DISTRICT COURT OF QUEENSLAND

CIVIL ACTION

REGISTRY: Brisbane
NUMBER: 861 and 864 of 2001

IN THE MATTER OF
APPLICATIONS IN
MATTERS NUMBERED 861
of 2001 AND 864 of 2001

REASONS FOR JUDGMENT

DELIVERED the twenty-first day of June, 2002.

These two applications involve only the plaintiffs and the third defendant, William Theodore D'Arcy. I shall refer to the Third Defendant simply as "the defendant." The applicants have each commenced an action in this Court seeking "$250,000.00 damages for negligence and/or assault including aggravated damages together with interest ...." As in each case the acts alleged to be negligent or to constitute an assault happened many years ago the plaintiffs have thought it advisable[1] to bring these applications for orders that:

> *The period of limitation prescribed by the Limitations of Actions Act 1974 for the bringing of this action be extended to 1 November 2001.*

The applications were heard together.

The plaintiff in action 861 of 2002 (whom I will refer to as "R") was born on 21st

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1. In fact the Notices of Intention to Defend in these proceedings were not filed until 6th February, 2002. In paragraph 7 of the Defences the statute of limitations is pleaded.

April, 1956. She is married, and has been a teacher for over twenty years

R alleges that she was a student at the Yalleroi State School (which I shall hereafter refer to simply as "the school") between 28th January, 1963 and 1st July, 1965. The defendant, it is alleged, was, during that time,[2] the only teacher at that school. It is alleged that during that time the defendant assaulted the plaintiff on a number of occasions. The particulars[3] given are:

> *(a)* *An occasion when the Third Defendant placed his hand on the Plaintiff's upper leg and rubbed it around her vagina area and placed a finger into her vagina. Whilst the Third Defendant did this he was seated at his desk in the main school room in the school and the Plaintiff was standing beside him;*
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> *(b)* *An occasion in the back left hand corner of the main school room when the Plaintiff was told by the Third Defendant to lie along one of the bench seats along the back wall, the Third Defendant removed the Plaintiff's underpants down to her knees, unzipped his shorts and exposed his penis to her and lay on top of her facing towards him rubbing himself against the Plaintiff in an up and down motion from her vagina area to her navel;*
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> *(c)* *An occasion in the store room at Yalleroi State School when the Third Defendant rubbed his pelvic area up and down against the Plaintiff's back; and/or*
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> *(d)* *An occasion when the Plaintiff was sitting on the Third Defendant's lap on a chair against the back wall dividing the library and the classroom and the Third Defendant was thrusting his pelvic region against the Plaintiff's bottom.*

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2. In the Defence of the Third Defendant it is alleged that he was not a teacher at the school after 30th June, 1964 (paragraph 4(a),) but it is clear from his evidence (which I accept on this point) that that was an error, and that he was teaching at Yalleroi State School until at least mid-1965.

3. See paragraph 4 of the Statement of Claim.

The plaintiff in Action 864 of 2001 (whom I shall refer to as "S") was born on 31st August, 1955. She too is married, and she is employed as a cleaner.

She also alleges that she was a pupil at the school, in her case between 20th October, 1963 and 1st July, 1965.[4] She alleges that the defendant assaulted her during that time, and the particulars given[5] are:

> *(a)* *An occasion in the room where the stationery was kept at the school at lunch time when the Third Defendant touched the Plaintiff on her shoulders and leaned over and breathed in her left ear; the Third Defendant kissed the Plaintiff was* (sic) *placing his mouth over hers and forcing his tongue into the Plaintiff's mouth. The Third Defendant was fumbling with the Plaintiff's clothes below her waist;*
>
> *(b)* *There were several other incidents that occurred in the back room of the school which were of a similar nature;*
>
> *(c)* *An incident which occurred in the sewing room at the school where the Plaintiff was standing in front of the desk and the Third Defendant was standing behind her. The Third Defendant removed the Plaintiff's underpants and pushed the Plaintiff forward onto the desk and then placed his penis into her vagina;*
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> *(d)* *An occasion at the front of the class in the classroom when the Third Defendant put his right arm around the Plaintiff's waist and again sat the Plaintiff on his knee forcing the Plaintiff to masturbate him and then rubbed his penis between the Plaintiff's buttocks and then placed his penis in the Plaintiff's vagina;*
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> *(e)* *Another occasion at the front of the class as the third Defendant put his right arm around the Plaintiff's waist and again sat the Plaintiff on his knee forcing the Plaintiff to masturbate him and then rubbed his penis between the Plaintiff's buttocks and then placed his penis in the Plaintiff's vagina;*

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4. In the defence it is alleged that S was not a pupil at the school between the alleged dates as "she left and attended another school during that time." (See paragraph 2(b) of the Defence.)

5. See paragraph 4 of the Statement of Claim.

(f) *An incident which occurred in the library/sewing room when the Third Defendant made the Plaintiff lie on a table and ran his hands up and down her body from her knees to her underarms and then removed her underpants and kissed the Plaintiff on parts of her body and began biting her skin with her teeth. During this the Third Defendant kissed and licked the Plaintiff's vagina and placed his fingers near and in her vagina. The Third Defendant then inserted his penis into the Plaintiff's vagina and continued to kiss her around the neck region.*

In the case of each plaintiff it is alleged[6] that, as a result of the defendant's "breaches" the plaintiffs have:

(a) *... undergone and will continue to undergo pain and suffering;*

(b) *require[d] psychiatric treatment and will continue to require the same;*

(c) *... suffered a loss of income and [their] earning capacit[ies] ha[ve] been deleteriously affected;*

(d) *... been forced to expend money;*

(e) *... suffered other loss and damage ...*

It is also alleged[7] by each of the plaintiffs that:

> *... the assaults committed upon the Plaintiff[s] have caused [them] considerable personal indignity, fear, insult and humiliation ....*

Each plaintiff claims aggravated damages as part of her claim.

The applications are brought pursuant to the provisions of section 31 of the *Limitation of Actions Act 1974* ("the *Act*".) That section provides:

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6. Paragraph 5 of each statement of claim.

7. Paragraph 6 of the Statements of Claim.

(1) This section applies to actions for damages for negligence, trespass, nuisance or breach of duty ... where the damages claimed by the plaintiff for the negligence, trespass, nuisance or breach of duty consist of or include damages in respect of personal injury to any person ....

(2) Where on application to a court by a person claiming to have a right of action to which this section applies, 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 a period of limitation;

The court may order that the period of limitation for the action be extended so that it expires at the end of 1 year after that date ....

(3) This section applies to an action whether or not the period of limitation for the action has expired -

(a) before the commencement of this Act; or

(b) before an application is made in under this section in respect of the right of action.

Section 30 of the Act provides:

(1) For the purposes of this section and sections 31, ... -

(a) the material facts relating to a right of action include the following -

(i) the fact of the occurrence of negligence, trespass, nuisance or breach of duty on which the right of action is founded;

(ii) the identity of the person against whom the right of action lies;

(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;

(b) material facts relating to a right of action 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;

(c) a fact is not within the means of knowledge of a person at a particular time if, but only if -

(i) the person does not know the fact at that time; and

(ii) as 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.

(2) In this section -

***"appropriate advice"**, in relation to facts, means the advice of competent persons qualified in their respective fields to advise on the medical, legal and other aspects of the facts.*

"Right of action" includes a cause of action.[8]

Section 8 of the *Act* provides:

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8. See section 5(7)(a) of the *Act*.

