

Case Note

Willmot v State of Queensland [2022] QSC 167

Warning: This Case Note discusses serious sexual and physical abuse.

In its recent decision of *Willmot v State of Queensland*,¹ the Supreme Court considered whether a permanent stay should be granted in a case involving allegations of historical sexual and physical abuse that were said to have occurred between 1957 and 1967. Accepting that her decision had serious implications for the plaintiff, Bowskill CJ held that the grant of a permanent stay was warranted given the effects of the passage of time since the events alleged in the action. Her Honour concluded that a fair trial was not possible due to the lack of availability of witnesses, after more than 60 years had passed since the events which founded the claim.

This decision should be understood in the context of a line of similar cases in other Australian states, after the removal of the limitation period for claims involving allegations of historical sexual abuse² in response to a recommendation made by the Royal Commission into Institutional Responses to Child Sexual Abuse³.

Facts

Joanne Edith Willmot (**Plaintiff**) sought \$1,764,620.83 in damages for negligence from the State of Queensland (**Defendant**) on the basis that she had sustained a psychiatric injury as a result of sexual abuse and/or serious physical abuse while she was a 'State child' and subject of the *Aboriginal Protection and Restriction of the Sale of Opium Act 1897* (Qld). The alleged abuse occurred from 1957 to 1967 while the Plaintiff was living in a foster home, at the Cherbourg girls' dormitory and visiting her grandmother. The claim was based on the Defendant's alleged failure to properly monitor and supervise her and those entrusted with her care.

The alleged abuse can be summarised as follows:

- Between 1957 and 1959, when the Plaintiff was about three or four years old, the Defendant placed her in foster care with a married couple, Jack and Tottie Demlin. There were three other foster children living at their house at the same time, and they shared a bedroom. The Plaintiff alleged that Mr Demlin sexually abused her and that she witnessed Mr Demlin sexually abusing two of the other foster children. She was removed from the house in 1959 due to reports of concerns that she was malnourished.

¹ [2022] QSC 167

² Section 11A, *Limitations of Actions Act 1974*

³ Explanatory Notes to the *Limitation of Actions (Institutional Child Sexual Abuse) and Other Legislation Amendment Bill 2016*, at p 2.

- Between 1959 and 1966, when the Plaintiff was about five to 12 years old, the Defendant placed her at the Cherbourg girl's dormitory. The Plaintiff alleged that she was subjected to serious physical abuse during that time by a woman who the Plaintiff described as a harsh disciplinarian because she imposed punishments for minor infractions. These included being hit by a switch (a tree branch), being made to stand on one foot for two hours and being locked in the 'women's prison' (a room with only a bucket inside).
- The Plaintiff alleged that on two occasions when she visited her grandmother's house:
 - she was sexually assaulted by her uncle who was 15 or 16 years old in or around 1960, when she was about six years old, and
 - she was sexually assaulted by her cousin/great uncle who was about 50 or 60 years old in or around 1967, when she was about 13 years old.

The Plaintiff did not recall the alleged abuse by Mr Demlin until about 2016 when she reconnected with one of the other foster children (RS) who was also allegedly abused. RS gave evidence about Mr Demlin's alleged sexual abuse of the Plaintiff in a statement.

The Defendant did not dispute that it owed a duty to take reasonable care to avoid foreseeable risk of injury to the Plaintiff while she was a 'State child'. However, it did dispute the content of that duty and the knowledge it allegedly had of the abuse. The Defendant argued that, due to the effluxion of time (more than 60 years), it could not ascertain the truth or falsity of the Plaintiff's allegations and it was prejudiced in defending the claim, such that there could not be a fair trial. The Defendant had undertaken investigations, which revealed that:

- there was no evidence of any abuse of the Plaintiff
- there was no evidence of any complaints made about the Demlins
- there were some documents evidencing complaints about the woman who ran the Cherbourg girls' dormitory, but they were investigated and determined to be unfounded, and
- many of the alleged perpetrators and other involved persons were deceased.

Decision

Bowskill CJ cited a number of decisions interstate that dealt with permanent stays of proceedings. Significantly, her Honour noted that a permanent stay should only be ordered in exceptional circumstances, such as where a defendant can demonstrate, on the balance of probabilities, that it will not be possible to obtain a fair trial⁴.

Bowskill CJ emphasised that in matters where there is a considerable passage of time, it is the consequences of the passage of time that are significant, rather than the amount of time per se. Lengthy delay of itself does not justify a stay.

Despite there being some documentary records available, Bowskill CJ considered that the trial would be heavily dependent on oral evidence, where the quality of memory and recollection would be paramount, and

⁴ Moubarak by his tutor *Coorey v Holt* (2019) 100 NSWLR 218

all pivotal witnesses were (with one exception) deceased. Her Honour held that, insofar as the critical facts (that is, the alleged abuse) were concerned, the consequences of the passage of time since those events, and the fact that the Defendant was not able to obtain instructions from the alleged perpetrators to defend the claim, or call them as witnesses, were such that any trial would be fundamentally unfair.

It was not sufficient that one witness (the Plaintiff's uncle who allegedly sexually assaulted her in or around 1960) was still alive. Bowskill CJ held that it would be insurmountably difficult to distinguish between the injury(s) caused by his abuse from the other alleged abuse. RS's evidence about having witnessed Mr Demlin's alleged sexual abuse was also considered insufficient. Bowskill CJ held that cross-examination of the Plaintiff and RS would not solve a barrier the Defendant faced, which was its inability to obtain instructions from Mr Demlin to respond to the allegations.

Bowskill CJ ordered the proceeding be permanently stayed.

Implications

This decision serves as a reminder that, although an action for damages arising from the abuse of a child is not subject to any limitation period in Queensland, courts can and will exercise power to permanently stay proceedings where it would be unfair to a defendant to allow the claim to proceed. It emphasises that in historical abuse cases, the passage of time is an obstacle that a plaintiff must overcome if they wish to pursue a claim in later life. If that passage of time has consequences that significantly impedes a defendant's ability to defend the claim, the proceeding may not be allowed to continue.

Unfortunately, plaintiffs may not be able to assess their prospects of avoiding a permanent stay until such claims are significantly progressed (likely following disclosure from the defendant/s).

Upon being given notice of historical abuse claims, defendants should consult with all available witnesses to obtain instructions about the allegations in issue. If pivotal witnesses have passed away, this can be a key consideration in a court exercising discretion to grant a permanent stay. *Willmot v State of Queensland* suggests that the alleged perpetrators of the abuse may be considered critical, and evidence from witnesses to the abuse may be insufficient to gain a real understanding of the facts. The extent of any useful documentary records about the alleged abuse is also an important factor. With this in mind, defendants to historical abuse claims should quickly ascertain the availability of witnesses and historical records and retain evidence of their investigations/enquiries to determine whether they may be able to apply for a permanent stay of the proceeding.

Willmot v State of Queensland could also be used as an authority for defendants who may face exposure for some, but not all, of the events alleged by a plaintiff who alleges many instances of abuse. It confirms that it is difficult to distinguish between different events and determine the degree to which they separately contributed to the totality of a plaintiff's psychiatric injuries.

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