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Case Alert

Shaping the future of insurance law

Recent abuse cases offer further guidance

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AT A GLANCE

- There have been a number of recent cases in the NSW and QLD Courts dealing with issues of abuse.
- These cases provide further guidance on how the courts are addressing some key liability, damages and limitation issues.
- These issues include:
  - the need for specific evidence about the level of impact of limitation periods in considering applications to set aside settlements in institutional abuse matters
  - the importance of clearly articulating causes of action in pleadings
  - the way damages are assessed when there is both physical and sexual assault, and
  - the court's willingness to make global assessments of economic loss, even when there is little documentary evidence.

LIMITATION PERIODS

TRG v The Board of Trustees of the Brisbane Grammar School [2020] QCA 190

In this matter, the Queensland Court of Appeal decision upheld a 2019 first instance judgment that dismissed an application to set aside a deed of settlement in an institutional sexual abuse matter. The court found that it was not "just and reasonable" to set aside the previous settlement in circumstances where there was no evidence that the existence of a limitation period played any role in either the appellant entering into a settlement deed or on the settlement sum agreed.

BACKGROUND

The appellant attended Brisbane Grammar School as a student between 1986 and 1989. Kevin Lynch was employed at the school as a counsellor and sexually assaulted the appellant on numerous occasions in 1986 and 1987 when the appellant was in grades 9 and 10, aged 13 and 14 years.

In 2001 the appellant sued the body corporate of the school for damages for personal injuries, including psychiatric and psychological damage, which he had suffered as a result of the abuse. In 2002 the proceedings were resolved by a deed of settlement in which the school agreed to pay the appellant $47,000 plus costs.

The appellant applied to the Supreme Court of Queensland in 2019 to have the original settlement set aside in line with the 2016 amendments *to Limitations of Actions Act 1974* (Qld) (the Act).

The primary judge found it was not "just and reasonable" to do so as there was no evidence the limitation defence played any role in the settlement sum

and because the settlement amount was just under the amount recommended by the appellant's counsel.

THE APPEAL

The appellant's appeal was based on two arguments that:

1. the primary judge's construction of section 48(5A) of the Act was inconsistent with the legislative purpose underlying the provision, and
2. the primary judge was mistaken in finding the limitation defence did not materially affect the quantum of the settlement reached and was not a material factor to settle.

The appellant argued that the dominant legislative purpose of s 48(5A) is "to recognise the inherent unfairness of limitation periods in actions involving the sexual abuse of children and to provide the means to re-open cases where settlement of such cases was influenced or affected by such unfairness".

His honour disagreed, and found that the legislative purpose encompasses the interests of both parties in deciding whether it is "just and reasonable" to set aside a settlement agreement. He further found that the relative weight given to each material factor must depend on the circumstances of each case, not be weighted to the limitation defence as suggested by the appellant.

THE IMPACT OF THE LIMITATION PERIOD

In arguing the limitation period impacted the settlement, the appellant relied on:

- letters from school's solicitors in early 2001, which the appellant argued "made it clear" the school would rely on the limitation defence in proceedings brought by former students, and
- the primary judge's observation that the adjournment of applications for extensions of limitation periods was in the school's interests to keep the limitation defence alive "so it could be used as a negotiating tool".

> **This decision confirms that the fact a limitation period existed is not sufficient grounds to set aside a long-standing settlement.**

His honour agreed that without reference to other factors, these matters would support a finding the settlement was influenced by the expiry of the appellant's limitation period. However, he found those considerations were diminished by:

- new evidence that may easily be regarded as both material and decisive to demonstrate the school's knowledge of Lynch's offending, which would strengthen the appellant's chances in seeking an extension of the limitation period, and
- the fact that liability was a contentious issue, given the law in Australia at the time did not generally hold an employer vicariously liable for an assault by an employee where it was an independent personal act not connected with, or incidental to, their employment.

His honour noted these issues were reflected in the appellant's advice from counsel before mediation. This advice stated that the appellant's prospects of establishing liability against the school were "fair to reasonable" and ultimately "the litigation risks, consisting principally of proving at trial liability in the school for the actions of Lynch, [and] to a lesser extent … a limitation extension… dictate that [the appellant] ought seriously entertain any offer which is 50% to 60% of a proper assessment of his damages".