(1) Save as is provided in sections 31 and 32, nothing in this Act -

(a) enables an action to be brought that was barred before the commencement of this Act by an enactment repealed by this Act, ...;

(b) .....

(2) The time for bringing proceedings in respect of a cause of action that arose before the commencement of this Act shall, if it has not then expired, expire at the time when it would have expired -

(a) apart from this Act; or

(b) if this Act had at all material times been in force,

whichever is the later.

(3) Save as is provided in this section, nothing in this Act affects an action if the cause of action upon which that action is founded arose before the commencement of this Act.

Section 29 (which is part of Part III of the *Act)* provides:

(1) If on the date on which a right of action accrued whether before or after the commencement of this Act for which a period of limitation is prescribed by this Act the person to whom it accrued was under a disability, the action may be brought at any time before the expiration of six years from the date on which the person ceased to be under a disability ..., notwithstanding that the period of limitation has expired.

(2) Notwithstanding subsection (1) -

(a) ....;

(b) ....;

(c) an action to recover damages in respect of personal injury shall not be brought by a person after the expiration of three years from the date on which that person ceased to be under a disability ....;

"Personal injury" in the *Act* includes "an impairment of a person's physical or mental

condition,"[9] and a person is "taken to be under a disability" while "he is an infant."[10]

The *Age of Majority Act 1974* was assented to on 27th September, 1974, and commenced on 1st March, 1975.[11] Section 5 of that Act provides:

> *(1) Subject to this section and to section 7, for all the purposes of the laws of the State -*
>
> *(a) a person who, on or after the date of commencement of this Act, attains the age of eighteen years attains full age and full capacity on attaining that age; and*
>
> *(b) a person who, on the date of commencement of this Act, is of or over the age of eighteen years but under the age of twenty-one years attains full age and full capacity on that date.*

Subsection (2) of section 5 of the *Age of Majority Act 1974* makes it clear that it applies, so far as my present purposes are concerned, to any reference in an act (whether passed before or after the date of commencement of that Act) to the use of the word "infant."

At the date of the commencement of the *Age of Majority Act 1974* S was nineteen and a half years old so she attained her majority on that day. Similarly, R was almost nineteen years old, and she also attained her majority on that date.

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9. Section 5(1) of the *Act.*

10. Section 5(2) of the *Act.*

11. See Section 2 of the *Age of Majority Act 1974* and the proclamation made on 14th November, 1974 published in the *Queensland Government Gazette*, No. 49, 16th November, 1974, at page 1083.

Hence both S and R "ceased to be under a disability" on 1st March, 1975. Pursuant to the provisions of the *Limitation of Actions Act 1974* which came into force four months later both S and R's causes of action became "barred" on 1st March, 1978, that is, three years after they "ceased to be under a disability."[12]

As will be apparent from the above, if the applicants are to succeed they must show that there was a "material fact relating to a right of action" which was "not within the[ir] means of knowledge" until a date after the commencement of the last year of the relevant period of limitation. The "material fact" must be "of a decisive character."

On 1st November, 2000 the defendant was convicted of eighteen counts by a jury. Those counts on which he was convicted included some which were founded on the same allegations of assault as are made by the applicants in these proceedings.

The essence of S's claim is set forth in her affidavit filed on 7th March, 2001 and read in these proceedings. In that affidavit she sets out several facts relating to the defendant which are not challenged. They include:

1. From 1961 to 1972 he was a teacher at five different one teacher schools in Queensland;
2. In 1965 he joined the Australian Labor Party, having spent a period as President of the Gold Coast branch of the Queensland Teachers' Union;
3. In 1972 he was elected to the State parliament as the member for Albert,

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12. Sub-section (c) of sub-section 2 of section 29 of the *Limitation of Actions Act 1974*.

holding that seat until 1974;

4. In 1977 he was elected to the State parliament as the member for Woodridge, a seat which he held until his resignation in about January, 2000;

5. Upon his resignation he received a superannuation payment;

6. In 1980 he was elected to be the Deputy Leader of the Labor Party;

7. In 1998 he was elected to be the deputy Speaker of the Queensland House of Representatives.

S goes on to allege in her affidavit -

> 8. *From the time the ... Defendant committed the assaults on me ... until 1 November 2000 I did not ever think that I would have any prospect of bringing any civil proceedings against the ... Defendant because there was no witness to any of the assaults and it would have been simply my word against his word. At the time of the assaults the ... Defendant had been an adult and I had been a child. I thought it would be unlikely that anyone would ever believe my word against his where the allegations which I would make against him were so serious. That was especially so as the ... Defendant was a member of Parliament. My view about the prospects of success in a civil action changed when the jury believed my word against his and he was convicted.*
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> .....
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> 10. *Prior to [a] telephone conversation with police I had never told a single person about what the ... Defendant had done to me. The reason for that is:*
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> (a) *I did not think anyone else would believe me;*
>
> (b) *I was not aware that the ... Defendant had behaved in a similar fashion towards others; I thought I was the only one;*[13]
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> (c) *to tell someone else meant I would have had to describe what had occurred to me out aloud and, until I gave my statement to*

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13. Her evidence is that at the time of the Defendant's committal S realised that others were making allegations against the defendant, but this "didn't change [her] mind at all" as to whether she might be believed. See page 13 of the transcript.

the police, I could not bring myself to do that as it meant reliving the events;

(d) *I felt guilty and ashamed of what the ... Defendant had done to me; I thought it was my fault and it must have happened to me because I was a bad person and not "normal". I could think of no other explanation for why the ... Defendant had assaulted me.*

.....

12. *If it had not been for the fact that I knew that others had been treated by the ... Defendant in a way similar to me, I do not think I could ever have given evidence about what had happened to me.*

The allegation that "there were no witnesses to any of the assaults" is not strictly correct. In her statement[14] she describes an incident that occurred "during class." She says she was called to the defendant's desk, and stood by it. He then placed his arm around her waist, and began to rub her upper thigh. He then lifted her on to his knee. He had his hands upon the desk. He then "told the students who were looking up, to get on with their work." He then "removed his penis from his shorts" and he then told her how to masturbate him. After ejaculating he wiped his penis with a handkerchief. Later that day, three students spoke to her about the incident, one of them telling her that she "didn't have to do that to [the defendant.]" One of the other students told her that he had seen the handkerchief, and tried to explain to her why it had been used. Another student was present during this conversation and was "nodding her head in agreement." Another student said, "Don't let him hurt you."[15] She also relates another incident which took place in the classroom, during which the

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14. The statement is Exhibit "A" to her affidavit. See paragraphs 22 to 28.

15. It would seem S told Dr. Grant that the students told her that they had seen what had happened in the classroom. See page 2 of his report of 2nd January, 2001, which is Exhibit "C" to her affidavit.

defendant had sexual intercourse with her.[16] At the time she says she can recall hearing the other students moving their chairs around. She says she did not look at them, as she was staring at a painting on the back wall of the classroom.[17]

Further, the suggestion in her affidavit that what had occurred was known only to her and the defendant is to some extent inconsistent with her belief, stated in paragraph 44 of her statement, that her father "was aware of what had occurred between [the defendant] and [her]."[18]

S agreed that she had, in "the last ten years" heard of cases in which people had been sued for abusing children sexually, and knew that damages had been awarded in such cases.[19]

S's evidence is that she did not turn her mind to the question of bringing civil proceedings until after the defendant was convicted.[20] S states in her affidavit that after the defendant was convicted she was contacted by a solicitor who was a friend of R, and she then decided "for the first time in my life, that I should consider taking civil action to redress what

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16. Pargraphs 29 to 41.

