

DISTRICT COURT OF NSW  
FILED  
AT SYDNEY

on 13 DEC 2012

Form 7A (Version 2)  
UCPR 14.3



## AMENDED DEFENCE

### COURT DETAILS

Court	District Court
Division	Civil
Registry	Sydney
Case number	2218/2008

### TITLE OF PROCEEDINGS

First Plaintiff	AIL
Number of plaintiffs	15
Defendant	State of New South Wales
Number of Defendants	1

### FILING DETAILS

Filed for the Defendant	State of New South Wales
Legal Representative	I V Knight, Crown Solicitor
Legal Representative Reference	PCN: 3321 200801481 T09
Contact name and telephone	Evangelos G Manollaras (02)9224 5103 Benish Haider (02) 8093-5546

### PLEADINGS AND PARTICULARS

Insofar as the Statement of Claim relates to Kathleen Monica Biles, the defendant pleads as follows:

1. The defendant admits paragraph 1 of the Statement of Claim.
2. As to paragraph 2 of the Statement of Claim, the defendant:
  - (a) admits that it was responsible for the operation of the Department of Youth and Community Services;

- (b) admits that it is responsible for the operation of the Department of Community Services; and
  - (c) otherwise does not admit the paragraph.
3. As to paragraph 3 of the Statement of Claim, the defendant:
- (a) says that at various times during the period from about February 1974 to about 1989, Bert and/or Edith Gordon received payments or funding from sources including:
    - (i) The Commonwealth Department of Aboriginal Affairs paid a grant to Bert Gordon and supplied funds to the Department of Youth and Community Services later known as the Department of Community Services (“**the Department**”). Such funding was not intended to and did not operate so as to allow the Department to have any management or control over Bethcar Children’s Home (“**Bethcar**”) and the Department acted as the regulatory licensing authority for Bethcar.
    - (ii) The Department paid grants at a weekly rate for various children living with Bert and Edith Gordon from time to time. Such funding by the Department and its instrumentalities did not operate and was not intended to operate as any acceptance of a duty of care to the plaintiffs whilst in care at Bethcar.
    - (iii) The Department of Social Security paid child endowment.
    - (iv) The Department of Education paid a subsidy for school transport of the children.
  - (b) says that in the period from on or about 7 June 1976 to 7 June 1978, the Department issued permits and extensions to permits under s.34 of the *Child Welfare Act* 1939 (NSW) to Bert Gordon allowing the use of Bethcar for the purpose of a Children’s Depot;

- (c) says that on or about 4 December 1978, the Minister for Child Welfare granted Bert Gordon a licence to control a Children's Depot, Home or Hostel at Bethcar under s.29 of the *Child Welfare Act 1939* (NSW);
- (d) says that the licence was revoked on 1 September 1984;
- (e) says that the exercise by the defendant of its function by issuing permits and issuing and revoking the licence, did not create a duty on the part of the defendant, either of itself or by and through its instrumentalities or servants and agents by reason of the provisions of s.46 of the *Civil Liability Act 2002* (NSW); and
- (f) otherwise does not admit the paragraph.
4. As to paragraph 4 of the Statement of Claim, the defendant:
- (a) says on 10 December 1974, Judge Cross of the Tamworth District Court committed Ms Biles to the care of Bert and Edith Gordon for a minimum period of five years at the request of her parents, REDACTED and AIL [redacted] AIL and
- (b) otherwise denies the paragraph.
5. The defendant does not admit paragraph 5 of the Statement of Claim.
6. As to paragraph 6 of the Statement of Claim, the defendant:
- (a) says on 10 December 1974, Judge Cross of the Tamworth District Court committed Ms Biles to the care of Bert and Edith Gordon for a minimum period of five years at the request of her parents, REDACTED and AIL [redacted] AIL and
- (b) otherwise denies the paragraph.
7. The defendant denies paragraph 7 of the Statement of Claim.

8. As to paragraph 8 of the Statement of Claim, the defendant:
  - (a) says that whilst Ms Biles was residing at Bethcar she was under the care and control of Bert and Edith Gordon and the defendant by and through its instrumentalities did not play any role in the day to day care and control of Ms Biles, or in the management or administration of Bethcar as an institution or otherwise;
  - (b) says that Bethcar was an institution run, managed, controlled and maintained independently of the defendant and its instrumentalities; and
  - (c) otherwise denies the paragraph.
9. As to paragraph 9 of the Statement of Claim, the defendant:
  - (a) says that Ms Biles was placed at Bethcar at about 3 years of age and departed at about 17 years of age; and
  - (b) otherwise does not admit the paragraph.
10. The defendant denies paragraph 10 of the Statement of Claim.
11. The defendant does not admit paragraph 11 of the Statement of Claim.
12. The defendant denies paragraph 12 of the Statement of Claim.
13. The defendant denies paragraph 13 of the Statement of Claim and each and every particular of negligence pleaded.
14. Further or in the alternative, the defendant says that the claim is subject to the provisions and operation of the *Civil Liability Act 2002* (NSW) and pursuant to the provisions of Part 2 thereof, any vicarious liability of the defendant is to be limited for any civil liability of any servant or agent by reason of s.3C.

