Cross-examining in the dark – Queensland Supreme Court shines light on prejudice to institutional defendant

Willmot v State of Queensland [2022] QSC 167

SEPTEMBER 2022

At a glance

- The Queensland Supreme Court has granted a permanent stay of proceedings involving allegations of sexual and physical abuse dating back to the 1950s and 1960s. The Plaintiff made three separate allegations of abuse whilst a ward of the State of Queensland.
- The Court considered the inherent unfairness of a trial against the Defendant given the passage of time, unavailability of key witnesses, including the alleged offenders, and the absence of any documentary evidence.
- A key consideration was the ability of the institutional defendant to respond to the threshold issue of whether the alleged abuse occurred.
- If allegations were never put to alleged offenders before their death, the evidence of other alleged victims will not cure this prejudice, but rather highlight it.
- This decision highlights the relevant considerations of the Court when granting what is an exceptional remedy – the permanent stay of proceedings – and is a useful guide for institutional defendants and their insurers when defending claims of historical abuse.

Background

The Plaintiff, Joanne Willmot, sued the State of Queensland (**the State**) claiming damages for psychiatric injury she suffered as a result of sexual and serious physical abuse whilst a ward of the State.

The Plaintiff alleged three separate periods of abuse:

1) From 1957 to 1959, whilst placed in the care of foster parents Jack and Tottie Demlin (**the Demlins**), where she alleges Mr Demlin sexually abused her.

2) In or about 1959, whilst residing in a girls' dormitory at Cherbourg (an Aboriginal settlement in Queensland), where she alleged being subjected to serious physical abuse by the supervisor of the dormitory, Maude Phillips (**Phillips**).

3) Two instances of sexual abuse while visiting her grandmother in 1960 and 1967. These instances were allegedly perpetrated by her mother's brother, Uncle NW (a pseudonym) (**NW**), and her cousin/great uncle, Pickering (**Pickering**).

Interestingly, the Plaintiff had no memory of the alleged abuse by Mr Demlin until 2016, when a fellow foster child, RS (a pseudonym), who resided with the Demlins at the same time as the Plaintiff, told her she had been abused.

The Plaintiff said the State was negligent in failing to properly monitor and supervise her, and those into whose care she was placed, including the Demlins, her carers at Cherbourg and her grandmother. She did not allege the State was vicariously liable for any of the alleged abuse.

Following the removal of limitation periods for historical sexual abuse claims, the Queensland Supreme Court retained an inherent power to "summarily dismiss or permanently stay proceedings if the lapse of time has a burdensome effect on the defendant that is so serious that a fair trial is not possible". The State applied for an order that the proceeding be permanently stayed under section 11A(5) of the *Limitation of Actions Act 1974* (Qld) (**the Act**).

Application for permanent stay

Central to the State's argument was that, due to the passage of time, it could not meaningfully respond to the allegations about both the alleged abuse and the Plaintiff's claim in negligence. The State argued it had no way of investigating or ascertaining whether or not the alleged abuse occurred, let alone contradict the Plaintiff's allegations. Extensive searches failed to unearth any documents which address the allegations and the pivotal witnesses – with capacity to provide instructions to the State – were, with the exception of NW, deceased.

The State relied on the following considerations in support of its application:

1) Those alleged to have perpetrated abuse upon the Plaintiff are long deceased, with the exception of NW (who had been located by the Plaintiff's solicitors shortly before the hearing). The Demlins died in the 1960s, Phillips in 1982 and Pickering (who was 50 to 60 years old at the time he allegedly perpetrated the abuse in 1967) was also reasonably assumed to be deceased.

2) The State's solicitor had reviewed all available documentation relating to the Plaintiff and the periods of time relevant to the alleged abuse and could not locate any record or report of any abuse suffered by the Plaintiff.

3) The State's solicitor had reviewed the Department of Communities records in relation to the Demlins and was unable to identify any complaints raised against the Demlins by any person.

4) The only document which had been found relating to a complaint about Phillips significantly pre-dated the Plaintiff's time at the dormitory.

5) Extensive medical records for the Plaintiff had been obtained but none revealed any reference to the events at the subject of the Plaintiff's claim.

6) Persons who otherwise might know something about the matters alleged by the Plaintiff, such as staff at the dormitory, who could provide instructions in relation to procedures which were (or were not) in place, were also deceased.