17. Paragraph 39.

18. See also Dr. Grant's account of his conversations with S at page 3 of his report of 2nd January, 2001. However, later in the report, a more confusing picture is presented - see page 5.

19. Transcript, page 14.

20. Transcript, page 11.

the ... Defendant had done to me."[21] At this solicitor's suggestion she consulted a psychiatrist to obtain an opinion "as to whether I had suffered any psychiatric injury as a result of what the ... Defendant had done to me."[22]

S goes on to explain that from after the assaults she would suffer "panic attacks."[23] As a child her grandmother took her to a doctor who thought these attacks were "growing pains."[24] She saw a "sexual assault counsellor" in June and July, 1999, but it was not suggested to her by that counsellor that the "Defendant's conduct towards [her] was the cause of the panic attacks which [she] had suffered over the years."[25] She says in her affidavit:

> *20. It never really occurred to me to blame the ... Defendant for the panic attacks or anxiety that I had been suffering. I thought that I suffered from that because I was not "normal" and that I was a bad person. I thought that that was why the ... Defendant had assaulted me as I could think of no other explanation for what had happened to me. As such, I did not ever connect the ... Defendant's assaults with me as the cause of what I had gone through until I read Dr. Grant's report.*

S also says that she has suffered over the years from depression. She says:[26]

> *21. I also suffered, over the years, from what I call depression. I just knew that I got depressed but was not putting the blame anywhere. I had*

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21. Paragraphs 13 and 14.

22. Paragraph 15.

23. Paragraph 16.

24. Paragraph 17.

25. Paragraph 18.

26. Paragraph 21.

been brought up by my parents to believe that one had to be responsible for your own actions and not to blame others for what happened to you. Over the years I did not think that what I suffered from was caused by the ... Defendant until I read the report of Dr Grant. I did not think that physical assaults committed upon me could affect me mentally until I read the report of Dr. Grant in this matter.

22. *I did not understand, until I read the report of Dr. Grant, that I suffered from post traumatic stress disorder nor from a distorted personality development with avoidant and anxious traits. No person had ever told this to me before I read Dr. Grant's report.*

S's affidavit concludes:

23. *I also knew that over the years I suffered from pain in the neck and back. No physical cause for this was ever found but I did not ever think, prior to reading Dr. Grant's report, that it might be the product of what the ... Defendant had done to me. Similarly, with chronic fatigue which I have suffered from over the years, I had had numerous investigations in order to try to establish the cause of that chronic fatigue and no abnormality was ever found. No person ever suggested to me that it might be caused by what the ... Defendant did to me and I did not think that that was a possibility.*

In her evidence the following occurred:[27]

MR. MAHER: Had you been to doctors over the years about problems you thought you were having? – Yes.

Yes. And were you trying to get help but really didn't know how to go about it? Would that be fair to say? – I suffered from depression, bad neck and bad back and they told me it was all in my mind, there is nothing wrong with me.

and later:[28]

I am looking at paragraph 23 of your affidavit now. When you say that you had had numerous investigations to try and establish the cause of the chronic

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27. Transcript, page 15.

28. Transcript, page 18.

fatigue, do you mean you had been to see numerous doctors? – Yes.

What do you mean? – I had seen two doctors.

When did you see those doctors? – I don't remember. I remember seeing Dr Hossack once and she took tests and she said there is nothing wrong with me, and I didn't believe her so I went to another doctor and they said the same thing, but I don't remember when.

Did those doctors ask you if there had been anything in your life which was causing you anxiety or worry? – Yes, they did ask me.

And you told them what you could but you didn't mention these assaults? – No, I told them there was no stress in my life.

But that wasn't the case, was it, because there was stress in your life, on your evidence, from these assaults? — But I didn't know that.

Dr. Grant, a Clinical Associate Professor in Psychiatry, saw S in his rooms on 27th December, 2000, and furnished a report to her solicitors about a week later. He expresses his conclusions as follows:

From the diagnostic point of view [S] can be seen as suffering from the following conditions resulting from the sexual abuse.

1. *An anxiety disorder with panic attacks.*

2. *A distorted personality development with avoidant and anxious traits.*

3. *A post-traumatic stress disorder. This disorder is demonstrated by a number of symptoms that would satisfy the criteria for PTSD as outlined in DSM-IV of the American Psychiatric Association. Criteria satisfied are as follows.*

    a. *[S] was exposed to a series of traumatic events during her childhood that involved a threat to her physical integrity and actual injury. At the time of these events her response involved intense fear, helplessness, and horror.*

    b. *This traumatic event has been persistently re-experienced through recurrent and intrusive distressing recollections of the event, and acting or feeling as if the traumatic event was recurring. She has had intense psychological distress and*

physiological reactivity upon exposure to cues that remind her of the offences.

c. *She has persistently avoided stimuli associated with the trauma and has shown numbing of general responsiveness as evidenced by efforts to avoid thoughts, feelings, and conversations associated with the trauma, feelings of detachment and estrangement from others, and a restricted range of affect (inability to have loving feelings).*

d. *There have been persistent symptoms of increased arousal as indicated by difficulty staying asleep, irritability, hypervigilance, and exaggerated startle response.*

e. *This disturbance has been present for many years and has caused clinically significant distress and impairment in social functioning.*

This chronic post-traumatic stress disorder would be rated as moderately severe.

[S] has had a number of physical symptoms over the years which can be seen as secondary to her anxiety. This includes fatigue and muscle tension causing neck and back pain, as well as pain to the temporo-mandibular joints from muscle spasm of the jaws.

The essential basis of R's application is set out in her affidavit filed on 7th March, 2001 and which was read in this proceeding. In paragraph 7 of that affidavit she swears:

From the time the ... Defendant committed the assaults on me ... until 1 November 2000 I did not ever think that I would have any prospect of bringing any civil proceedings against the ... Defendant because there were no witness to any of the assaults and it would have been simply my word against his word. At the time of the assaults the ... Defendant had been an adult and I had been a child. I thought it would be unlikely that anyone would ever believe my word against his where the allegations which I would make against him were so serious. That was especially so as the ... Defendant was a member of Parliament. My view about the prospects of success in a civil action changed when the jury believed my word against his and he was convicted.

She goes on to say:

8. *... at the time of the trial, in October 2000, and particularly at its conclusion, I started to suffer emotional lability, and crying fits. At*

times I felt the need to scream or to cry. I noticed that I was very irritable and snappy with my husband and that I had to be very careful in order to control a lack of patience with children at the preschool that I teach at. I suffered nightmares for the first time, ..., and I felt angry and aggressive. At about that time I became preoccupied with thoughts of the ... Defendant on a daily basis. At the same time my appetite was poor, my concentration was poor and I had extreme memory difficulties. These conditions have continued until the pesent time. The first time that I ever suffered from these conditions, as opposed to the anger and resentment I felt towards the ... Defendant, was at about the time of the conclusion of the trial on 1 November 2000. I gave evidence at that trial as to the assaults perpetrated against me and was cross examined at length by counsel representing the ... Defendant. ....

