*Tabled by Mr Rod Best 21/12/06, APSC 2
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BACKGROUND TO AMENDMENTS TO THE CHILDREN AND YOUNG PERSONS (CARE AND PROTECTION) ACT 1998 CONCERNING SIMILAR FACT EVIDENCE AND THE ONUS OF PROOF.

Introduction

A question has arisen as to why the amendment to section 106, *Children and Young Persons (Care and Protection) Act 1998* was thought to be necessary. The question then took on greater importance because the Chief Justice of the District Court appears to have commented that he was unaware of any case which raised the question of similar fact evidence in a way that leaves the law unclear.

The purpose of this submission is therefore to address this question.

This amendment concerns what information that should be considered by a court during the course of care litigation.

In looking at the information to be put before the court the court firstly determines what information is to be received at all and then, having received the information what weight is to be given to it. In matters concerning children there is then a further stage to the process that should also be followed which is that:

> "[After] The judge evaluates the evidence adduced both as to facts already in existence and frequently expert evidence as to future advantages and risks of possible decisions as to the child's future. At the [next] stage upon the evidence provided to the court the judge exercises his discretion with the test of the welfare of the child paramount and weighs in the balance all the relevant factors and assesses the relative advantages and risks to a child of each of the possible courses of action … He has to assess the risks and, if there is a real possibility that the child will be at risk, he will take steps to safeguard the child."[1]

In terms of getting information before the court for its consideration the three stages are therefore:

- is the evidence admissible
- once admitted what weight can be given to the evidence
- the paramount considerations of the child

[1] *Re H and others (Minors)(Sexual abuse: standard of proof)* [1996] 1 AllER 1 per Butler-Sloss LJ. Also see Re Frances and Benny (2005) 34 FamLR 523 per Barrett J (NSWSC) at 526 on the relevance of "the interests of the children are the predominant consideration for the Children's Court".

Each of these three elements needs to be considered in addressing concerns about the supply of information to the court.

Is the evidence admissible ?

The *Children and Young Persons (Care and Protection) Act 1998* provides that the rules of evidence which largely govern what evidence is admitted in other courts are not applicable in care proceedings.[2] This does not mean that any information can be considered but rather it is said that:

> "The Children and Young Persons (Care and Protection) Act is not the first Act which has directed particular courts not to be bound by the rules of evidence. Nevertheless, the authorities going back to the beginning of this century, if not earlier, are clear that for material to be relied upon it must have some apparent credibility".[3]

Similarly, a former Senior Children's Magistrate has described the situation as:

> "The court is not bound by rules of evidence. Nevertheless the court is entitled to the best evidence that is available....The weight to be given to evidence admitted on less than the 'best evidence' test must be compared with other direct and sworn evidence given in the proceedings and the fact that some such evidence might not be subject to cross-examination. Despite the relaxation of the rules of evidence to a far greater extent than the Child Welfare Act had permitted, the court must ensure that all parties received natural justice." [4]

The NSW Court of Appeal has said:

> "Guardianship is a continuing state. When the court is enquiring whether a child is under incompetent or improper guardianship, though it has to find that existing at a certain date, it is in no way concerned with events close to that date; it is concerned with all evidence which is relevant, that is evidence which can make more probable or less probable a finding as to the kind of guardianship the child is experiencing. The enquiry may cover years.....He tells us in the clearest terms that, for reasons which seem to me wholly erroneous, he had excluded a considerable body of important evidence. He may ultimately come to not accept it, but that is a different question. In my opinion, therefore, the magistrate when he asked the court

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[2] Section 93

[3] *R v Department of Community Services* [2001] NSWSC 419 per Hulme J; *Re Katherine* [2004] NSWSC 899.

[4] R Blackmore *The Children's Court and Community Welfare in New South Wales* (1989)

did he err in law must be told he did. In cases of this kind concerning injury done to children by persons who, in fact, are their guardians, it is quite wrong for the hearing to be confined within narrow limits. What a court is concerned with in cases involving guardianship is a continuing relationship dealing with all aspects of the conduct of the guardian to the child and the child's conduct to the guardian."[5]

In establishing this level of credibility the question arises to the extent to which information arising prior to a child's birth or information about instances which may have occurred to other children will be relevant to considering the need to care for the child the subject of the care proceedings. This type of information is particularly relevant when considering the needs of babies and very young children where there may be no evidence of harm to the baby but orders are being sought on the basis of proven harm to other children and with a view of preventing harm to the baby.[6]

On this aspect, while there appear to be clear statements when matters are taken on appeal to the higher courts there are a number of cases that demonstrate that a number of judicial officers over a period of time have not accepted that information which demonstrates a particular tendency of behaviour is admissible where it does not relate to the specific instances of abuse before the court. It is for this reason that clarity was required to be introduced and a legislative amendment considered appropriate.

In relation to authority in a higher court, a NSW authority from the Court of Appeal is *Whale v Tonkins*[7]. (Copy attached at Tab A)

Whale v Tonkins was a case in which the Children's Court magistrate had ruled inadmissible evidence of violence of the child's school teacher that had been gathered over a number of months prior to the relevant incident of abuse or neglect.

Despite the Court of Appeal making this clear statement of the law in the mid 1980s there continue to be a series of cases in which courts have ruled information as inadmissible into evidence because the information is said not to relate to the specific child or the specific instances of harm being alleged in relation to that child.[8]

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[5] *Whale v Tonkins* (1984) 9 FamLR 410 at 411 per Hutley JA

[6] For a discussion of tendency evidence in the criminal law as it applies to children see: Australian Law Reform Commission *Seen and heard: priority for children in the legal process* Report No 84 (1997)

[7] (1984) 9 FamLR 410

[8] For example: *Cormack and Burton* (1984) 9 FamLR 666, *In the matter of Shantell White* unreported 11 December 1987 per NSWCA; *Prohm v Corcoran* unreported 30 October 1987 per Allen J (NSWSC) *B v B* unreported 4 December 1989 per Hodgson H (NSWSC); and *In the matter of Department of Community Services v Couley* unreported 14 June 2000 per Mahoney DCJ

The number of times in which this specific point has had to be raised on appeal demonstrates that there is an established pattern whereby final arrangements for the child have had to be delayed pending resolution of this aspect. This has also incurred costs to each of the parties involved in the matter in unnecessarily running appeals to clarify the law.

