

Case Alert

Shaping the future of insurance law

11 DECEMBER 2019

NSW Court of Appeal grants permanent stay for institutional defendant

The Council of Trinity Grammar School v Anderson [2019] NSWCA 292

AT A GLANCE

- In this significant decision, the NSW Court of Appeal has [again](#) ruled that there is scope for defendants, in the context of historic child sexual abuse claims, to obtain a permanent stay where the lack of evidence would unfairly prejudice the defendant.
- The decision helps clarify the scope of investigations a defendant needs to make before it can demonstrate that it would suffer from real prejudice if the proceedings are not stayed.
- The case highlights that the burden on a defendant to demonstrate prejudice remains a “high bar” but crossing it need not involve an “unreasonable burden.”

Background

The respondent attended Trinity Grammar School (the school) between 1969 and 1976. Whilst a student at the preparatory school, he was sexually abused by a teacher at the school, Mr Futcher (the perpetrator). The abuse occurred in the following contexts:

- In trips in the perpetrator’s vehicle from the school to the school sports grounds.
- During camping trips where the perpetrator was one of the supervisors, noting it is unclear whether these camps were ‘school’ trips.
- Outside school hours, in the perpetrator’s van and at his home.

The abuse continued after the respondent left the preparatory school (although that was not the subject of these civil proceedings). In 1997, as an adult man, the respondent complained to police that he had been

abused by the perpetrator. An investigation occurred, although no charges were laid at that time.

The respondent made an unlitigated demand of the school in 2004, and again in 2014 through different lawyers. The claim was declined both times, partly on the basis of the Limitations Act 1969 as it then was.

In 2014, the police investigation was re-enlivened and the perpetrator was charged. In 2018, he was convicted of criminal offences regarding the respondent (not all which were the subject of the civil proceedings).

Civil proceedings were commenced in 2016, shortly before s. 6A was inserted into the Limitations Act 1969. Liability was argued on two grounds:

1. The school breached its non-delegable duty of care to the respondent in failing to supervise the respondent and the perpetrator.

2. The school was vicariously liable for the perpetrator's actions on the basis that the perpetrator used the power and intimacy of his role as the occasion for the abuse.

By the time proceedings were commenced in 2016, the preparatory school master and other potentially key witnesses were deceased. In 2018, the school filed a Notice of Motion seeking that the proceedings be permanently stayed on the grounds of prejudice.

At first instance

On 24 October 2018, His Honour Rothman J dismissed the school's stay application as among other reasons he was not satisfied that the school had exhausted all potential avenues of enquiry. The school appealed.

On appeal

On 9 December 2019, after a two day hearing, the NSW Court of Appeal, comprised of Bathurst CJ, Payne JA and Simpson AJA, unanimously upheld the school's appeal and granted a permanent stay of the proceedings. Bathurst CJ wrote the lead judgment.

Consideration of law

Bathurst CJ reviewed the authorities regarding liability of a school for sexual abuse by staff. Following *Lepore*¹, for the respondent to succeed on the non-delegable duty claim, he would have to prove the risk posed by the perpetrator was foreseeable and that the school breached its duty to take reasonable steps to protect the respondent from that risk. Following *PAC*², for the respondent to succeed on the vicarious liability claim, he would have to prove that the school provided the 'occasion' for the abuse by providing the perpetrator with a special role vis-à-vis the respondent, which included certain features such as power, trust, control and intimacy.

Consideration of evidence

Having identified the relevant legal issues, His Honour then turned to the available evidence regarding those issues. In particular, he considered the affidavit from the school's solicitor, who deposed that he considered, early in the proceedings, that it would be appropriate to take statements from all available teachers and instructed an investigator to do so. The investigator's report was in evidence, which annexed statements or

records of interview from 16 different teachers. In broad summary, the evidence of the teachers was that:

- none of them were aware of the abuse
- none of them were aware of anything to suggest the perpetrator posed a risk of sexually abusing students
- none of them were aware of the circumstances of the perpetrator's contact with the respondent, and
- the preparatory school master exercised a high degree of control of the school.

Based on that evidence, the school submitted that the preparatory school master ran the school as a "one-man band".

The investigator's report and solicitor's affidavit both went on to identify many other members of the teaching staff from the relevant time period who were either deceased, unable to be contacted, or who were not contacted after the solicitor made an evidence-based determination that their evidence was not likely to assist. Importantly, regarding the camps where the claimant was abused, the evidence indicated it was uncertain to what extent the school was aware of, or had responsibility for, operating the camps.