Prior to 1 November 2000:

(a) I did not think I could win a case against the ... Defendant; after his conviction, I think I can succeed in such an action; and

(b) prior to that time, whilst I had anger and resentment against him, I had none of the symptomatology that I have suffered since that time.

Again the claim that there were no witnesses to the alleged assaults is surprising in that the first incident described by R in her statement[29] is said to have occurred in the classroom during class time. She says that this incident "was repeated on numerous separate occasions in which [the defendant] would call me to the front of the class."[30]

In her evidence R said that she had suffered memory difficulties, and I understood her

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29. Exhibit "A" to her affidavit, paragraphs 11 to 13. It may be that R believes other students could not see the assault as she stood behind the defendant's desk.

30. Paragraph 14 of the statement.

to be saying that these difficulties predated the conviction of the defendant.[31]

Professor Grant examined R on 30th November, 2000 and his report dated the same day is exhibited to R's affidavit. The following is taken from that report:

> *... The four offences which were the subject of the charges are clearly recalled by [R] but there are quite likely to have been a number of other offences for which she has a less clear recall. She does not recall any of these other possible offences as being more severe in nature, but she is really very unclear about what they may have consisted of and is reluctant to try to recall any further details for fear of the emotions that might be aroused.*
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> *From the nature of the offences is it (*sic*) clear that [R] would have been significantly affected by the abuse that she was subjected to, and her reactions at the time are not unusual. She did not tell anyone about what was happening, but developed a deep and abiding hatred for the perpetrator. Over the years since then she has often felt angry and had thoughts of vengeance whenever Mr. D'Arcy has received publicity or she has heard someone mention her school. However she did not tell anybody about the offences until the police began their inquiries and interviewed her.*
>
> *The anger and resentment felt by [R] over the years has been the main result of the abuse which she experienced. These feelings have remained fairly confined to Mr. D'Arcy and the relevant events, and she has not developed a pervasive feeling of resentment towards the world or any significant personality disorder. Nevertheless she did have significant behavioural problems in high school, with constant testing of limits, and was eventually expelled from [a high school.] It is quite likely that this rebellious behaviour could have had some of its origins in the abuse from Mr. D'Arcy and the subsequent anger that she felt towards teachers and school discipline.*
>
> *.... the abuse does seem to have shaped her attitude towards her career and has caused her to be quite driven and committed to high standards in her work.*
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> ....
>
> *.... She seems to have been able to compartmentalise the abuse and put it in the past sufficiently so as not to affect her subsequent development and*

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31. Transcript, page 22.

relationships. Overall it would appear that over the years, up until the charges were being investigated, [R] did not show symptoms suggestive of any diagnosable psychiatric disorder.

Since the case began, and particularly since it has concluded, [R] has shown more obvious symptoms of disturbance. She has had dysphoric and irritable mood, she has been emotionally labile, she has had some bad dreams and significant sleep disturbance, and she has felt very angry with the process to which she was subjected, particularly in regard to the publicity. These symptoms represent an adjustment disorder with mixed emotional features secondary to the trauma of the trial, the need to recall the past traumas, and the way in which the legal proceedings were conducted.

The adjustment disorder currently being experienced by [R] will probably settle down spontaneously over the next few months, and may not require any psychiatric treatment. However [R] is now facing the issue of whether she should receive some kind of ongoing counselling and assistance in coming to terms with what happened to her as a child, and the current effects that she is experiencing. Any decision about whether she has treatment has to be hers, and such a decision will really depend upon whether she feels she is functioning satisfactorily or experiencing ongoing symptomatology. Choosing to forget about past traumas and put them in the background is a legitimate way of dealing with these events, but not everybody finds this to be possible and it may be that now that these events have come to the fore [R] is no longer able to suppress them and put them in the past. She may therefore need to have some kind of psychiatric treatment. In addition, if her adjustment disorder symptoms do not settle down over the next couple of months I would advise her to seek some psychiatric attention. If she does need to seek treatment for the adjustment disorder, she will probably need about six sessions of psychiatric treatment costing of the order of $160 per session. She might also need antidepressant medication. If she chooses to have some psychotherapy in relation to the child sexual abuse, she would probably need of the order of 20 sessions of psychotherapy, costing approximately $160 per session.

Overall, I believe that [R] will make a satisfactory recovery from her adjustment disorder, given time, and that she will also make a satisfactory psychological adjustment to the sexual abuse and the subsequent trial. It is unlikely that there will be long term psychiatric sequelae. [R] has considerable personality strengths and has dealt with these issues in a positive way over the years. She has not developed a post-traumatic stress disorder and it is unlikely that there will be future development of any more significant psychiatric syndromes than she is currently exhibiting.

Dr. Grant gave oral evidence and was cross-examined. I think his evidence in chief

can largely be summarised as follows:[32]

1. In the 1970s there was "virtually no knowledge or understanding of sexual abuse;"

2. At that time (i.e., the 1970s,) it was "very unusual for a victim of sexual abuse to report it or to seek treatment;"

3. In the 1970s there was little community awareness of the existence of sexual abuse or of the problems experienced by victims of such abuse;

4. In particular, the medical profession generally shared the public lack of awareness of the existence of and problems caused by sexual abuse;

5. It was then (i.e., in the 1970s,) and still is, very difficult for the victims of sexual abuse "to bring themselves to report it;"

6. Victims of parental and teacher assaults "often entertain an irrational sense of guilt;"

Dr. Grant also gave the following evidence when being questioned by counsel for the applicants:[33]

> *The passage[34] which I was ... quoting ... goes on in this fashion, Doctor, "For this and other reasons they are generally reluctant to discuss it. Dr. Kippax was asked whether the applicant should reasonably have sought medical advice before she was 23 concerning her troubles. 'At an intellectual level it sounds very reasonable' she added: 'but ... human beings are not reasonable and not logical' and the applicant's omission to discuss it made her 'no different to ... 99 per cent of sexually abused victims. They simply lived ... with the abuse.... They didn't seek treatment then.'" Is that your experience? – Yes, that would be similar to my experience. I think that not only were people reluctant to seek treatment, but there was very little available.*

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32. The following points are taken principally from page 41 of the transcript.

33. Page 41 of the transcript.

34. The reference is to the judgment of Byrne J. in *Tiernan v. Tiernan* (not reported, No. 39 of 1992, 22nd April, 1993.) Rather than quoting entirely from the transcript (page 41) I have quoted directly from the Butterworths Unreported Judgments Service, which was handed to me by counsel, as I am confident counsel quoted accurately from the judgment.

In cross-examination of the doctor the following points emerged:[35]

1. Had the doctor (or any other competent psychiatrist) seen S ten years ago, and had he then been given the same material he had when seeing her on 30th November, 2000, he would probably have made the same diagnosis then as he does now;

2. Had S consulted with him professionally ten years ago he believed he would have been able to assist her;

3. If a patient does not provide an accurate history to a treating doctor then "if their history isn't provided then you can't make the diagnosis;"

4. Over the last eight years Dr. Grant has had patients complaining of sexual abuse referred to him by general practitioners - and "generally" he has been able to assist them;

5. By the mid 1990's there was "widespread understanding and debate on the issue of sexual abuse and its effects;"

6. By the 1990s "the medical profession's awareness of the topic of sexual abuse was considerably broader than it was ... a decade earlier;"

7. Apart from the consequences of the trial process, R did not suffer from any diagnosable psychiatric disorder as a result of the respondent's actions.

