that context the success of the appellant's fiduciary claims, in this case, would indeed be a novelty.
> …
> Here, the conduct complained of is within the purview of the law of tort, which has worked out and elaborated principles according to which various kinds of loss and damage, resulting from intentional or negligent wrongful conduct, is to be compensated. That is not a field on which there is any obvious need for equity to enter and there is no obvious advantage to be gained from equity's entry upon it. And such an extension would, in our view, involve a leap not easily to be justified in terms of conventional legal reasoning" p 219.

[29] They noted that the interests which the equitable doctrines invoked by the plaintiff had hitherto protected were economic interests and the one exception, *Breen v Williams* (1996) 186 CLR 71 (the right of a patient to access medical records held by her doctor) had failed in the High Court. Their Honours had been pressed with the Canadian decision of *M (K) v M (H)* (1992) 96 DLR (4th) 289 where the Supreme Court of Canada held in a claim based on tort and fiduciary obligation arising out of alleged incidents of incest, that the relationship of parent/child was fiduciary giving rise to a fiduciary duty to protect the child's health and that incest was in breach of that duty. The Supreme Court rejected a role for such an obligation limited to protecting economic interests. The Full Court of the Federal Court agreed that there could be no doubt that a fundamental aspect of a parent's obligation was to refrain from inflicting personal injury upon one's child but suggested that "fiduciary" was not the right label for it "still less that equitable intervention is necessary, appropriate or justified by any principles developed from equity's doctrines" p 220.

[30] A claim of fiduciary obligation was pleaded in *Williams v Minister, Aboriginal Land Rights Act 1983* (1994) 35 NSWLR 497, the relationship allegedly arising between the plaintiff and the defendant's predecessor Aboriginal Welfare Board acting under the *Aborigines Protection Act* 1909 in 1947 when she was removed from her mother and placed in a series of homes from which conduct she alleged she suffered adverse psychological consequences. In this case, as in the Canadian case, the claim for compensation for breach of a fiduciary obligation arose in the context of an application to extend the limitation period where the relevant statute barred proceedings in law but not in equity. The New South Wales Court of Appeal allowed the claim to proceed to trial. Kirby P observed at p 511

> "But can it be said that the action for breach of fiduciary duty is so hopeless that this established legal error matters not? I do not believe that it can. The Board was in the nature of a statutory guardian of Ms Williams. The relationship of guardian and ward is one of the established fiduciary categories: see *Hospital Products Ltd v United States Surgical Corporation Inc* (1984) 156 CLR 41 at 141f; *Bennett v Minister for Community Welfare* (1992) 176 CLR 408 at 426f. The Board was, in my view, arguably obliged to Ms Williams to act in her interest and in a way that truly provided, in a manner apt for a fiduciary, for her 'custody, maintenance and education'. I consider that it is distinctly arguable that a person who suffers as a result of a want of proper care on the part of a fiduciary

> may recover equitable compensation from the fiduciary for the losses occasioned by the want of proper care: cf *Norberg v Wynrib* [1992] 4 WWR 577 at 606; (1992) 92 DLR (4th) 499. In other jurisdictions, compensation for breach of fiduciary duty has been held to include recompense for the injury suffered to the plaintiff's feelings: see, *Szarfer v Chodos* (1986) 27 DLR (4th) 388; *McKaskell v Benseman* [1989] 3 NZLR 75."

Priestley JA agreed in the result but with hesitation at 516

> "These considerations have influenced my general agreement with the approach of Kirby P. That approach involves conclusions, favourable to Mrs Williams, about the arguability of a number of issues. I have reached some of these conclusions only with hesitation and I recognise they may be vulnerable to a strict approach. However, this case seems to me pre-eminently to be of the kind where a broad approach should be taken to questions of arguability of legal propositions which may be novel but which require careful consideration in the light of changing social circumstances. On this basis I agree with the orders proposed by Kirby P."

Powell JA dissented, seeing no justification

> "… for seeking further to extend the range of fiduciary duties cast upon a person, or body, adopting the role of a parent, or guardian, so as to constitute as breaches of fiduciary duty – and, thus, as actions constituting an abuse of the relevant relationship – conduct undertaken in furtherance of a statutory duty, and in the belief – founded upon what were then, even if they are not now, the accepted standards of the time – that they were in the best interests of, and for the furtherance of the welfare of, the person fulfilling the role of the child in the relevant relationship" p 519.

[31] In the result, Abadee J at the trial concluded that the plaintiff had no maintainable cause of action for breach of a fiduciary obligation, *Williams v The Minister, Aboriginal Land Rights Act (1983) and Anor* [1999] NSWSC 843 (26 August 1999) at para 695 *et seq* where his Honour analyses the authorities in detail. I accept that there are the features identified by Powell JA which would distinguish *Williams* from the present case.

[32] The High Court in *Breen* expressed disagreement with the direction the Canadian authorities had gone in developing the law relating to fiduciaries at pp 83, 94, 110 and 132. In *Breen* it was said that the law of negligence and contract which governed the duty of a doctor to a patient left no room for the imposition of fiduciary obligations, per Dawson and Toohey JJ at 94 and Gaudron and McHugh JJ at 110.

[33] Notwithstanding the strong indication in the cases that it is inappropriate to seek to find a role for fiduciary obligations in personal injury claims, O'Loughlin J in *Cubillo v The Commonwealth* (1999) 163 ALR 395 in a claim similar to that made in *Williams* concluded that the existence, nature and extent of the alleged fiduciary relationship should be explored at trial.

> "… the warning in *Northern Land Council v Commonwealth* not to determine the nature of any relationship in the abstract, the

> acceptance in *Bennett v Minister of Community Welfare* that the relationship of guardian and ward created a fiduciary relationship and the acknowledgment in *Paramasivam v Flynn* that the relationship of guardian and ward may give rise to a fiduciary relationship are sufficient to persuade me that it would be premature to hold, at this stage, that the applicants have failed to make out a case of fiduciary relationship on the pleadings. It may transpire, when all the evidence has been taken, that no such relationship has been proved: That is a matter, however, that should await the trial of the action" p 440.

[34] Even if the law relating to fiduciaries were to be extended to protect other than economic interests and those interests, contrary to the clear trend of the Australian authorities, embraced the relationship of parent and child or ward/guardian there is no alleged fact in this action which could support such a relationship. The first alleged act took place in the plaintiff's own house when the defendant and his family were visiting. The other alleged incidents took place when the plaintiff's family visited the defendant's property. It is straining language greatly to argue that a fiduciary relationship arose on any of those occasions. The common law relating to assault amply provides for the circumstances pleaded. It seems, as in other cases, resort to equitable principles has been to avoid the defence that the action is statute barred. The *Limitation of Actions Act* 1974 does not apply to equitable claims for compensation, see the discussion by Kirby P in *Williams* at 509 and the Full Court of the Federal Court in *Paramasivam* at 215. I agree, with respect, with the observations of Abadee J in *Williams No 2* at paras 734 and 735 that it is inappropriate that a limitation statute can be circumvented by an equitable plea in a non-trustee type relationship arising from the same circumstances and particulars relied upon to support a tortious or contractual liability.

[35] I would therefore strike out the claim made by the plaintiff against the defendant in so far as it is based on a breach of fiduciary duty. The formal orders are

1. That the period of limitation for this action be extended to and include 23 December 1997.

2. That the allegations in the statement of claim in so far as they refer to a breach of the defendant's fiduciary duty to the plaintiff owed to her as a child in his care (para 4(c), part of para 6 and para 8(b)) be struck out as disclosing no reasonable cause of action.

[36] I will hear submissions as to how the costs of these applications ought to be disposed.