

NSW Court of Appeal again grants a stay of historic child abuse civil litigation

The Trustees of the Roman Catholic Church for the Diocese of Lismore v GLJ [2022] NSWCA 78

JUNE 2022

AT A GLANCE

- The NSW Court of Appeal has overturned a first instance decision and stayed historic child abuse proceedings in circumstances where the alleged perpetrator had died before the allegations were put to him. The case was stayed despite evidence the alleged perpetrator had a sexual interest in children generally.
- This case reinforces that the courts are open to permanent stays of proceedings where a defendant can prove that fair trial will not be possible.
- This case also gives scope for institutional defendants to argue for a permanent stay of proceedings, even where there is some tendency evidence that might support the allegations, if the defendant is totally unable to meaningfully respond to the allegations.
- It is worth noting that any application for a permanent stay must be highly fact-specific and remains an exceptional remedy.

BACKGROUND

The respondent, who litigated under the pseudonym 'GLJ', alleged that she was sexually abused by a priest of the Roman Catholic Church in 1968 (the alleged perpetrator), when she was 14 years old. The alleged perpetrator was a priest in the Diocese of Lismore (the Diocese) at the time of the abuse.

GLJ alleged that she was abused after her father was injured in a motorcycle accident. The alleged perpetrator was allocated as support priest for her family. He visited the family regularly and gained the trust of GLJ's parents. GLJ said the alleged perpetrator assaulted her on a single occasion when he attended her family home unannounced one day, while her parents were not home.

GLJ sued the Diocese (by way of the relevant statutory trust capable of being sued) for damages in 2020 in the Supreme Court of NSW. Her claim was advanced on two bases:

1. the Diocese owed her a duty of care to protect her from the risk of sexual abuse and breached that duty by, *inter alia*, allowing the alleged perpetrator to remain a priest when it knew or ought to have known that he had a propensity to sexually abuse children, and
2. the Diocese was vicariously liable for the assaults by the alleged perpetrator.

The Diocese filed a defence not admitting the fact of abuse, duty of care, breach or vicarious liability.

THE EVIDENCE OF ABUSE

The only primary evidence of abuse was from GLJ's own statement. Other than herself and the alleged perpetrator (who died in 1996), there were no other witnesses to the abuse itself.

There was evidence produced on subpoena dating from 1971 (three years after the claimant's alleged abuse) that some members of the Diocese, including senior members, were aware of allegations that the alleged perpetrator had sexually abused children while he was a priest in the Diocese. One document from 1971 prepared by the Archbishop of another Diocese contained the following passage:

"It would appear, however, that the greatest problem that [the alleged perpetrator] had while a Priest in the Diocese of Lismore was a personal one. [Other priests] mention accusations made by lay people concerning homosexuality. The Bishop of Lismore sums up this matter by saying 'he has had a recurring trouble in sexual matters, especially homosexuality. This first came to my notice about some six years ago, and in every case young boys were involved. We have made persistent efforts to help him to overcome his problem, but apparently without any appreciable result'."

The materials obtained under subpoena also included details of seven other allegations made by individuals who claimed to have been sexually abused by the alleged perpetrator as children. All seven were male, unlike GLJ. GLJ's solicitor also annexed to an affidavit four unsworn statements from other people (all male) who alleged they were sexually abused by the alleged perpetrator when they were children.

AT FIRST INSTANCE

The Diocese filed an application seeking a permanent stay of proceedings in 2020. The application was heard before his Honour Campbell J in March 2021, and judgment was handed down in September of that year.

The Diocese argued that a fair trial could no longer be held considering the paucity of evidence due to the time that had passed since the events in question. The trial judge accepted, based on the Diocese's evidence, that virtually all of the relevant senior people who could have provided instructions and given evidence in the current proceedings had died.

However, the trial judge declined to grant permanent stay. He held that there were considerations that positively demonstrated a fair trial could be held. In particular, he noted that even though the alleged perpetrator could not be called as a witness to deny allegations, there was still "plenty of objective ammunition by which his credibility in that regard could be called into question". His Honour also noted that the Diocese had some evidence that seemed to contradict the claimant's allegations. GLJ's evidence was that the assault occurred when she returned home from netball, however the Diocese submitted that netball is a winter sport and the alleged perpetrator was appointed to Lismore during summer months. Given the Diocese had evidence that might contradict the allegations of abuse, a fair trial was possible.