These cases demonstrate the need to introduce a legislative provision seeking to codify this aspect of the law.

At tab A is attached copy extracts from each of these cases to demonstrate that they are appeal judgments in which the higher court in NSW has overruled one or more lower courts on the question of admitting into evidence questions of parenting history. The examples given all relate to courts in this State.

It is also a practice engaged in other jurisdictions (such as England) but for the purposes of this submission examples from other jurisdictions have not been included as sufficient examples have been provided from care proceedings in NSW alone.

Having said that no reference is made to other jurisdictions it is noted that coincidentally his Honour Judge Fogarty a former Justice of the Family Court of Australia has recently had an article published[9] in which he discusses the use of similar fact evidence where there are allegations that a child might be at risk of harm in Family Law proceedings. In that article Mr Fogarty says:

> "... in most cases the concern about future risk is based on past events, most obviously evidence that the person has previously abused the child thought to be at risk, or some other child. In the cases to be discussed that is often the most important evidence, and at times a great deal of the evidence and argument, and reasons for decision, deal with the question whether the person from whom the child is thought to be at risk has, in fact, abused a child in the past. The underlying assumption in these cases is that if unacceptable conduct occurred (or may have occurred) in the past it may (might) occur again if the opportunity arises, and that orders should be made which thwart that opportunity. This assumption is often entirely reasonable. But it is important to ensure that one does not slide uncritically from the question of past abuse to future risk: things may have changed in the meantime....

[9] J Fogarty "Unacceptable risk-a return to basics" (2006) 20 *Australian Journal of Family Law* 249

[In relation to Mr Fogarty's discussion of a decision of the Full Court of the Family Court of Australia[10] where similar fact evidence was in issue he went on to say] the views expressed by the Full Court that the evidence may be inadmissible because it is evidence of 'bad character' is wide of the mark....Evidence which is not relevant to the issues is not admissible. In addition a trial judge has a discretion to exclude evidence which is of little probative value. The evidence here had probative value although less obviously so than similar evidence in most other cases. There is an outward limit to the relevance of behaviour which is simply gauche. But here, at its lowest, it accords with the statement in the *Marriage of M* [11] above, that such evidence 'had a bearing on the degree of responsibility and self control (in a sexual sense) of the husband'.

The general community may in more colloquial terms regard the evidence as indicative of the father being a dirty old man who was prepared to use opportunities as they came to achieve his sexual ends.

The trial Judge correctly admitted the evidence. He treated it as 'significant' That was a matter for him. The appeal court had no justification to intervene and substitute its own evaluation.

Professor Parkinson in his paper 'Family Law & Parent-Child Contact' above,[12] made a valiant attempt to explain this case under the heading 'Restrictions on evidence'. He concluded by saying: "Whatever the merits of this decision as an application of the strict rules of evidence, it illustrates one of the problems with endeavouring to assess child sexual abuse allegations when the rules delimit the evidence which is admitted..."[13]

This article is discussing the same issue in family law proceedings as was identified in care proceedings. The article demonstrates the currency of the issue and that courts continue to exclude similar fact evidence from deliberations about the care and protection of children.

The cases set out above, with respect to His Honour, contradict the statement of the Hon Justice R O Blanch that there is no "judgement that I am aware of [in which] it has been suggested that the parenting history cannot be considered"[14] as the cases from NSW courts referred to above are all appeal cases where that is exactly the decision reached by a judicial

[10] *WK v SR* (1997) 22 FamLR 592 per Baker, Kay and Morgan JJ
[11] *M v M* (1988) 166 CLR 69
[12] (1992) 23 *MULR* 345
[13] Pages 253, 278-9
[14] Letter dated 28 November 2006

officer (always in the Children's Court but in some cases also in other courts) what the appeal court was considering.

Once admitted what weight can be given to the evidence?

Once the information is before the Court the authorities referred to above establish that the Court is to give consideration to the matter. Anecdotally, departmental legal officers were advising that even where information was received as evidence the courts were apparently failing to give any, or any sufficient, weight to the information. Because this aspect is clearly a matter of judicial discretion in weighing the evidence before the Court it is a difficult matter to successfully argue on appeal.

In response to this anecdotal evidence a paper was commissioned from one of the departmental legal officers for presentation to the executive of the department and this paper was subsequently distributed for discussion purposes to other bodies including the Ministerial Advisory Committee on 29 June 2006 and the Children's Court and the Legal Aid Commission at a meeting on 11 July 2006.

WHALE v TONKINS & ORS

SUPREME COURT OF NEW SOUTH WALES — COURT OF APPEAL

MOFFITT P, HUTLEY and GLASS JJA

14 February 1984 — Sydney

Evidence — Neglected child — Admissibility — Whether child under incompetent or improper guardianship — Whether Magistrate should reject evidence of a school teacher gathered over a long period of time — Child Welfare Act 1939 (NSW) s 72.

The Magistrate, in determining whether the child was at the relevant date under improper guardianship, rejected evidence from the child's school teacher which had been gathered over a period of several months prior to that relevant date.

Held: (i) The evidence of violence recorded over a considerable period of time ought to be admitted evidence.

(ii) "When the court is enquiring whether a child is under incompetent or improper guardianship, though it has to find that existing at a certain date, it is in no way concerned with events close to that date; it is concerned with all evidence which is relevant, that is, evidence which can make more probable or less probable a finding as to the kind of guardianship the child is experiencing. The enquiry may cover years." Per Hutley JA; Hutley & Glass JJA concurring.

