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Case Alert

Shaping the future of insurance law

NSW Court of Appeal declines to stay historic abuse matter

***Gorman v McKnight* [2020] NSWCA 20**

3 MARCH 2020

AT A GLANCE

- In two decisions last year, *Moubarak bht v Holt* and *Council of Trinity Grammar School v Anderson,* the NSW Court of Appeal granted a permanent stay of proceedings that involved allegations of historic child abuse.
- On 10 February 2020, the NSW Court of Appeal further clarified its position on this issue in *Gorman v McKnight* [2020] NSWCA 20.
- In *Gorman*, the NSW Court of Appeal did not grant the stay of proceedings sought by the Estate of the perpetrator as, among other reasons, the defendant did not show it had exhausted all the reasonable attempts to investigate the matter.
- These decisions clearly indicate that, while there is scope for defendants in historic child sexual abuse claims to apply to permanently stay proceedings on the basis of an inability to obtain a fair trial due to the passage of time, there must be sufficient evidence to prove the defendant could not have a fair trial.

On 19 February 2020, the NSW Court of Appeal further clarified its position on granting a permanent stay of proceedings that involve allegations of historical child abuse, with its decision in *Gorman v McKnight*[1]. *Gorman* follows two other NSW Court of Appeal decisions on this issue last year, *Moubarak bht v Holt*[2] and *Council of Trinity Grammar School v Anderson*[3].

With these decisions, the NSW Court of Appeal has made it clear there is scope for defendants of historic child sexual abuse claims to permanently stay proceedings on the basis of inability to obtain a fair trial due to the passage of time, despite such claims no longer being statute barred under the *Limitation Act 1969* (NSW). However, it is also clear that assessment is made on a case-by-case basis with high evidential standards required from the defendant.

[1] Gorman v McKnight [2020] NSWCA 20
[2] *Moubarak by his tutor Coorey v Holt* [2019] NSWCA 102
[3] *The Council of Trinity Grammar School v Anderson* [2019] NSWCA 292

BACKGROUND TO THE *GORMAN* CASE

In this matter it was alleged that a man (the alleged perpetrator) sexually abused three boys (the claimants) on different dates in a time range between 1978 and 1993. The circumstances of abuse varied between claimants, however all alleged that at least some of the abuse took place at the perpetrator's farm at Camden, NSW. At the time of the alleged abuse, the claimants were between 13 and 17 years old.

One of the claimants reported the abuse to NSW Police in 2015. NSW Police obtained a warrant to record a telephone conversation between that claimant and the perpetrator. Importantly, in the recorded conversation, the perpetrator spoke of performing certain sexual acts with that claimant. The perpetrator also gave evidence to the effect that he knew the claimant was only 13 years old at the time he commenced his relationship with him.

The perpetrator was charged with criminal offences, ultimately concerning all three claimants and one other man. When visited by his solicitor, the perpetrator admitted he had sex with at least one of the claimants, but instructed the solicitor to plead not guilty on the grounds that the sex was consensual.

As to the other claimants, according to his solicitor, the perpetrator: *"… gave a combination of instructions that was a little bit blurred in terms of either consensual or some incidents didn't happen in the way described."*

The perpetrator died of cancer in 2016 at the age of 77. His Estate was worth more than $500,000.

In 2016 and 2017, the claimants individually commenced proceedings in the Supreme Court against the Estate of the perpetrator. A defence was filed on behalf of the Estate that did not admit any of the allegations.

AT FIRST INSTANCE

In 2017, the executors of the Estate filed a summons seeking orders that each of the claimant's proceedings be permanently stayed. The summons was heard before Garling J over three days in 2017 and 2018.

Garling J dismissed the executor's summons. He did so in part because the perpetrator and Estate's solicitor (the same person) had made only "perfunctory" attempts to investigate the allegations, both before and after the perpetrator's death.

A police brief was served that included significant evidence corroborating the claimants' allegations, as well as statements from multiple witnesses. The Estate's solicitor made no attempt to speak with those witnesses.

Garling J was critical of the Estate's solicitor for effectively ceasing his investigations after the perpetrator died:

> *"No exploration has been undertaken by [the solicitor], who seems to me to have preferred to take the approach that, in the absence of [the perpetrator], nothing useful could be obtained to counteract the claims of the three claimants. It will be apparent from my earlier remarks in discussing these issues, that I do not accept that this is so. At the very least, the Executors were in a position to test the claims which were made against known facts by examining them for inconsistency. The position is that the solicitor for the Executors has not attempted to ascertain any of the known facts or corroborative material which would assist in the defence of the claim, in circumstances where enquiries may have been productive."*

Garling J also noted that seeking a stay placed a "heavy onus" on the applicant, which he was not satisfied was discharged in this case. He also noted that that the perpetrator gave at least a partial account of his conduct before he died.

The Estate appealed to the Court of Appeal.

ON APPEAL

The appeal was heard on 25 October 2019 and judgment was handed down on 19 February 2020. President Bell wrote the lead judgment, with Payne JA and Emmett AJA agreeing.