Dr. Grant also said this in cross-examination:[36]

> *It's possible for anybody to misremember or misinterpret the past. That can happen in any normal person and certainly can happen in anybody also who has experienced traumatic events. You can't necessarily assume that exactly what is remembered is exactly what happened, especially when there are many years involved between the memory and - between the memory being related and the events that actually occurred.*

The defendant has filed an affidavit in each matter, and gave oral evidence at the

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35. Transcript page 42 and following.

36. Transcript page 46.

hearing.

So far as the defendant's affidavits are concerned he swears that he did not assault S and R, but admits that he was convicted of the "allegations made by the Plaintiff[s]" in the Supreme Court on 1st November, 2000. His appeal against those convictions was dismissed by the Court of Appeal on 22nd August, 2001. He is presently seeking the leave of the High Court to appeal to that court. Otherwise his affidavit deals with the issue of prejudice, the thrust of it being that so much time has elapsed since the events complained of are said to have occurred that a fair trial is not now possible. Much of his affidavit is argumentative rather than asserting facts.

He does refer in his affidavits[37] to evidence that the school building in which he taught has now been moved, and it is not now possible to ascertain the extent of any structural changes that may have been made to it. He claims to have thereby lost the chance to take meaningful photographs or measurements. He also alleges that it is now impossible to remember or ascertain the seating configuration in the classroom at any relevant time.

The defendant was cross-examined in respect of a number of matters. Many of them seemed to me to relate to his credibility. I can only say that, having watched him closely, and not forgetting that he has been convicted of serious sexual offences against young children, I nonetheless am persuaded that I should accept him as an honest and reliable witness on those factual issues which emerged during the hearing other than whether or not he assaulted

37. Paragraph 11.

S and R whilst they were students.

I accept that a school inspector by the name of Reithmuller visited the school unannounced whilst the defendant was the teacher and that he (Reithmuller) prepared a report on his visit.[38] Reithmuller is now over ninety years old, and has no memory of his visits to the school. It may well be that the defendant was inspected by another inspector, Tomlinson, during the relevant time, although the defendant does not recall his visits.[39] Tomlinson is now dead. In respect of this issue the defendant said:[40]

> *... Let's start with paragraph 9* [of the defendant's affidavit.] *Is what's in paragraph 9 your lawyer's ideas rather than yours? – No, I – I pointed out to lawyers that many people were deceased in the area - within the area and that - and I did - we did have copies of the school, in fact, or reports of the time that had been - that had been tendered and the fact that they - they - those people visited the school during the period and - and examined the children.*

Later the defendant went on to say that he would get many visitors at the school during the day.

The following also occurred during the defendant's cross-examination:[41]

> *.... can you go back to paragraph 8, please? You say there, ..., you were informed by your solicitor "evidence will have to be sought from a variety of persons, including other pupils who attended the school at the relevant times,*

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38. The defendant in his affidavits refers to an affidavit of Donna Stevenson filed on 15th March, 2001. That affidavit was not read in this application by either counsel.

39. Transcript, page 29.

40. Transcript, page 29.

41. Transcript, page 31.

teachers or inspectors who may have attended the school, parents of students and other persons, and many of these people cannot be found or are not available." Well, who are they? Who can't be found? – Well, there are quite a few that couldn't be found at various times that we looked for during this period.

When you were being prosecuted criminally? – When we were being prosecuted we looked for people that the police hadn't found, or people the police had found and there were quite a few that were not available at that stage or couldn't be found.

But you don't know whether they could give any useful evidence? – Well, there were some that could have.

On your case the most they could say was they never saw anything because there was nothing to see, isn't that right? – There - depending on what you were talking about, because there were other allegations made by the police or other claims made by the police that just weren't true.

.....

So nothing ever happened. That's your case, isn't it? There was nothing for anybody else to ever see, isn't that your case? — It is not the case that's been put up, because in a small country school, in a small country school of 20 odd pupils they're suggesting that these - these allegations took place in front of 20 pupils.

You can ---- ? – In a room that was - that was accepted as being, what, 20 feet by 18.

Later the defendant said:[42]

You would have a good idea of who the students were at the school at any time? – Only from records, because I taught so many pupils you wouldn't - over the years.

Certainly? – You would have to recall from records, but there are some pupils you remember more than others.

The defendant said that he had records from the Education Department, but not the rolls or other "documentation."

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42. Transcript, page 32.

I have thus far sought to summarise the relevant legislation and evidence which pertains to this matter. There is one other matter that I should mention before declaring the conclusions I have reached.

Until the enactment of the *Evidence Act 1977* the fact that the defendant had been convicted of criminal offences would have been irrelevant, and hence evidence of the convictions inadmissible, in civil proceedings against the defendant arising from those offences. The law was, as expressed by the English Court of Appeal in *Hollington v. F Hewthorn and Co. Ltd.*,[43] that the verdict of the jury was "nothing more than its opinion based on facts which it did not witness."[44]

The introduction of the *Evidence Act 1977* on 1st January, 1978[45] changed the law. Now section 79 of that *Act* provides that in proceedings such as these proof of the defendant's convictions will create a rebuttable presumption that he "committed the acts ... which at law constitute that offence."

In short, in this case, as it seems to me, if the plaintiffs were to tender a certificate of conviction, or even the defendant's own admissions that he has been convicted, the situation would be, to all intents and purposes, that the defendant would essentially then carry the onus

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43. [1948] K. B. 587

44. See *Cross on Evidence*, J. D. Heydon, Volume 1, page 5086, paragraph 5200. See also the helpful discussion in *Working Paper on a Bill to Consolidate, Amend and Reform the Law of Evidence* prepared by the Queensland Law Reform Commission and held in the Supreme Court Library.

45. See Section 1(1) of the *Act*.

of showing that he did not assault the plaintiffs as they allege.[46]

At the end of these reasons I have appended a chronology of what appear to me to be dates which may be thought to be relevant to a consideration of the issues raised by these applications. In the fourth column I list those matters which are common to both applications. In the fifth I deal with those relating to S, and in the sixth, those relating to R's application. In the second column I have set out the number of approximate years that have elapsed between when the defendant ceased teaching at the school and the event listed in column four or five or six. Likewise, the figure in the third column represents the number of years since the defendant commenced teaching at the school and the relevant event.

The application is brought pursuant to the provisions of section 31 of the *Act*. That section applies only to actions for "damages for negligence, trespass, nuisance or breach of duty ...." The claim is for damages for "negligence and/or assault."

It has concerned me whether when parliament used the word "negligence" in the section it intended that the word should be understood to include allegations of intentional assaults such as are alleged to have occurred in this case. Likewise, is the reference to "trespass" intended to include the tort of battery? Neither of these matters was raised before me, and as both counsel clearly made their submissions on the basis that the claims made here came within the section I will assume in favour of the applicants that their claims are

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46. This could conceivably lead to further delay. If the defendant were to be given leave to appeal to the High Court against his convictions a judge hearing the matter might well take the course adopted in *Re Raphael; Raphael v. d'Antin* [1973] 1 W.L.R. 998; [1973] 2 All E.R. 19 and adjourn the trial until the appeals had been determined.

indeed properly characterised as being for "damages for negligence, [and/or] trespass."