Appeal by Stated Case

This was an appeal from a decision of Yeldham J on the admissibility of certain evidence in proceedings under the Child Welfare Act (NSW) 1939.

Mr Barlow for the appellant

Mr Robinson for the respondent

Hutley, JA: This is an appeal from a decision of Yeldham J, given on 11 October 1983. There was an appeal to him by way of stated case from a special magistrate sitting in the Cobham Children's court. The parents of a child, T, were before the court and it was alleged that the child was neglected because the child was in the opinion of the court under incompetent or improper guardianship. His Honour upheld the decision of the magistrate which was to refuse to make an order.

Two matters were raised before this court in the appeal. It was first submitted that on the facts found by his Worship he was bound to find that the child was under incompetent or improper guardianship. This matter was not fully argued. Speaking for myself, it is not a simple question because, departing from the usual pattern found in the definition of neglected child under s 72 of the Child Welfare Act 1939, there is inserted into the definition the opinion of the court itself. Why that is there remains — despite the efforts of counsel for the appellant — a mystery. It is a mystery which some day it may be necessary for counsel to dissipate. Fortunately, it is not necessary for this court to resolve it.

There is a radical difference between the situation of a court supervising the decision of a magistrate who has, for example, to deal with the question of whether a child is destitute and a court supervising the decision of a magistrate when the matter is handed over by very definition to his opinion.

The substantial matter before this court concerns the admission of evidence. It should be emphasised that this appeal is by stated case, that is, the magistrate tells the court matters which he has found and the facts upon which he has relied for coming to that decision. This magistrate clearly told the court that there was material tendered which he rejected. He said in para (h) of the stated case:—

"There were further entries dated from February 1982 up to July 1982 detailing injuries and bruising of the child T as observed by Mrs Denkil. I rejected all evidence prior to and including 7 July 1982, as being too remote and therefore irrelevant."

The matter about which the magistrate had to form his opinion was as to the guardianship of the parents. There was abundant evidence that this child had been the subject of severe injury. The extent to which the parents were responsible was in issue.

Guardianship is a continuing state. When the court is enquiring whether a child is under incompetent or improper guardianship, though it has to find that existing at a certain date, it is in no way concerned with events close to that date; it is concerned with all evidence which is relevant, that is, evidence which can make more probable or less probable a finding as to the kind of guardianship the child is experiencing. The enquiry may cover years.

In a case such as this where an obviously conscientious and devoted school teacher was recording over a considerable period of time the state in which she found a child coming to school, it is, in my opinion, impossible to hold that any evidence which she may wish to bring or evidence contained in the records which she prepared is irrelevant to the determination of what kind of guardianship the child is experiencing, it being assumed, of course, that the child had the same guardian during the whole period of her record. It is, therefore, in my opinion, clear that the magistrate misdirected himself when he excluded the evidence.

Before this court, it was contended that this statement appearing in the stated case was wrong in that the evidence was received. It is not, in my opinion, proper to go outside the stated case without formal proceedings being taken to correct the stated case. That involves taking the stated case to the magistrate. The settlement of a stated case requires all the care and attention which is given to the settling of elaborate conveyances. No stated case should come to any court without the most careful scrutiny of every line in it and the concurrence of all persons involved in its text.

The court has been taken to material outside the stated case. Speaking for myself, it confirms the correctness of the magistrate's statement and does not contradict it, the critical thing being what are the facts upon which the magistrate relied to come to the conclusion which he did. That he rejected a relevant question arising out of the record which he excluded is clear. He tells us in the clearest terms that, for reasons which seem to me wholly erroneous, he had excluded a considerable body of important evidence. He may ultimately come to not accept it, but that is a different question.

In my opinion, therefore, the magistrate when he asked this court did he err in law must be told he did. In cases of this kind concerning injury done to children by persons who, in fact, are their guardians, it is quite wrong for the hearing to be confined within narrow limits. What a court is concerned with in cases involving guardianship is a continuing relationship dealing with all aspects of the conduct of the guardian to the child and the child's conduct to the guardian.

Therefore, in my opinion, the judgment of Yeldham J should be set aside, the stated case should be answered by informing the magistrate that the evidence should have been received and the matter should be remitted to him for further hearing.

A plea was made to this court on behalf of the child that no such order should be made. No material was put before this court to justify any such approach. Such material as was going to be relied on should have been put before the court in the form of affidavits. In any case, this court is not the tribunal which can try the issue as to what is presently good for the child. Representations can be made to the Department. It may be after this period of time the child may have settled down in the bosom of his parents as was alleged. However, no material is before this court which justifies any order other than an order that the case be returned to the magistrate with the expression of opinion in the way I have indicated.

The formal answer to question 4(c) should be "Yes". It is unnecessary to answer the other questions.

Moffitt P: I agree with the judgment of Hutley JA. I would only add this, that the rejection of evidence as to the condition of the child seen by the teacher, being a condition consistent with violent conduct before the cut off date, not many months before the relevant date, was no mere technical error of law in the present case. It seems that, having regard to the relevant date and the evidence in relation to violence to the child prior to the cut off date, the evidence of similar conduct before the cut off date, some of it not long before, was of substantial importance. In a case such as this, the question at issue cannot be properly determined unless the court is prepared to look at evidence of alleged violence or indications of it over some period of time, particularly where there is some similarity or apparent continuity.

I agree that the appeal should be allowed and question 4(c) should be answered "Yes" and the other two questions not answered.

Glass JA: I agree with what has fallen from my brethren and have nothing to add.

Moffitt P: The order of the court is that the appeal is allowed, the judgment of Yeldham J is set aside, question 4(c) in the case is answered "Yes". The court finds it unnecessary to answer questions 4(a) and (b). The court directs that the case be sent back to the magistrate with the expression of the opinions in its judgment together with the answers stated.