The judgment is relatively short. Bell P refers to *Moubarak* judgment, which collected and considered the principles relating to applications to stay claims for historic sexual assaults.

The appeal was brought on three grounds:

1. That the primary judge was incorrect in finding that the perpetrator had accepted the abuse took place before he died. This issue was dealt with promptly. Bell P found that there was no valid basis to criticise the primary judge's characterisation of the perpetrator's position. The perpetrator had accepted the abuse took place, but raised only the issue of consent in his defence.

2. That the primary judge had incorrectly characterised the Estate's solicitor's investigations as *"*perfunctory*"*. This argument was also addressed immediately. Bell P found that when the primary judge described the Estate's solicitor's investigations as "perfunctory":

    a. *"What his Honour said, in my opinion, was in substance that the exceptional nature of a decision to grant a permanent stay of proceedings required unfairness to be clearly demonstrated. His Honour noted that unfairness will not be able to be demonstrated where the party seeking such exceptional relief, and who bears the onus of proof, has not explored or pursued all reasonable lines of inquiry that may bear upon the fairness or unfairness of any trial proceeding …in my opinion, there were a number of inquiries which the Estate's solicitor could have made, but that had not apparently been made, which cannot be described as remote."*

3. That the primary judge was wrong in his ultimate conclusion that a stay should not be granted. The Estate argued a fair trial would not be possible in circumstances where the perpetrator was dead. Although the perpetrator clearly had sexual contact with one of the claimants, the Estate no longer had the opportunity to lead evidence from the perpetrator regarding his belief that the claimants consented to their sexual interactions with him.

Bell P dealt with the third challenge as follows:

> *"There is an important distinction between the fact of consent … on the one hand, and a person's belief as to another's consent, on the other hand. The latter may form the basis of a defence to criminal charges in some but not all contexts ... In the context of consent as a defence to a claim in tort, however … it is the presence or absence of consent that matters. That, in turn, will principally turn on an analysis of the evidence of the plaintiff … It would not be affected by any evidence as to Mr Judd's state of mind so that his inability to participate in the trial should not in this regard be considered to be a material source of prejudice."*

In the present case, it was open to the Estate to raise the consent issue in its defences to the claims. The claimants could then address that issue as a question of fact and/or contend that it was not a legal defence open to the Estate. Issues that might arise include whether the claimants had the maturity to give consent[4] at the time, given their young age, or whether consent could be properly given in circumstances of coercion (noting the perpetrator allegedly threated to "out" at least one of the claimants).

Another issue might be whether the claimants' actual consent, if proved, could ever be available as a defence in tort when the perpetrator's conduct was unlawful under criminal law (which at the time outlawed all homosexual sex, consensual or otherwise). Bell P reiterated, however, that these were solely questions for the claimants' evidence or questions of law, and would not be affected by any evidence the perpetrator might give.

> **The unavailability of a single witness, including the alleged perpetrator, is not in and of itself grounds for a stay.**

Bell P distinguished this case from that of *Moubarak*, as in that case the alleged perpetrator had advanced dementia that was onset before the allegations of abuse were ever put to him. In contrast, in *Gorman*, the fact of sexual interactions between the claimant and the perpetrator could not be seriously put in issue.

THE SIGNIFICANCE OF THIS DECISION FOR INSURERS

The *Gorman, Anderson* and *Moubarak* decisions provide a useful body of guidance from the NSW Court of Appeal on when defendants might be able to seek a stay of proceedings given the passage of time. This is frequently a live issue in historical child abuse claims given the removal of the limitation period.

This decision clearly illustrates the principle that the unavailability of a single witness, including the alleged perpetrator, is not in and of itself grounds for a stay – particularly where the perpetrator has given some evidence in response to the allegations.

[4] See Marion's Case, *Secretary, Department of Health and Community Services v JWB and SMB* (1992) 175 CLR 218 at 310-311; [1992] HCA 15

More broadly, it is clear the Court will not countenance granting a stay unless, and until, the defendant can satisfy the Court that it has exhausted all reasonable attempts to investigate a matter. In *Gorman*, the Court of Appeal accepted the primary judge's criticism of the Estate's solicitor for failing to first investigate all of the matters he could have before bringing the stay application. In contrast, in the matter of *Anderson*, a stay application was granted where the applicant's solicitor deposed to having conducted exhaustive investigations, including locating and speaking with numerous surviving witnesses.

The decision also includes some useful analysis of the role that a victim's so-called "consent" can play in a tort claim for child sexual abuse. It is important to remember that there is no scope, as there is in the criminal law, for the defence of honest and reasonable mistake of a victim's age to be raised. The questions of consent in a civil context turns on the claimant's own evidence, considering principles including whether the claimant has the maturity to provide consent.

For more information about the *Moubarak* and *Trinity Grammar* decisions, read our earlier articles.

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For more information please contact us.

Sean O'Connor
Partner, Sydney
T: +61 2 8273 9826
E: Sean.OConnor@wottonkearney.com.au

Patrick Thompson
Senior Associate, Sydney
T: +61 2 8273 9920
E: Patrick.Thompson@wottonkearney.com.au