On that assumption, the next thing that must be shown is that, in each case, a material fact of a decisive character relating to the right of action was not within the means of knowledge of the applicant until after 1st March, 1977 (i.e., "the commencement of the year last preceding the expiration of the period of limitation for the action.")[47] As the claim was filed on 27th February, 2001, it will also be necessary for the applicants to show that the material fact came to each of their knowledge after 20th February, 2000.

In both applications the applicants rely upon the fact of the defendant's convictions on 1st November, 2000 as being a "material fact of a decisive character relating to the right of action."

It seems to me that the fact of the defendant's convictions does not come within the scope of the list of matters specifically referred to in sub-section (a) of subsection (1) of section 30 of the *Act*. The fact of the occurrence of the assaults was well known to both S and R and the identity of the perpetrator of those assaults was equally well known to them.

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47. It is interesting to observe that section 31 refers in sub-section (2)(a) to "the period of limitation for the action" which in this case would be three years from, at latest, 30th June, 1965 (the last time the alleged torts might have been committed..) Section 29 provides that in the case of a child action may be brought within six years of the plaintiff's ceasing to be a child "notwithstanding that the period of limitation has expired." In other words, it does not seem to enlarge the period of limitation, but rather provides that action may be brought even though the period of limitation has expired. By way of contrast, section 31 provides that if an order is made "the period of limitation is extended accordingly." I do not know whether there has been any discussion of this aspect by any court of authority. It is not necessary for my decision in this matter to resolve any ambiguity if any in fact exists.

The fact of the convictions is not relevant to the last three matters listed in the last three sub-sections.

The list of matters in sub-section (1) of section 30 is not exhaustive - it is clearly inclusive. So the question still remains for consideration, is the fact of the defendant's convictions a "material fact relating to [the] right of action."

Prior to 1st January, 1978, as I have pointed out, the fact of the defendant's convictions would have been irrelevant and hence inadmissible during a civil trial based on the facts alleged in this case. After that date, the fact of the convictions is rendered admissible by virtue of section 79 and indeed, as I have pointed out above, creates a rebuttable presumption (in the circumstances of this case) that the defendant did the things which are alleged against him.

In my view, the fact of the convictions (so long as they stand) is, in the circumstances of this case, a fact which "relates to [the] right of action." It is a fact which goes to facilitate proof of the tortious acts.

Further it seems to me the fact of the defendant's convictions is, in the circumstances of this case, clearly of a decisive character. There is much force in the applicants' counsel's submission that had the applicants gone to a competent lawyer prior to the convictions the likelihood is that such a lawyer would have been slow to advise the bringing of an action. Such a lawyer would consider that on the one hand there was the uncorroborated account of the applicant, neither of whom had made fresh complaint, against the word of a man who had

been many times elected to parliament by the electors of two electorates, and who had played a significant part in political affairs in Queensland over many years.

I therefore hold that each applicant has shown 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."

Each applicant has urged upon me that there was a further fact which might bring them within the section. In case I should be held to be wrong in the decision I have just announced, I should deal with these further submissions. I shall do so briefly. The facts relied on in each case are different.

S relies upon the fact that "until she saw Dr. Grant, or read his report, she was not aware of the nature and extent of the personal injury caused to her."[48]

It is clear that S has had a number of problems in her life. She has been aware of the problems, and from time to time has sought help from doctors in respect of them. Prior to consulting with Dr. Grant she had not told any of the doctors with whom she consulted of her treatment by the defendant.

I accept that in the 1960's and 1970's it may well have been the case that even

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48. Quoted from the applicant's counsel's written submissions.

appropriate medical specialists, assuming they had been told all by S, may not have come to the conclusions that Dr. Grant has now reached. The evidence is, however, that Dr. Grant at least feels that by the early 1990s he and his colleagues were much more aware of many of the issues arising from child sexual abuse, and he feels he would have been able to appropriately diagnose and treat S had she consulted with him and told him of her childhood experiences.

Indeed, I am satisfied that by the early 1990s there was a far greater public awareness of the prevalence of and the insidious consequences of child sexual abuse. There is evidence in this case to that effect, and, in any event, it would seem to me to be a matter of notoriety which I can properly take into account.

I fully accept that often child victims of sexual abuse will find it very hard, if not impossible, to tell others of their experiences. I also accept that when such a victim becomes an adult, it will continue to be extremely difficult for such a person to tell a doctor of the abuse. The mere fact that she has been silent for so long will compound the problems in relating the abuse, let alone in persuading others that it in fact occurred.

However, the facts in this case are that, despite these difficulties, S did in fact tell an investigating police officer of her experiences on 28th September, 1998.

In essence, S was in the early 1990s aware of numerous health problems which she had. She had sought help in respect of them, but had not divulged to those from whom she was seeking help the facts relating to the defendant's conduct. Whilst one can understand

her reluctance to raise such matters with her advisors, it seems to me that by the mid-1990's her failure to do so was not reasonable.

In short, I do not consider that S has shown that she took "all reasonable steps to find out the facts" before 30th November, 1999,[49] and hence it has not been shown that the material fact relied upon was "not within [her] means of knowledge."

In the case of the application by R the additional fact relied upon is expressed in her counsel's written submissions in the following terms:

> *that until the Plaintiff saw Dr. Grant there was no evidence which would have supported a worthwhile action so far as quantum is concerned and what she was told by Dr. Grant, or realised upon reading his report, was a material fact.*

Had R spoken with a lawyer prior to seeing Dr. Grant, and had she then sought advice on the amount of any damages which might be awarded to her should she succeed in an action against the defendant, the lawyer would have had to take into account a number of factors. The first would be her initial pain and suffering for which she should be compensated. The indignity that the defendant's acts occasioned her might well lead to a conclusion that some amount should be included in any advice for aggravated damages. The lawyer would also have had to take into account the extent to which her enjoyment of life, or, as it sometimes called, loss of the amenities of life, had been diminished over the years because of her continuing anger and outrage at the defendant's actions.

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49. That is, a year before she saw Dr. Grant.

Quantification of such a claim would have been extremely difficult. That is not to say, of course, that an experienced solicitor or barrister might not have been able to give her meaningful advice on what she might expect to be awarded should she successfully pursue her claim.

The argument advanced by counsel for R is that Dr. Grant's advice introduced a new element, as it were, into the equation - or rather into the calculation of the anticipated damages - so as to tip the balance in favour of her bringing an action.