These issues were consistent with the mediation and subsequent negations, with the position paper of the school primarily focusing on liability in light of the new evidence. The submissions on the limitation issue made by the school at the mediation were brief and were not pressed beyond the opening session of the mediation, including subsequent negotiations.

His honour rejected any argument the limitation defence impacted the settlement sum. The ultimate settlement was only $800 below the low range recommended by the appellant's counsel. There was also significant difficulties with quantum due to expert evidence suggesting the appellant's psychiatric condition could have resulted from external factors unrelated to Lynch's abuse.

His honour concluded that the evidence supports the primary judge's findings that the settlement is a reasonable measure of the amount of the appellant's loss and damage caused by the alleged wrong and it was not discounted with reference to the limitation issue but rather reflected counsel's advice that the appellant's prospects of establishing the school was liable were not better than "fair to reasonable".

It remains to be seen whether the appellant will continue to test the Act by seeking special leave to appeal the decision in the High Court.

IMPLICATIONS

When considering whether to set aside a historical settlement agreement for abuse, courts will always look at the specific circumstances of each case. For insurers, this decision confirms that the fact a limitation period existed is not sufficient grounds to set aside a long-standing settlement, especially when that agreement was the outcome of fair negotiation between the parties.

The Court of Appeal's comments on its discretion about what is 'just and reasonable' will be helpful when addressing settlements revisits as they confirm the relative weights of material factors will depend on the circumstances of each case.

Limitation issues were also raised in *Ms P v Mr D [2020] NSWSC 22*, which is discussed below.

CAUSES OF ACTION

PWJ1 v The State of New South Wales [2020] NSWSC 1235

In this case, the NSW Supreme Court refused leave to a plaintiff to join two additional defendants to an institutional abuse proceeding, due to deficiencies in the way the plaintiff's causes of action were articulated in a proposed amended pleading. Ultimately, the plaintiff was granted a further opportunity to amend the claim.

BACKGROUND

The plaintiff alleged abuse during a period of committal to six institutions in New South Wales in the 1970s. The existing defendant, responsible for four of the six institutions, opposed the grant of leave to file the proposed pleading but did not oppose the joinder of the prospective defendants. Each of these was said to be responsible for a remaining institution.

One of the prospective defendants did not oppose the application. The other opposed being joined on the basis that the pleading was entirely deficient in articulating any arguable cause of action against it.

THE DECISION TO REFUSE LEAVE

In refusing leave, Justice Garling found that the subject pleading:

- did not articulate the risk of harm to which s 5B of the Civil Liability Act 2002 (NSW) (CLA) applies
- regarding the common law duty relied on, did not include any material that adequately pleaded and proved the necessary elements for a negligence claim under ss 5B and 5C of the CLA
- did not consider s 5D of the CLA and the causal link between the conduct of the defendant and the occurrence of the particular harm
- regarding vicarious liability, failed to identify the exercise of any statutory powers, the role of each perpetrator and the nature of their employment or engagement, and
- otherwise included a number of irrelevant allegations to the facts pleaded, as well as overly formulaic particulars of the relationship between the defendant, the perpetrator and the plaintiff that were not anchored in the facts of the case.

> **This decision highlights that courts will allow plaintiffs to address deficiencies in their pleadings in appropriate circumstances.**

This decision also followed *Dare v Pulham* (1982) 148 CLR 658, in which the court found:

> *"Pleadings and particulars have a number of functions: they furnish a statement of the case sufficiently clear to allow the other party a fair opportunity to meet it… They define the issues for decision in the litigation and thereby enable the relevance and admissibility of evidence to be determined at the trial … They give a defendant an understanding of a plaintiff's claim in aid of the defendant's right to make a payment into court. … [T]he relief which may be granted to a party must be founded on the pleadings …".*

IMPLICATIONS

This case highlights that courts will allow plaintiffs to address deficiencies in their pleadings in appropriate circumstances.

For defendants and their insurers, the judgement is comforting as it encourages accurate and specific pleadings that permit a clear understanding of the allegations made, which is particularly important when matters involving multiple perpetrators, defendants and instances of alleged wrongdoing.

DAMAGES

Ms P v Mr D [2020] NSWSC 22

BACKGROUND

The plaintiff (Ms P) sued the defendant (her mother's partner who had effectively assumed the role of step-father) regarding seven allegations of sexual abuse that occurred between 1995 and 2001, and one count of physical assault in 2012. She further alleged that between 2001 and 2012, the defendant verbally abused and belittled her, intentionally causing physical and psychiatric injury in line with *Wilkinson v Downton* (1897) 2 QB 57.