The court has considered the question of costs and considers that the appropriate order is that the appellant have her costs and the respondents pay the costs of the appellant of the appeal, including the costs of the application for leave to appeal, and that each respondent have a certificate under the Suitors' Fund Act.

Order

Appeal allowed, judgment set aside and question 4(c) in the stated case answered "Yes." The case to be sent back to the magistrate with the expression of opinions in the judgment and the answer. The respondents to pay the appellant's costs, including the costs of obtaining leave to appeal and each set of respondents to have a certificate under the Suitors' Fund Act.

Solicitor for the appellant: *H K Roberts, State Crown Solicitor*

Solicitors for the respondents: *Ilk, Coode and Roberts*

DUNCAN HOLMES
SOLICITOR

CORMACK v BURTON

SUPREME COURT OF NEW SOUTH WALES — COMMON LAW DIVISION

CARRUTHERS J

12 July 1984

Infants and children — Neglected and uncontrollable children — Incompetent guardianship — Ex-nuptial children — Wide ranging nature of enquiry — Admissibility of evidence — Relevance of evidence — Consideration of events over undefined period — Justices Act 1902 (NSW) s 56 — Child Welfare Act 1939 (NSW) s 72(j).

Held: (i) In proceedings alleging that children are "neglected" children within the Child Welfare Act 1939 (NSW) s 72(j) being under incompetent guardianship the ultimate question to be determined is whether as at the date alleged they are under incompetent guardianship and that issue will necessarily involve consideration of events over an undefined period prior to the date alleged in the complaint.

Whale v Tonkins & Ors (1984) 9 Fam LR 410 followed.

(ii) Statements made by the guardian whose competence is impugned as to her capacity to discharge the trust reposed in her are admissible and relevant to the proceedings.

Humberside County Council v DPR (an infant) [1977] 3 All ER 964 at 967 followed.

(iii) The Justices Act 1902 (NSW) s 56 operates to impose a bar to the time within which proceedings may be commenced and it does not regulate the admissibility of evidence. In any event, guardianship is a continuing state and s 56 has no application to continuing offences.

Whale v Tonkins & Ors (1984) 9 Fam LR 410 and *Cook v Cook* (1923) 33 CLR 369 followed.

Cases stated

These were cases stated pursuant to the Justices Act 1902 (NSW) s 101 involving the admissibility and relevance of evidence in proceedings under the Child Welfare Act 1939 (NSW) s 72(j).

Mr Graham: for the plaintiff.

Mr Harding: for the 1st defendant (children).

Ms Lawrie: for the 2nd defendant (mother).

Carruthers J. The first two matters are cases stated by Mr C L Thompson, stipendiary magistrate, under s 101 of the Justices Act 1902 (as amended) in relation to proceedings before him at Cobham Children's Court at Werrington on 14 November 1983. In the third matter, the plaintiff seeks relief by way of mandamus.

These lastmentioned proceedings were brought for more abundant caution because it was feared that technical difficulties may have prevented the court dealing with the questions of law set out in the stated cases. However, in the events which have transpired, there is no need for this prerogative relief and I dismiss that summons.

It is convenient to deal with both stated cases together as the proceedings before the magistrate were heard together.

The plaintiff Leslie Alan Cormack (hereafter referred to as the complainant), is a district officer for the Department of Youth and Community Services at Mount Druitt. The proceedings before the magistrate alleged that M and J were as at 10 October 1983, "neglected children" within the meaning of s 72(j) of the Child Welfare Act 1939 (as amended) in that they were under incompetent guardianship.

M was born on 28 February 1974, and J was born on 24 August 1972. Both children are ex-nuptial children born to Cheryl Burton who has at all times been their guardian, see *Youngman v Lawson* (1981) 7 Fam LR 260; [1981] FLC 91-105; [1981] 1 NSWLR 439.

Both children had been apprehended by the complainant on 10 October 1983, and were brought before the Special Children's Court on that day. Proceedings ultimately came on for hearing before Mr Thompson on 14 November 1983. At the close of the case for the complainant the learned magistrate held there was no case to answer and dismissed the complaints.

What transpired before the magistrate can be seen from paras 2(c) to 2(i) inclusive of the stated case. Each stated case is identical except with regard to the name of the child. I set out here paras 2(c) to 2(i) of the stated case:—

"(c) On 14 November 1983, the complainant was called as a witness and sworn. His evidence was led by Mr A Sbrizzi, a court officer of the Department of Youth and Community Services, and was the only evidence presented at the hearing of the proceedings. The child was represented by Mr Taylor, solicitor, and the child's mother by Mr Corry, a solicitor.

"(d) The complainant identified and swore to the accuracy of a four page document setting out conversations which he had had with the mother of the child on 21 September 1983 and on 7 October 1983. A copy of that document is annexed hereto and marked with the letter 'B'.

"(e) Mr Corry objected to the tender of the document on the ground that the conversations did not relate to the existing state of affairs in relation to the children on 10 October 1983. The tender of the evidence was rejected on the ground that the evidence was hearsay evidence and was not within the exception created by the Child Welfare Act sub-s 81B(2) in that it was agreed no assaultive (sic) behaviour ill-treatment or exposure was alleged nor had the contents of the conversation been adopted by the child.

"(f) The court officer then indicated that he would seek to lead evidence from the complainant as to matters which occurred more than six months prior to 10 October 1983. Such evidence was held to be inadmissible as being in breach of the Justices Act 1902 s 56.

"(g) The court officer then sought to lead evidence from the complainant relating to events occurring within six months prior to 10 October 1983. This evidence was objected to on the basis that it was not relevant to the complaint before the court, which alleged that the child was, on 10 October 1983, a neglected child within the meaning of the Act.