15. The defendant relies upon the provisions of Part 5 of the *Civil Liability Act 2002* (NSW) and more particularly the provisions of s.42 and denies that it had a duty of care to Ms Biles as alleged or in the alternative if it did have a duty of care then such duty was not breached within the meaning of the section in that:
- (a) the functions required to be exercised by the Department were limited by the financial and other resources that were reasonably available to it for the purpose of exercising its functions;
  - (b) the general allocation of those resources by the Department is not open to challenge;
  - (c) the functions required to be exercised by the Department are to be determined by reference to the broad range of its activities (and not merely by reference to the matter to which these proceedings relate); and
  - (d) the Department complied with the general procedures and applicable standards for the exercise of its functions and therefore properly exercised its functions in the matter to which the proceedings relate.

#### PARTICULARS

Full particulars of the s.42 defence will be provided to the plaintiff prior to any hearing.

16. Further and in the alternative, to the extent that any alleged liability is based on a breach of statutory duty by the Department in connection with the exercise of, or a failure to exercise a function, the defendant says the Department is a public authority within the meaning of s.43 of the *Civil Liability Act 2002* (NSW) and relies upon that provision to deny that any act or omission of the Department constitutes a breach of statutory duty in circumstances where the act or omission was in the circumstances not so unreasonable that no authority having the functions of the authority in question could properly consider the act or omission to be a reasonable exercise of its functions.

17. Further and in the alternative, the defendant relies upon the provisions of s.43A of the *Civil Liability Act 2002* (NSW) and says that the Department's powers in relation to licensing, placement of children, care and control of children, funding and any other power under the *Child Welfare Act 1939* (NSW) or otherwise is a special statutory power as defined in that provision. To the extent the allegations of liability are based on the Department's exercise or failure to exercise special statutory powers, the defendant has no civil liability given the act or omission was not in the circumstances so unreasonable that no authority having the functions of the authority in question could properly consider the act or omission to be a reasonable exercise of its functions.
18. The defendant further relies upon the provisions of s.158 of the *Child Welfare Act 1939* (NSW) and the immunity provided therein in that no suit or action shall lie against the Minister or any officer or employee of the Department for or on account of any act done for the purpose of carrying out the provisions of the said Act in circumstances where the Department acted in good faith and with reasonable care.
19. Further, the defendant says that s.3A(1) of the *Civil Liability Act 2002* (NSW) operates to give it protection from civil liability under sections 3C, 42, 43, 43A and other provisions of that Act as well as under s.158 of the *Child Welfare Act 1939* (NSW).
20. In further answer to AIL cause of action, the defendant says that:
- ~~(a) if it is alleged that the cause of action accrued before 1 September 1990 then it did not accrue within 6 years before the commencement of these proceedings and the cause of action is therefore statute barred and not maintainable pursuant to s.14(1)(b) of the *Limitation Act 1969* (NSW);~~
- ~~(b) alternatively, if it is alleged that the cause of action accrued on or after 1 September 1990 then it did not accrue within 3 years of the commencement of these proceedings and the cause of action is therefore statute barred and not maintainable pursuant to s.18A of the *Limitation Act 1969* (NSW).~~
21. In further answer to the claim, the defendant says that Ms Biles lodged an Application for Compensation pursuant to the *Victims Support and Rehabilitation Act 1996* (NSW) by way of compensation for any injury suffered. Pursuant to s.77G of that Act, if

Ms Biles is or was successful in these proceedings then judgment is not to be entered for the sum of any compensation received pursuant to that application.

22. The defendant denies that it is liable to the plaintiff with respect to the cause of action pleaded and further denies any liability to pay damages whether by way of compensatory damages, out of pocket expenses, treatment expenses or otherwise.

**SIGNATURE OF LEGAL REPRESENTATIVE**

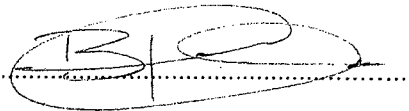
I certify under section 347 of the Legal Profession Act 2004 that there are reasonable grounds for believing on the basis of provable facts and a reasonably arguable view of the law that the defence to the claim for damages in these proceedings has reasonable prospects of success.

Signature of legal representative

I V Knight  
Solicitor for the defendant

..... I V KNIGHT .....

Signed in my capacity as a solicitor  
employed in the office of the said  
I V Knight

.....  .....

Date of signature

13 December 2012

**FURTHER DETAILS ABOUT FILING PARTY****Filing party**

Name	State of New South Wales
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**Legal representative for filing party**

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