Further, the State could not disentangle the cause(s) of the Plaintiff's psychiatric injury from the alleged abuse and other various stressors experienced by the Plaintiff throughout her life, which was a further prejudice faced by the State.

The Plaintiff put "significant emphasis" on the availability of evidence from RS, who had also brought a claim against the State for alleged sexual abuse by Mr Demlin. RS provided an affidavit claiming that she witnessed the Plaintiff being sexually abused by Mr Demlin. The Plaintiff asserted the availability of this evidence results in there being no unfairness, because RS can be cross-examined at trial.

The Plaintiff also argued:

1) the State had the ability to call evidence from other residents of the dormitory and other supervisors

2) there was a public interest factor in allowing the present proceedings to continue, having regard to the fact the defendant was the State, not an individual, and

3) the fact that NW, whose whereabouts was discovered late, was alive was evidence the State cannot say it had undertaken all possible enquiries.

Judgment

Chief Justice Bowskill found the facts of this matter warranted the granting of a permanent stay.

A critical and threshold issue was whether the alleged abuse occurred. The inability of the State to obtain instructions from any of the alleged perpetrators (but for NW) resulted in the State having "… no means for investigating the foundational facts underpinning the alleged wrongful acts which are critical to establishing liability of the part of the State."

Her Honour accepted it may have been possible, on the basis of documentary records and evidence of others who lived or worked at Cherbourg while the Plaintiff resided there, for the State to respond to the allegations concerning the alleged "system", or lack of one, for monitoring and supervising children. However, this did not alleviate the overarching prejudice suffered by the State, which was responding to the "critical facts" of the Plaintiff's case as to whether the abuse occurred.

Adopting the reasoning of Bell P (as the Chief Justice then was) in *Moubarak*, her Honour said:

> *"… the consequences of the passage of some 60 years since those events are said to have occurred, and the fact that the State now does not have any opportunity to confront the alleged perpetrators to obtain instructions for the purpose of defending the claim, let alone calling those persons as witnesses, are such that any trial would be fundamentally unfair, and there is nothing that a trial judge could do to overcome that unfairness."*
>
> (Her Honour's emphasis)

Her Honour was not convinced the evidence raised by the Plaintiff overcame this unfairness, finding:

1) the fact one of the alleged perpetrators (NW) was still alive did not overcome the unfairness because it would be "insurmountably difficult" to extricate this one event from the other alleged abuse concerning Mr Demlin, Phillips and Pickering (in terms of causation), let alone the Plaintiff's relevant subsequent life events, and

2) while there is, unusually, a witness to the alleged abuse at the hands of Mr Demlin, this witness only served to highlight the potential unfairness and would "only render the trial more unfair". This was because the State was also deprived of the opportunity to obtain instructions from Mr Demlin in response to the allegations made by RS. The ability to cross-examine the Plaintiff and RS did not cure this impediment, but rather rendered any trial even more unfair as the State would be "cross-examining in the dark".

Her Honour emphasised that her conclusion in granting a permanent stay was in regard to the consequences of the passage of time and did not involve any criticism of the Plaintiff in delaying coming forward with her complaint.

Implications

This decision follows a number of recent cases from other jurisdictions – such as *The Trustees of the Roman Catholic Church for the Diocese of Lismore v GLJ* [2022] NSWCA 78 – where defendants were successful in obtaining permanent stays of the proceedings in circumstances where the passage of time, and in particular the death of key witnesses (such as the perpetrators themselves), had rendered a fair trial impossible.

This decision provides guidance for defendants and their insurers for historical claims where most, but not all, witnesses are deceased. Even if a Plaintiff seeks to rely on a witness to the alleged abuse, this will not cure the prejudice caused by the passage of time if the alleged offender is deceased and did not have the opportunity to respond to the allegations.

The absence of any documents and the "impoverishment of evidence will be more acute where a trial is exclusively or heavily dependent on oral evidence and the quality of witnesses' memory and recollection"[1].

Where there is no documentary evidence of the relevant complaints (or any complaints at all) and no documentation evidencing any response to those complaints from the alleged offender, those circumstances may be compelling for awarding a permanent stay pursuant to section 11A(5) of the Act.

Each case will turn on its own facts and merits, however *Willmot* provides useful guidance for Queensland defendants, consistent with other interstate decisions, about the limits of permanent stay applications.

[1] Bell P in *Moubarak*.

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Need to know more?

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