"(h) The court officer then sought to 'amend' the complaint to allege a period of neglect of six months. On objection by Mr Corry I declined to allow the amendment in that the mother appeared to meet a complaint alleging incompetence as at 10 October 1983, and not a complaint alleging several conversations over a six month period, particulars of which from the manner in which the court officer sought to elicit such conversations had obviously not been supplied to the mother at the commencement of the proceedings thereby depriving her of the opportunity to

previously consider the admissibility of those other conversations apart from conversations contained in the statement sought to be admitted and rejected by me as being hearsay.

"(i) The court officer without seeking any adjournment then indicated that, in light of the ruling in sub-para (h) above, he could proceed no further. I then upheld a submission by Mr Corry that there was no case to answer and dismissed the complaint."

It can be seen that the guardian was represented and, indeed, her solicitor played the dominant role in the "defence" at the proceedings. The grounds for determination are set out in para 3 of the stated case as follows:—

"(a) Evidence of conversations with the mother of the child on 21 September 1983 and on 7 October 1983, were inadmissible because they were hearsay and were not exceptions to the hearsay rule either by way of the circumstances contemplated by sub-s 81B(2) of the Child Welfare Act or as having been adopted by the child.

"(b) The proceedings before the court were by way of complaint within the meaning of the Justices Act s 53 of that Act so as to exclude evidence as to events occurring more than six months before the date of the bringing of the complaint, because of the provisions of that Act, s 56.

"(c) Where the complaint alleges that a child is a neglected child on a specified date, evidence of events occurring within six months prior to that date is only relevant if it is linked to the events alleged to have occurred on the specified date.

"(d) Where the complaint alleges that a child is a neglected child on a specified date, evidence of events occurring within six months prior to that date may only be treated as a variance pursuant to sub-s 65(1) of the Justices Act where those events are linked to the events alleged to have occurred on the specified date.

"(e) For the various reasons set out in sub-paras (a) to (d) inclusive, the evidence sought to be led from the complainant was inadmissible and was rejected and I, therefore, dismissed the complaint."

The document referred to as Annexure B is in the following terms:—

"My name is Leslie Alan Cormack. I am a district officer with the Department of Youth and Community Services, stationed at Mount Druitt. At 10 am on 21 September 1983 I interviewed Cheryl Burton, the mother of the girls before the court and had the following conversation:

"I said: 'Cheryl, I believe something has happened between you and Paul' (de facto). 'What's up?'

"She said: 'Paul reckons he can't control the kids any more. They're worse than ever. He said when he gets his next cheque on Friday he's leaving.'

"I said: 'What is it about the girls' behaviour that he doesn't like?'

"She said: 'The kids have been away so long and then having them back and all. J has been playing up a bit, not doing as she's told and kicking up a stink.'

"I said: 'The girls were in Burnside for about two months, weren't they?'

"She said: 'Yes.'

"I said: 'How long have they been back out of Burnside?'

"She said: 'About four days.'

"I said: 'Paul can usually control the girls. When he's gone, will you be able to control them?'

"She said: 'Don't know; don't think so.'

"I said: 'If Paul moves out, are you going to return to the house at Blackett?'

"She said: 'Yes, but I don't know how I'll cope till then.'

"I said: 'What do you mean?'

"She said: 'With the kids and that. I want to put them out again. I'm afraid that if I'm left alone with them I'll be on their back all the time.'
"I said: 'What do you mean, "put them out"?'
"She said: 'Have them fostered. It's getting too much. I can't take much more. I'm thinking of adopting the kids out.'
"I said: 'The Housing Commission is going to offer you a new place at Minto or Campbelltown. Is that true?'
"She said: 'I couldn't go up there on me own. I wouldn't be able to cope.'
"I said: 'What will you do if I place the kids?'
"She said: 'Don't know. I don't know what I'll do tonight if he's not there.'
"I said: 'What might you do?'
"She said: 'Kill myself.'
"There was other conversation.
"At 12.30 pm on 7 October 1983 I had a further conversation with Cheryl Burton in the Community Welfare Office.
"She said: 'I've been given a house in Guildford and I should be able to move next week.'
"I said: 'Cheryl, do you remember when you lived at Bougainville Road, you had to move to a new place. What was the reason for that?'
"She said: 'It was Wendy who threatened to blow the place up.'
"I said: 'Wendy was a friend of yours, wasn't she?'
"She said: 'She was, yes.'
"I said: 'You and the girls also had to stay at Penrith Refuge last year because Wendy was giving trouble. Is that right?'
"She said: 'Yes. She was threatening to put a screwdriver through us.'
"I said: 'And another time last year I had to place the girls with Church of England Homes because they were in danger from Wendy?'
"She said: 'Yes.'
"I said: 'In the last Christmas holidays you asked me to place the girls in foster care for two weeks, which I did. Why was that?'
"She said: 'To give me a break.'
"I said: 'When you moved to the town house things were fairly settled for a while. What happened to change that?'
"She said: 'It all started when Wendy came back on the scene.'
"I said: 'When Wendy moved away things didn't settle down, did they?'
"She said: 'No.'
"I said: 'There were a lot of other people using the house that you didn't want there. Is that right?'
"She said: 'Only me brother who wanted to drink there. It would have been different if I'd've done it at his place.'
"I said: 'Is that because he could get away with it at your place?'
"She said: 'Yes.'
"I said: 'About two and one half months ago you were forced to move out of the town house. Why was that?'
"She said: 'Because young guys were coming around and threatening me and the kids.'
"I said: 'The girls were really frightened, I remember. I placed the girls at Burnside and supported your application for a housing transfer.'
"She said: 'Yes.'
"I said: 'The girls have been placed a few times recently. What sort of effect has that had on them?'