JUDGMENT

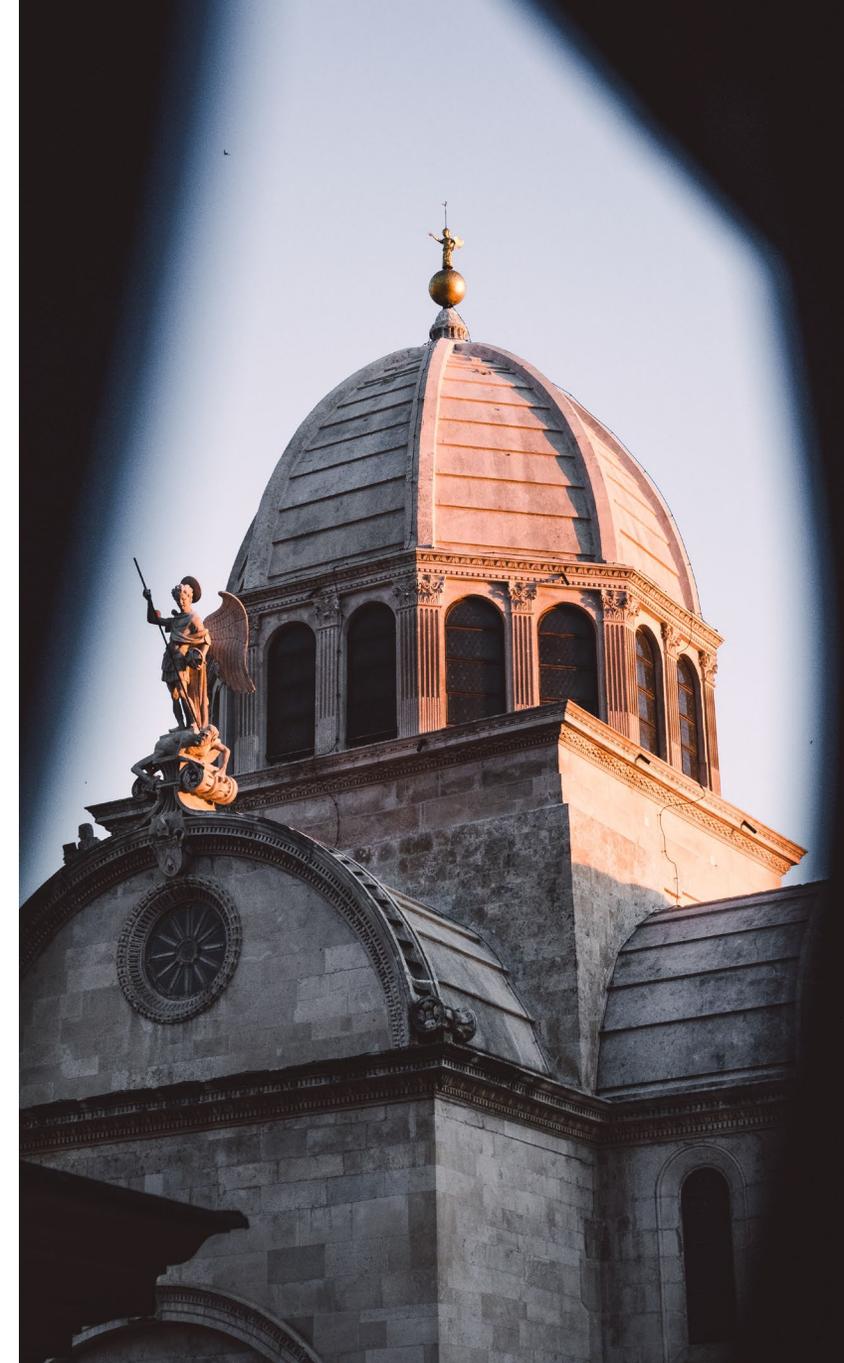
Her Honour Mitchelmore JA wrote the lead judgment, with which their Honours Brereton JA and Macfarlan JA agreed.