Disposition

His Honour noted that granting a permanent stay is an exceptional remedy, to be made only in circumstances where the passage of time may result in unfairness from "the impoverishment of the evidence available to determine the claim"³. He noted, however, that a lengthy delay in itself was not sufficient to stay the proceedings as real prejudice must be demonstrated. He also noted that a fair trial was not synonymous with a perfect trial.

In considering whether to re-exercise the Court's discretion to stay the proceedings, His Honour considered to what extent the school was unfairly prejudiced.

Non-delegable duty

Regarding the breach of non-delegable duty claim, his Honour found that the only suggestion the school was aware the perpetrator posed a foreseeable risk came from an alleged report in 1975 by another student's mother to the preparatory school master.

¹ *State of New South Wales v Lepore* (2003) 212 CLR 511; [2003] HCA 4

² *Prince Alfred College Incorporated v ADC* (2016) 258 CLR 134; [2016] HCA 37

³ Citing Bell P at [77] in *Moubarak by his tutor Coorey v Holt* [2019] NSWCA 102

However, the preparatory school master, being dead, could not give evidence about whether or not this occurred, or what steps he took regarding it. His Honour concluded:

“In those circumstances, the ability to deal with the alleged breach of non-delegable duty ... is substantially, if not completely undermined, by the absence of the [preparatory school master]. That can be shown by the examination of the particulars of breach of duty. To the extent that they do not depend on the knowledge of the [preparatory school master] with which I have already dealt, they allege ... a failure to put in systems and procedures designed to protect students from abuse. In the absence of any records from the time to show the existence or non-existence of such procedures, the absence of the [preparatory school master] means that [the school] is unable to consider one way or the other what, if any, protections were in place and why at the time they were considered adequate.”

Vicarious liability

Regarding the vicarious liability claim, His Honour found that in the absence of the preparatory school master, the school was not in a position to confirm one way or another whether it authorised the perpetrator to drive the respondent to sport, to take him to his own home or to pick him up in his van. He took the view that: “[the school] is unable to provide a meaningful response to the claim”. Similarly, regarding the camps, His Honour noted that the evidence was unclear about whether the school had knowledge of, or was responsible for, the particular camps in which the respondent was abused. In the absence of evidence to determine the issue one way or another, His Honour concluded that: “[the school] is unable due to the effluxion of time, the unavailability of witnesses, particularly the [preparatory school master] and the absence of documentation concerning the attendance of pupils at the camp, to deal in any meaningful fashion with the critical question of whether [the perpetrator] was placed by [the school] in a position of power and intimacy which gave the occasion for the wrongful acts”.

Adequacy of inquiries by the school

His Honour rejected the primary judge’s conclusion that the school’s inquiries had been inadequate. While the school had to surmount a “high bar” to demonstrate it had exhausted all reasonable inquiries to ascertain what material was available to meet the claim, he noted: “that does not mean that it was necessary to pursue any line of inquiry however remote which may, as a matter of mere possibility, produce some information which may be of assistance in dealing with the issue. That would pose an unreasonable burden on the [the school] and would of itself be oppressive and unfairly burdensome.” The solicitor’s decision not to speak with all available students or teachers was made on a principled basis, given that they would be very unlikely to assist.

Finally, there was no criticism of the school for failing to investigate the matter when the school was first notified by the police in 1997, or after the 2004 letter of demand. At both of those times, the Limitations Act, as it then was, offered a complete defence to the claim.

The significance of this decision for institutional defendants

The judgment assists institutional defendants to understand the circumstances in which an application to permanently stay proceedings can be made. The unavailability of witnesses, including the perpetrator, is not enough in and of itself; nor is the passage of time or the unavailability of documents. The key issue is whether these factors, put together, would unfairly prejudice the defendant. That analysis begins by a defendant considering what the legal issues are, and then what evidence remains available to assist in determining those issues.

The school’s success in this matter was significantly attributable to the thorough, reasonable and timely investigations of the school’s solicitor and his appointed investigator, which went toward the legal issues in the case. The burden on a defendant to demonstrate prejudice remains a “high bar”, but crossing it need not involve an “unreasonable burden.” Institutional defendants need to be able to justify why certain avenues of investigation were, or were not, investigated regarding to the relevant issues.

Need to know more?

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