"She said: 'Bad.'
"I said: 'What about all the trouble at home leading up to each placement. What effect do you think that has had?'
"She said: 'Don't know.'
"I said: 'Cheryl, you have had a homemaker visiting for over two years now. Is that right?'
"She said: 'Yes'.
"I said: 'You've had Joyce, your current homemaker for over a year now. How do you get on with her?'
"She said: 'Good.'
"I said: 'Would it be fair to say that you depend on Joyce a lot?'
"She said: 'Yes, it wouldn't be so bad if I had me mother standing by me.'
"I said: 'So Joyce is like a mother to you?'
"She said: 'Yes.'
"I said: 'How would you have coped without her?'
"She said: 'Don't know.'
"I said: 'I've been visiting you for over three years. Do you think that the Department has done all it can to make things better for you and the girls?'
"She said: 'Yes.'
"I said: 'With this move to the new house, how will you cope without Joyce?'
"She said: 'It'll be rough, but after a few weeks it'll settle down.'
"I said: 'What things can you do to help yourself settle?'
"She said: 'Don't know.'
"I said: 'My concern is that every time you have moved you have not been able to escape your problems. I'm worried that this time will be no different and that you will soon be involved with people who will try to take advantage of you.'
"She said: 'I think Roslyn' (a friend) 'is going to try to move in on me.'
"I said: 'I would like the girls to come home on trial, Cheryl, but I know you want them home for good so I intend to take the matter to children's court and have the girls remanded at home for a couple of months.'
"There was other conversation."

The appellant's contentions are set out as follows:

"The appellant contends that my determination was erroneous in point of law upon the following grounds:—

"(a) I erred in law in construing the meaning and effect of the Child Welfare Act 1939 (as amended).

"(b) I erred in law in refusing to permit the tender of a record of conversations between the appellant and the mother of the respondent.

"(c) I erred in law in refusing to admit into evidence matters relating to the subject complaint occurring prior to the laying of the complaint on 10 October 1983.

"(d) I erred in law in determining that evidence as to whether a child is neglected by reason of being under incompetent guardianship must relate specifically to the date of the complaint.

"(e) I erred in law in refusing to allow the complaint to be amended to show incompetent guardianship over a period of time rather than as at a particular date.

"(f) I erred in law in applying s 56 of the Justices Act to a complaint made pursuant to the Child Welfare Act 1983 (as amended).

"(g) I erred in law in construing the meaning and effect of the decision of Yeldham J in *Whale v Tonkins* (unreported, 11 October 1983, No 13360 of 1983).

"(h) I erred in law in finding that no prima facie case existed."

It should be observed at the outset that an appeal against the judgment of Yeldham J in *Whale v Tonkins & Ors, supra,* was upheld by the court of Appeal on 14 February 1984. As yet that judgment remains unreported. [Reported 9 Fam LR 410.] Thus, if I may respectfully say so, to the extent that the learned magistrate relied upon the judgment at first instance in *Whale v Tonkins & Ors,* the Magistrate must necessarily have been in error.

When the matter was argued before me it was conveniently dealt with under four headings:

(1) Did the magistrate err in holding that the conversations recorded in Annexure B offend against the hearsay rule?

(2) Did the magistrate err in holding that evidence as to matters which occurred beyond the period of six months prior to 10 October 1983, was inadmissible as "being in breach of the Justices Act 1902 s 56"?

(3) Did the magistrate err in holding that evidence as to matters which occurred within the period of six months prior to 10 October 1983, was inadmissible as it was not relevant to the complaint which alleged that the children were, on 10 October 1983, neglected children within the meaning of the Act?

(4) Did the magistrate err in refusing the court officer leave to amend the complaint to allege a period of neglect of six months?

I shall deal with the questions of law in the order in which I have set them out.

(1) *The hearsay point*

The complainant sought to tender his record of interviews held with the guardian on 21 September 1983, and 7 October 1983. The objection to the tender was not based (either before the magistrate or before me) on the form of the document. As stated, the basis of the objection and the rejection was that the conversations were hearsay and not within the provisions of s 81B of the Child Welfare Act.

In *Youngman v Lawson* (1981)7 Fam LR 260 at 265; [1981] FLC 91-105 at 76,779; [1981] NSWLR 439 at 445, Street CJ points out that there runs through the paragraphs in s 72 "a common thread of the existence of an actual and current state of affairs calling for some external intervention in the protection of the child".

In *Whale v Tonkins & Ors, supra,* Hutley JA with whom Moffitt P and Glass JA agreed, said at 411 of the judgment:—

"Guardianship is a continuing state. When the court is inquiring whether a child is under incompetent or improper guardianship, though it has to find that existing at a certain date, it is in no way concerned with events close to that date; it is concerned with all evidence which is relevant, that is, evidence which can make more probable or less probable a finding as to the kind of guardianship the child is experiencing. The inquiry may cover years.

"In a case such as this where an obviously conscientious and devoted schoolteacher was recording over a considerable period of time the state in which she found a child coming to school, it is, in my opinion, impossible to hold that any evidence which she may wish to bring or evidence contained in the records which she prepared is irelevant to the determination of what kind of guardianship the child is experiencing, it being assumed, of course, that the child had the same guardian during the whole period of her record. It is, therefore, in my opinion, clear that the magistrate misdirected himself when he excluded the evidence."

The wide-ranging nature of the inquiry can be readily discerned from this passage.

In *Ex parte Dorman; Re Macredie* [1959] NSWSR 271 at 273 Maguire J said: "Fortunately, the legislature is enacting the Child Welfare Act 1939-56 made it clear

that the misfortune of being a 'neglected child' was not to be regarded as an offence and that Parliament's purpose in regard to such a child was not punitive but protective."

These extracts clearly express the philosophy of the relevant sections of the Child Welfare Act.