Her Honour accepted that the evidence arguably demonstrated the alleged perpetrator's sexual interest in young boys generally. However, she was not persuaded that this evidence overcame the prejudice to the Diocese in meeting the allegation that GLJ had been abused. She noted that the trial judge fell into error by stating that this was not a case where everything depended on acceptance of the plaintiff's account. On the contrary, on the issue of whether GLJ was abused or not and given the absence of a contradictor due to the death of the alleged perpetrator, everything did depend on acceptance of the plaintiff's account.

Her Honour also noted that the absence of the alleged perpetrator also put the Diocese in a difficult position regarding the unsworn statements from the other alleged victims. The impact on the fairness of the trial of the Diocese having to meet that evidence had not been considered at first instance. The Diocese was unable to meaningfully interrogate GLJ's allegations regarding what had occurred.

Her Honour concluded that the trial judge's discretion had miscarried regarding whether the Diocese could have a fair trial on the issue of whether the abuse occurred.

Re-exercising the discretion, her Honour commenced by noting that the court was in no way critical of GLJ for the stage at which she commenced proceedings, or the resultant lack of evidence. It was recognised that substantial delay was common and faultless in historic child abuse actions.





The passage of 54 years since the abuse in question was not of itself a reason to stay proceedings. It was the consequence of the passage of time that put this case into the ‘exceptional’ category.

Her Honour re-exercised the discretion in favour of granting a permanent stay for the following reasons:

“The issue of whether [the alleged perpetrator] sexually assaulted GLJ is foundational to the causes of action pleaded against the [Diocese]. Accordingly, although [the alleged perpetrator] is not a defendant, he is a critical witness. [The alleged perpetrator] died in 1996, before the [Diocese] was on notice of the allegations. It follows that the [Diocese] did not have an opportunity to confront him with the detail of GLJ’s allegations and obtain instructions for the purposes of its defence of her claims, nor will it be able to call him as a witness if it so chose”.

Her Honour acknowledged that the Diocese had not made enquiries regarding the layout of the house where GLJ alleged she was abused nor spoken with the other persons to whom GLJ reported the abuse. However, none of those further investigations could cure the fact that, without the alleged perpetrator, the Diocese was “utterly in the dark” about GLJ’s allegations (taking the same phrase from President Bell in [Moubarak](#)).

As to the tendency evidence from the other alleged victims, it was significant that there was no record that the alleged perpetrator had ever responded to their allegations either. Her Honour accepted that the other complaints of abuse might support a finding of fact that the alleged perpetrator was disposed to paedophilia. However, the Diocese could not be able to meaningfully engage with, or contradict, the other complaints given the alleged perpetrator’s death.

A permanent stay was granted.

Had it been necessary to decide, her Honour would not have granted a stay purely because of the difficulties the Diocese faced in meeting the alleged negligence and vicarious liability aspects of the claim. The documentary record was imperfect but did sufficiently demonstrate that senior clergy knew of the alleged perpetrator’s activities. Evidence of his duties as a priest could be obtained from other clergy, even if not those directly involved with the alleged perpetrator.

Brereton JA delivered a short judgment agreeing with Mitchelmore JA, noting that:

“There were only two potential witnesses to the alleged assault, GLJ and [the alleged perpetrator]. Deprived of the ability to obtain any instructions from [the alleged perpetrator] by his death, the [Diocese] has no means for investigating the facts. The fact that [the alleged perpetrator] may, by his own admission, have engaged in misconduct against young males, does not begin to establish that he assaulted GLJ as alleged. Even if he would not have been called as a witness, a matter which I would not regard as foreclosed, the circumstance that the foundational allegation of the assault was one which [the Diocese] had no way of investigating and ascertaining whether or not the alleged assault had taken place, let alone contradicting it, has the consequence that, regardless of the veracity and credibility of GLJ, the trial could not be a fair one.”

CONCLUSIONS

This case reinforces two other recent NSW Court of Appeal decisions granting a stay in civil proceedings ([Moubarak v Holt](#) and [Trinity Grammar v Anderson](#)). To date, only one appeal seeking a stay has been declined ([Gorman v McKnight](#)).

This case also gives scope for institutional defendants to argue for a permanent stay of proceedings, even where there is some tendency evidence that might be supportive of the allegations, if the defendant is totally unable to meaningfully respond to the claimant's allegations with direct evidence.

While the case further illustrates that the courts are open to permanent stays of proceedings where a defendant can prove that fair trial will not be possible, applications for a permanent stay remain highly fact-specific. Permanent stays also remain exceptional remedies.



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