The allegations of sexual assault were varied but resulted in Ms P becoming pregnant with the defendant's child at the age of 15. She gave birth to her son in 2001.

Ms P gave a statement to the NSW Police in 2015. As a result, the defendant was charged with and pleaded guilty to three offences, arising out of four of the incidents of sexual assault alleged by Ms P in the present proceedings. He is currently serving a sentence for seven years and six months. He was not charged regarding any of her other allegations.

In *Ms P v Mr D*, the defendant admitted the four occasions of sexual assault that gave rise to his criminal convictions. He denied the other three sexual assaults and the one non-sexual physical assault. He also raised limitation defences for the physical assault and the *Wilkinson v Downton* allegations.

THE FINDINGS

AJ Simpson did not find the defendant to be an impressive witness. After reviewing the evidence for each of those denied assaults, AJ Simpson was satisfied, on the balance of probabilities, that they occurred.

To further support her claim, Ms P sought to rely on tendency evidence. Ultimately, AJ Simpson did not consider it necessary to rely on the tendency evidence to support her findings that the abuse had occurred. However, if there had been any doubt, Her Honour indicated that the tendency evidence of the four admitted sexual assault had significant probative value regarding the disputed sexual assaults, given they occurred in very similar circumstances.

AJ Simpson accepted that the defendant's behaviour towards Ms P was "abusive and controlling", however found it did not satisfy the threshold in *Wilkinson v Downton*[1]. However, as the nature of the sexual and physical assaults did meet that threshold, this element of the claim was determined in favour of Ms P.

The defendant was also precluded from pleading a limitation defence regarding the allegations of sexual assault given the operation of section 6A of the *Limitation Act 1969* (NSW). However, he did raise a section 50C defence regarding the physical assault, which was not successful. Her Honour was not prepared to separate the effects of the physical assault from the sexual assault and said that section 50C was ill-suited to cases where cumulative injury was alleged. She noted that the onus was on the defendant to establish a limitation defence, which he had failed to do on the balance of probabilities.

ASSESSMENT OF DAMAGES

Her Honour confirmed that the *Civil Liability Act* did not apply and therefore assessed damages at common law.

When assessing general damages, AJ Simpson indicated that the award for general damages "must be substantial" and that this was an appropriate case for a component representing aggravated damages.

Her Honour considered the fact that Ms P was deprived of a normal adolescence and had taken on the responsibility of caring for a child and managing a household. She also noted that extent of Ms P's psychological suffering led to self-harm and suicidal ideation. AJ Simpson awarded a global figure of $275,000 for general and aggravated damages. Interest was awarded on 70% of that figure, which represented the component attributable to the past.

Her Honour awarded $150,000 for past economic loss and $200,000 for future economic loss. This was based on Ms P's evidence that she would have worked in the field of architecture, design or another related area, if it were not for the abuse. Ms P also relied on a forensic accountant's report, which Her Honour found to be of "limited assistance".

No award was made for past out-of-pocket expenses, however $40,000 was awarded for future treatment.

AJ Simpson also awarded $100,000 for exemplary damages regarding the allegations of sexual and physical abuse for which the defendant had not been criminally punished.

In total, Ms P was awarded $853,550 in damages.

[1] In *Wilkinson v Downton* the defendant had told the plaintiff that her husband had been severely injured as a practical joke, which resulted in the plaintiff suffering severe nervous shock. In that case, Judge Wright found that the defendant had "willfully done an act calculated to cause physical harm to the plaintiff" and that harm was actionable.

IMPLICATIONS

While this case does not involve institutional abuse, is important as it highlights the court's willingness to award general, aggravated and exemplary damages in appropriate circumstances. This includes when a defendant has not been adequately punished for wrongful acts. In this case, as the defendant had already been sentenced to a term of imprisonment for four of the alleged incidents, the award of exemplary damages was limited to the remaining four occasions of sexual and physical assault.

It is also notable as an example of the court's willingness to make global assessments of economic loss based on the plaintiff's evidence about what they would have done, if they were not abused, even when there is little documentary evidence to support the claim.

Finally, *Ms P v Mr D* confirms the courts will rely on tendency evidence of prior admitted allegations provided there is compliance with section 97 of the *Evidence Act 1995* (NSW).

Need to know more?

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