I would have thought that authority was not needed to support the proposition that statements made by the guardian of young children to a district officer relevant to the question whether she was or was not an incompetent guardian were admissible. However, clear authority to support the proposition is to be found in *Humberside County Council v DPR (an infant)* [1977] 3 All ER 964, a judgment of the Queen's Bench Division. At 967 Lord Widgery CJ (with whom Melford, Stevenson and Slynn JJ agreed) said:

"As far as I am concerned I am quite prepared to accept the general principle that the hearsay rule applies in juvenile courts. I think that is probably too well established now to seek to say anything else on the topic in general terms. On the other hand, I cannot for a moment believe that it is right that where you have proceedings which are essentially non-adversary, non-party proceedings, that the question of the admissibility of a confession or admission should depend on whether the person making the confession or admission was a party. A moment's thought would make it clear that such an attempt would produce a nonsense, because if there are no parties to the proceedings then the question of whether the admission is made by a party or not does not arise at all. I think that where you have proceedings of this kind, which are non-party, then confessions are to be admitted. In other words, all that is necessary to be shown is that the evidence tendered is direct evidence of an admission made by someone who has the control of the child or is concerned with the control of the child, and who can therefore make admissions which could conceivably be of any value under s 1.

"Here Mr D was the guardian of the child. If the evidence tendered was an admission by him of ill-treatment of the child or anything of that kind it ought to have gone in, and it ought not to have been kept out merely because of purely technical reasons."

That only leaves the question of the effect, if any, of s 81B of the Child Welfare Act, which is in the following terms:

"(1) In this section, 'court' includes a court of hearing or determining an appeal from a determination for an order made by—

(a) A magistrate; or

(b) justices,

exercising the jurisdiction of a children's court.

"(2) Where a child has been brought before a court as a neglected child and—

(a) the complainant in respect of which he had been so brought alleges that he has been ill-treated or exposed; or

(b) evidence has been presented to the court that the child has been assaulted,

the court, in hearing and determining the matter, may act upon any statement, document, information or matter that may, in its opinion, assist it to deal with the complaint, whether or not the statement, document, information or matter would be admissible in evidence."

To my mind s 81B(2) has no application to the present question. That section is specifically designed to ensure that where the question of ill-treatment, exposure or assault of a child is in question, the court in hearing and determining the matter is not to be inhibited by technical rules of evidence. That section deals with those special circumstances.

By no canon of statutory construction could that section have the effect of excluding statements by the guardian of young children to a district officer in a case such as the present. To my mind the magistrate clearly erred in applying the hearsay rule to reject the material contained in Annexure B.

(2) *The section 56 point*

The judgment of the Court of Appeal in *Whale v Tonkins & Ors, supra,* is decisive of this point. It is of no relevance that in its judgment the Court of Appeal made no reference to s 56 of the Justices Act. All inferior courts are bound by the judgment. See *Minister Administering the Environmental Planning and Assessment Act v San Sebastian Pty Limited* per Glass JA, [1983] 2 NSWLR 268 at 315.

In any event, the point to my mind has no substance. Section 56 could not have the effect of excluding evidence in the manner suggested by the magistrate. Section 56 operates to impose a bar to the time within which proceedings may be commenced. It does not regulate the admissibility or otherwise of evidence.

Further, as the Court of Appeal pointed out in *Whale v Tonkins & Ors, supra,* guardianship is a continuing state. Section 56 has no application to continuing offences: *Cook v Cook* (1923) 33 CLR 369.

(3) *The relevance point*

Again, *Whale v Tonkins & Ors, supra,* is decisive of this point. 10 October 1983 is the focal point of the inquiry by the magistrate because that is the date on which the children were apprehended.

The ultimate question is whether as at that date the children were, in the opinion of the court, under incompetent guardianship. That is the issue.

The resolution of that question will necessarily involve a consideration of events occurring over an undefined period prior to 10 October 1983. It will also include a consideration of statements made by the guardian whose competence is impugned, as to her capacity to discharge the trust reposed in her. In no sense is it a condition precedent to the admissibility of such material that the complainant adduce evidence of matters adverse to the competence of the guardian occurring on that particular day, namely, 10 October 1983. To suggest that there must be such a link is to misunderstand the protective nature of the jurisdiction being exercised.

(4) *The amendment point*

In view of the principles of law which I have set out above, there was no need for the complainant to seek an amendment through the court officer of the proceedings to allege a period of neglect of six months. This point does not, therefore, arise.

In summary, therefore, the magistrate was in error:

(1) in rejecting the evidence of conversations between the complainant and the guardian on 21 September 1983, and 7 October 1983; and

(2) in rejecting evidence from the complainant as to matters (relevant to the guardianship) which occurred more than six months prior to 10 October 1983, or within the period of six months immediately prior to 10 October 1983.

Accordingly, I answer the question asked in para 6 of the stated case in the affirmative and remit the matter to the magistrate with my opinion thereon for him to hear and determine the proceedings according to law.

I do not think it appropriate to make any order as to the costs of proceedings No 12131 of 1984. However, in relation to matters Nos 11461 and 11462 of 1984, I order

the respondents to pay the plaintiff's costs of the proceedings in this court and I grant the respondents a certificate under the Suitors Fund Act 1951 (NSW).

Solicitor for the plaintiff: *H K Roberts Crown Solicitor.*

Solicitors for the 1st defendant: *Michael Taylor & Wilkins.*

Solicitor for 2nd defendant: *T A Murphy.*

BEATRICE A GRAY
BARRISTER

contest have been mentioned to some extent in the course of the determination of the present stated case. The role of this Court on a stated case such as this does not include a re-evaluation of the merits and it is necessary that this be kept well in mind when evaluating the significance of the decision which is now being given.