The advice of Dr. Grant amounts to this:[50]

a. the nature of the abuse was such that she would have been significantly affected by it;

b. she has maintained a "deep and abiding hatred for the perpetrator;"

c. she has over the years felt angry and had thoughts of vengeance against the defendant;

d. there is a likelihood that some rebellious behaviour on her part as a teenager at high school "could have some of its origins in the abuse;"

e. she "seems to have been able to have compartmentalised the abuse and put it in the past sufficiently so as not to affect her subsequent development and relationships;"

f. until the charges were being investigated she did not show any symptoms of any diagnosable psychiatric disorder;

g. since the investigation began, and particularly since it was concluded, R has shown more obvious symptoms of disturbance. The symptoms "represent an adjustment disorder with mixed emotional features secondary to the trauma of the trial, the need to recall the past traumas, and the way in which the legal

50. These are all taken from the doctor's report which is exhibit "B" to her affidavit filed on 7th March, 2001.

proceedings were conducted;"

h. the adjustment disorder currently being experienced by her will "probably settle down spontaneously over the next few months, and may not require any psychiatric treatment;"

i. R is now facing the issue of whether "she should receive some kind of ongoing counselling and assistance in coming to terms with what happened to her as a child, and the current effects that she is experiencing;"

j. it may be that R will no longer be able to suppress them and put them in the past, and she may therefore need some psychiatric treatment. Indeed, if the adjustment disorder symptoms do not settle down over a couple of months his advice wold be for her to seek psychiatric attention. This might cost in the order of $960.00. If she chose to have some psychotherapy in relation to the abuse this would cost of the order of $3,200.00;

k. Dr. Grant's view was that R will make a satisfactory recovery from the adjustment disorder, and she will also make a satisfactory psychological adjustment to the sexual abuse and the subsequent trial. It is unlikely that there will be any long term psychiatric sequelae.

Much of what is set out in the above summary of Dr. Grant's conclusions was known to R, and could have been conveyed by her to a competent legal advisor long before 27th February, 2000. It really seems to me that the only "new" information brought to light by Dr. Grant was that her feelings following the trial amount to an adjustment disorder, and that it may now be necessary for her to seek professional assistance both in respect of that disorder and also to help her deal with the memory of the abuse. Bearing in mind the doctor's opinion that the likelihood is she will make a "satisfactory recovery" from her problems, and that it is unlikely there will be any long term psychiatric sequelae, it seems to me that these new components would be unlikely to have so altered the advice that the fictitious lawyer would have given her as to quantum as to persuade her that it was now in her interests to bring an action.

I am not persuaded that the information obtained by R from Dr. Grant was, within the meaning of the *Act*, a material fact of a decisive character relating to the right of action.

As both applicants have persuaded me that a material fact of a decisive character was not within their means of knowledge until 1st November, 2000 I next have to consider whether there is "evidence to establish the right of action." Clearly there is.

The applicants have thus fulfilled the primary requirements of the *Act*, and hence I have jurisdiction to make the order they seek. The question still remains, however, as to whether, in the exercise of the discretion vested in me, I should make the orders sought.

The High Court in *Brisbane South Regional Health Authority v. Taylor*[51] has made clear the proper approach to the task that I have. Dawson J. expressed concisely a number of aspects of that approach in the following terms:[52]

> *... s. 31 of the Limitation of Actions Act 1974 (Q) does not confer upon an applicant for an extension of time a presumptive right to an order once the two conditions laid down by sub-s (2)(a) are satisfied. The section confers a discretion upon a court to extend time and that discretion should only be exercised in favour of an applicant where, in all the circumstances, justice is best served by so doing. The onus of satisfying the court that the discretion should be exercised in favour of an applicant lies on the applicant. To discharge that onus the applicant must establish that the commencement of an action beyond the limitation period would not result in significant prejudice to the prospective defendant. I agree with McHugh J. that, once the legislature has selected a limitation period, to allow the commencement of an action outside that period is prima facie prejudicial to the defendant who would otherwise have the benefit of the limitation.*

51. [1996-1997] C.L.R. 541

52. *Ibid*, page 544.

In this case the defendant in his affidavit has raised a number of issues which he asserts show that he would be unfairly prejudiced if the matter were now to proceed to a hearing. As I have observed, much of his affidavit material is argumentative, but perhaps that is understandable in the circumstances.

I have already observed that the enactment of section 79 of the *Evidence Act 1977* will, if this matter goes to trial, enable the applicants (assuming the defendant's convictions stand) to facilitate proof of their cases by proof of his convictions. I do not think it is overstating matters to say that as a result of that provision the onus of proof will, to all intents and purposes, be cast upon the defendant to show he did not do the acts charged against him. Of course, as a matter of law, the onus will still be on the plaintiffs to prove their cases, but the practical consequences will be as I have indicated.

The prejudice to the defendant occasioned by this change of the law is clear. However, it seems to me that that prejudice is not appropriate for me to take into account in considering this application. It is prejudice resulting from a procedural change, introduced by the parliament for reasons which, no doubt, were thought to be sufficient to the parliament, but which cannot concern me. I therefore do not intend to take into account any prejudice to the defendant flowing from this change in the law. If I were wrong in this approach, I indicate that I would regard the prejudice caused by the change as being so great as to by itself lead me to refuse the applications.

As appears in the schedule I have annexed to these reasons, I have worked on the

basis that the defendant left the Yalleroi State School in June, 1965,[53] and that that date represents the last possible time on which any of the alleged assaults took place. That was thirty-seven years ago. This matter is still at the pleading stage. The High Court on 5th March, 2002 gave special leave to the applicants to appeal to that Court against orders of the Court of Appeal setting aside orders I had made in respect of pleading points involving the applicants' case against the first and second defendants. Pursuant to the order of the Court of Appeal the applicants may wish to re-plead their cases against the first and second defendants. It seems to me that if this matter is to proceed to trial, the likelihood is that it would not come on until late next year. And that assumes that there will be no other appeals. In short, the trial would take place at least 38 years after the last date the complained of acts could have been committed on.

The defendant has made it clear in his affidavit and in his oral testimony that, notwithstanding his convictions, he denies that any improper contact occurred between him and the applicants whilst he was their teacher. If he were to give evidence in a trial of these matters he would, essentially, be seeking to prove a negative. In short he would be asserting, "I was there, and nothing untoward happened," or perhaps, "If something was observed which might create suspicion, there is in truth an innocent explanation, and the observer must have misunderstood what he or she was seeing."

This case is unlike many involving allegations of sexual misconduct by an adult against a child in that many of the acts particularised in the claims are said to have occurred

53. It may be that in fact he did not leave until the end of 1965. If that were shown to be the case, it would not in any way affect my ultimate conclusions in these applications.

in a classroom whilst other children were present.[54] Thus there were perhaps of the order of fifteen to twenty potential witnesses to some of the defendant's alleged acts.

Often in cases involving allegations of sexual misconduct by an adult towards a child the only way a defendant can defend the claims (apart from asserting a straight out denial) is to identify what might loosely be referred to as "collateral issues" and to demonstrate that in respect of those issues the plaintiff's memory (or that of her witnesses) is unreliable. Everyday experience in the criminal courts shows that often such issues can arise unexpectedly during the course of evidence. With the passage of the years, the ability of the defendant to identify such evidence, and then contradict it, is clearly diminished.[55]

In this case there is evidence that the two school inspectors who visited the school during the time the defendant was the only teacher are unable to give meaningful evidence. The school building has been moved, and an inspection of it may not really assist in understanding the layout of the rooms in the early to mid 1960s. The defendant cannot remember visits by one of the inspectors.

The claims made by the applicants involve allegations that they have suffered not

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54. See sub-paragraphs (d) and (e) of paragraph 4 of S's affidavit, and sub-paragraphs (a) of paragraph 4 of R's affidavit. According to her statement (Exhibit "A" to her affidavit) the conduct complained of by R and particularised in sub-paragraph (a) was "repeated on numerous occasions in which Mr. D'ARCY would call me to the front of the class."