The three questions that have been asked in the stated case are:

> "(1) Whether I erred in law in holding that evidence of events occurring before the birth of the child was relevant to the question whether the child was a neglected child because under incompetent guardianship, and admissible?
>
> (2) Whether I erred in law in holding that evidence of behaviour of the parents (not being behaviour actually causing neglect to the child) of such nature as to be likely to cause a child to be neglected, being behaviour tending to show their incompetence as guardians, was relevant, and admissible?
>
> (3) Whether, having found the child to be neglected, I erred in law in that I failed to give any or sufficient weight to the desirability that a child be raised by its natural parents?"

Mr Miles, who appears for the appellant's parents, in helpful written submissions prepared by him and his instructing solicitor, Miss Herps, has contended that the task of a court, when considering an issue under s 72(j), is to evaluate the state of affairs of the guardianship as it directly affects the child. Plainly enough this is a well founded contention. Guardianship is a continuing state, as was pointed out by Hutley JA in Whale v Tonkins (1984) 9 Fam. Law Rep. 410. Where it is alleged that the guardianship is incompetent or improper, consideration must necessarily be given to so much of the past history of the parents as bears upon the current and continuing state of guardianship.

Mr Miles's submission to the foregoing effect is

undoubtedly well founded and I agree with it. Agreement with the proposition, however, does not open up in this Court a reconsideration of the merits of the case. Judge Badgery-Parker, as I read his Honour's reasons for the order he intended to make, disclose that he had in mind at all times the necessity of devoting attention to the particular circumstances of the child. The fact that the narrative of the domestic history of the parents included one particular incident does not necessarily establish that his Honour was led by that incident to the conclusion he reached. The evaluation of the domestic history of the parents was, as I read his Honour's reasons, undertaken with a view to assisting in the determination of whether the current and continuing state of guardianship of that particular child was incompetent or improper.

In the view that I hold the correct answer to be made to question (1) is:

> "Such evidence is admissible if it is relevant in evaluating whether the current and continuing state of guardianship of the child before the Court is incompetent or improper."

The second question has to a large extent been sufficiently answered by what has been said in relation to the first question. The ultimate issue for the Court to determine on this aspect of an application based upon s 72(j) is whether the guardianship in the extended sense indicated in the answer to question (1) is incompetent or improper. A very relevant question to be considered when undertaking a determination of that matter is whether there has been conduct likely to cause the child to be neglected. It is to be noted that paragraph (j) in s 72 is one of a number of paragraphs, all of which are

subsumed under the generic phrase "neglected child". Evidence of such a nature as to show a likelihood of neglect to the child, being behaviour tending to establish incompetence as guardians, is relevant and admissible, and should be taken into account by a court, when determining the ultimate global question of what should be done in the circumstances. I accordingly propose that question (2) should be answered "No".

The third question raises a matter which cannot readily be recognised as a question of law. There are many factors to be considered when determining what form of order is called for by the particular circumstances in the case in hand. The claim of the natural parents has always, from time immemorial, been recognised as a relevant matter to be taken into account. It is not, however, a predominating consideration - the welfare of the child has that pre-eminent character. There is no basis for concluding that his Honour excluded the claim of the natural parents from the considerations that he took into account. He evaluated the welfare of the child in the light of the whole range of factors touching upon that issue. I cannot see any error of law disclosed in the way in which his Honour dealt with the expectations and hopes of the natural parents in relation to the child and with the depth of the affection which they undoubtedly felt for it.

I would accordingly answer question 3:

"Insofar as this question can be construed as raising a question of law, it should be answered No."

SLATTERY CJ at CL: I agree.

McINERNEY J: I agree.

STREET CJ: The order of the Court is: the questions are

Magistrate seems not to have taken that into account in his overall assessment of the case.

The Director General also has appealed on the basis that the learned Magistrate refused to look at anything that might have occurred prior to the making of a Court order in 1997. In very detailed submissions, learned counsel for the Director has submitted that evidence which was either disregarded, or excluded, as the case may be, that I have just identified, should have been admitted and should have been taken into account. He relied upon what Hutley J said in **Wale(?) and Tonkins & Ors** 9 FLR 410 at 411, where Hutley J used the expression, "The inquiry may cover years." **Wale** was followed and applied in **Cormack and Burton** 9 FLR 666.

It was submitted also that the learned Magistrate made an error of law in regarding the holograph letter, which was identified by "BC's" present partner as hers. The error being only to mark it for identification instead of admitting it into evidence as an exhibit and regarding its contents as material to which one ought to pay regard. I uphold the submissions of the Director General in this regard, and I reject the submissions to the contrary. There was clearly a series of questions of law raised by this appeal, the questions of law being the admissibility or otherwise of those documents. In my view those documents and those facts were admissible. The history prior to 1997 was admissible in the light of **Wale** and of **Cormack**. Exhibit 4 was admissible. Hutley J in **Wale's Case** said that evidence was admissible in respect of "all aspects of the

conduct of the guardian" and, as I previously said, "BC's" niece was not either cross-examined out of, or even upon, the November 1998 incident. That should have been taken into account also. So that, there were errors of law and incorrect rulings on admissibility of evidence, and those are errors of law within s 81(2).

At the outset, learned counsel for the Director, in opening his case, suggested that what was required was a finding that there was an error of law and that in the first establishment phase, as he put it, there should have been a finding that there was a need for the child to be placed in care and that this Court should then remit the matter back to the learned Magistrate, with a direction that the additional evidence be taken into account. Learned counsel for "BC" contended that all the Director General was entitled to do was to raise the issue of whether or not there was a question of law, and if there were, after a lot of exchange between himself and the Court, he suggested that this Court only had jurisdiction to follow one of two options, either to quash the orders made by the Children's Court or to confirm them. His submission was in these terms, "S 81(2) rights are extremely limited and the Director general has no right to have an appeal de novo."

With due respect to both counsel, in my view, the best that can be made of this appallingly drafted statute, insofar as is presently relevant, is that the scheme of appeals runs this way: everyone in the community who is dissatisfied with a decision of the Children's Court except