55. Muir J. touches on this point in his judgement in *Helen May Carter v. The Corporation of the Sisters of Mercy of the Diocese of Rockhampton and Ors.* (Not reported, Court of Appeal, Appeal No. 8777 or 2000, 24th August, 2001) at paragraph 38 of his judgement.

only the physical pain associated with some of the assaults, but psychological[56] or psychiatric damage as well. Both of them have troubles with their memory. S, for example, gave evidence that she could not remember when she had seen an unnamed doctor about her troubles, and R described herself as having "extreme" memory difficulties. It seems to me that it would be a legitimate field of inquiry for the defendant, were these actions to proceed, to ascertain what traumatic or other significant events might have affected the applicants' well being. It should be remembered that essentially that inquiry would cover events from the applicants' adolescence and encompass their entire adult lives.

In *Brisbane South Regional Health Authority v. Taylor*[57] Toohey and Gummow JJ. said:

> *... an applicant must satisfy the court that grounds exist for exercising the discretion in his or her favour. There is an evidentiary onus on the prospective defendant to raise any consideration telling against the exercise of the discretion. But the ultimate onus of satisfying the court that time should be extended remains on the applicant. Where prejudice is alleged by reason of the effluxion of time, the position is as stated by Gowans J. in Cowie v. State Electricity Commission (Vict.) in a passage which was endorsed by Gibbs J. in Campbell v. United Pacific Transport Pty. Ltd.:*
>
> > *It is for the respondent to place in evidence sufficient facts to lead the Court to the view that prejudice would be occasioned and it is then for the applicant to show that those facts do not amount to material prejudice.*

In my view the applicants have not established that the commencement of an action

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56. Dr. Grant does not refer to the applicants' problems as being psychological, but it seems to me that much of what he is describing is best seen as psychological damage rather than psychiatric.

57. [1996] 186 C.L.R. 541, 547

beyond the limitation period would not result in significant prejudice to the defendant. Whilst perhaps the matters I have just mentioned above may seem comparatively insignificant, in cases involving allegations such as are made here it is often the case that evidence which at first seems innocuous assumes significance during the course of the trial.

Quite apart from the specific findings I have just made, it seems to me that the applicants' task of discharging the onus placed upon them by the section is onerous indeed bearing in mind the time that has elapsed between the events complained of and today. I think it is right to observe that in none of the cases to which I was referred by counsel has a court been asked to consider making an order for an extension of time so long after the tortious act is said to have been committed. I think the delay here of at least thirty-seven years renders it almost impossible to conclude that there would not be significant prejudice to the defendant in this case and that a fair trial is possible.

There is, I think, authority which acknowledges that in cases of considerable delay the fact of that delay may of itself lead to a conclusion that a fair trial is not possible. Thus, in *Taylors Case*[58] McHugh J. suggests that "long delay [gives] rise to a general presumption of prejudice." The trial judge in that case, McLauchlan D.C.J., had referred to the words of Tadgell J. in *Kosky v. Trustees of Sisters of Charity*:[59]

> *There are no doubt some cases in which a lapse of fourteen years from the time of allegedly negligent conduct until the commencement of an action in respect of it would of itself render a fair trial of the issues impossible or so unlikely that a trial ought not to be countenanced. In such a case it would*

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58. [1996] 186 C.L.R. 541, 556.

59. [1982] V.R. 961, 969

> *presumably be right to refuse to make an order ... even if the applicant were otherwise entitled to ask for one.*[60]

In *Helen May Carter v. The Corporation of the Sisters of Mercy of the Diocese of Rockhampton and Ors.*[61] McPherson JA observed that the reasons for judgement in *Taylor's Case* "suggest that there may be a presumption of prejudice to the third defendant in having to defend itself at a trial taking place after such a long time; ..." More recently, in a case which has a number of similarities to the one I have to consider, Dutney J. said:[62]

> *This is a good example of the type of case where time alone is likely to cause great prejudice to the defendant. ... It is hard to imagine that after 27 years anyone except perhaps the plaintiff will have a clear recall of events. ...*

As I have observed, at the time this matter was argued before me, at least thirty-seven years had elapsed since the last possible date on which an outrage could have been perpetrated by the defendant on either applicant. After such a period, I find it impossible to conclude that prejudice will not be occasioned to the defendant by such delay. In my view his chances of a fair trial are significantly reduced because of such delay.

The applicants have not discharged the onus of persuading me that a fair trial is now possible. In fact, in my view, the time that has now elapsed since the events complained of

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60. I have taken the quotation from the joint judgements of Toohey and Gummow JJ. at pages 547-548 of the report of *Taylor's Case.*

61. Not reported, Court of Appeal, No. 8777 of 2000, 24th August, 2001, at page 7.

62. *James Howard Lambert v. Gregory Ian Bannerman*, not reported, Supreme Court of Queensland, Rockhampton, No. S289 of 2001, 21st September, 2001, page 5. That was a case in which one of the proposed defendants was a school principal who had in 1975 been convicted of sexually assaulting pupils in 1974. The convictions did not relate to the assaults alleged against him in the civil proceedings.

took place make the chances of a fair trial unlikely.

It may perhaps trouble some that in a case where a criminal trial has taken place, and convictions ensued, that our legal system should deny the complainants the right to pursue their violator fot compensation by civil action. It is not my function to seek to explain, let alone seek to resolve any such apparent incongruity. My task is to apply the law as I understand it to the facts as I find them. I would simply observe that in *Taylor's Case*[63] McHugh J. sets out his understanding of the reasons why, for the last 400 years, parliaments have chosen to provide that, as a general rule, civil actions shall be prosecuted within a specified time period. With very few exceptions, there are not similar provision in the Criminal law, presumably because it is thought by the legislature that the public interest demands that those alleged to have committed serious offences should be prosecuted.

I feel I should add this, however. As the evidence in this case amply demonstrates, society's understanding of the incidence and devastating consequences of the sexual abuse of children has changed dramatically since the applicants were first enrolled at the Yalleroi State School. Furthermore, society's attitude towards its responsibilities to the innocent victims of crime have changed. At the time the applicants were primary school children the only avenue open to victims who sought compensation for the harm done to them was to litigate in the civil courts. In the late 1960s parliament acknowledged, by enacting section 663B and 663C of the *Criminal Code*, that it could be appropriate for victims to receive compensation from the public purse. We now have parliament's virtual "Bill of Rights" for

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63. [1996-1997] 186 C.L.R. 541, 551 ff.

victims set out in Part 2 of the *Criminal Offence Victims Act 1995*, which is said to emanate from "national and international concern about the position of victims of crime in the justice system."[64]

I assume for the purpose of these observations that the defendant's convictions were appropriate and will be sustained. On the basis of that assumption, it has to be said that each of these applicants rendered an important service to the community in coming forward, with others, to give evidence against him. It was very apparent to me during the brief evidence that each of them gave that it must have taken extraordinary courage to do so, and each has paid a very high price for having done so.

I would think that most would be of the view that, on the assumption set out above, it is only right that each of them should receive from the community compensation for their pain and suffering and other losses.

The applications must be dismissed.

I order that the applicants pay the respondent/third defendant's costs of and incidental to the applications to be assessed.

As I must hand down these reasons in Bundaberg, I will give liberty to apply in respect of any costs incidental to the application which may have been reserved at earlier

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64. Section 4.

mentions of these matters.

H. W. H. Botting, D.C.J.