

Case Alert

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NSW Court of Appeal stays proceedings in historic child sexual abuse claim

Moubarak by his tutor Coorey v Holt [2019] NSWCA 102

AT A GLANCE

- The Court of Appeal has indicated that the removal of the relevant limitation period does not abrogate the defendant's right to a fair trial.
- The circumstances in which the defendant cannot receive a fair trial will be decided on a case-by-case basis. The onus is on the defendant to establish that they cannot receive a fair trial.
- Although a fair trial need not be a perfect trial, the passage of time and unavailability of evidence tends toward unfairness.
- In this case, the inability of the defendant to provide evidence, a defence, or instructions was also material.

DISTRICT COURT DECISION

The claimant brought a civil claim in the NSW District Court in 2016 against the defendant, whom she alleged sexually assaulted her in 1973 or 1974 when she was a child. At the time the proceedings were commenced, amendments to the *Limitation Act 1969* (NSW) removed any statutory limitation period regarding personal injury claims for acts that constituted child abuse, defined to include sexual abuse.

A tutor was appointed for the defendant, who has severely advanced Alzheimer's disease. The defendant filed a notice of motion in 2018 seeking a permanent stay of the proceedings on the basis that a fair trial would not be possible as the defendant could not personally give evidence or provide instructions.

The primary judge Wilson DCJ was not persuaded that the circumstances were exceptional and dismissed the defendant's application with costs. The primary judge accepted that the defendant was under a legal

incapacity, but held that it would still be possible for the proceedings to be defended. The primary judge noted the public interest in advancing claims of this type. The defendant appealed to the NSW Court of Appeal.

COURT OF APPEAL DECISION

The NSW Court of Appeal handed down judgment on 9 May 2019. By way of three separate judgments, Bell P, Leeming JA and Emmett AJA unanimously allowed the defendant's appeal and ordered that the District Court proceedings be permanently stayed. President Bell wrote the lead judgment.

As the appeal concerned an interlocutory point, the defendant required leave. Bell P granted leave on the basis that the application concerned issues of significant public importance, given the large number of historic child sexual abuse claims currently being litigated since the removal of the relevant limitation period.

The Court also noted the NSW Attorney General had – in his second reading speech moving the Bill that removed the limitation period for child sexual abuse – expressly stated that the Bill preserved the court’s power to stay or dismiss proceedings to safeguard parties’ rights to a fair trial.

Principles governing stays of proceedings

Bell J reviewed the authorities regarding staying proceedings in circumstances where it is demonstrated that it will not be possible for the defendant to obtain a fair trial, and authorities regarding how the passage of time creates such injustice. He cited, with approval, the observations of McHugh J in *Taylor*¹ that: “[w]here there is delay the whole quality of justice deteriorates”. Bell J noted that he was in no way critical of the claimant, or plaintiffs generally, for bringing allegations long after the alleged offending. The analysis rests entirely on the prejudice delay might cause the defendant, not on the plaintiff’s reasons for delay.

Bell J noted that a fair trial need not be a ‘perfect’ trial, and that it is routine and not inherently unfair or prejudicial that memories fade; witnesses die; and documents are destroyed. But in some circumstances, the unavailability of a witness may preclude the possibility of a fair trial. Bell J cited the Full Court of the Federal Court in *R v Davis*², where the Court stayed criminal proceedings 20 years after the offences were alleged to have occurred.

Bell J also relied on and applied the decision of Smith J in *R v Presser* [1958] VR 45, where the court came up with minimum standards that a criminal defendant needs to meet before they can be tried without injustice to them, including that they need to understand the nature of the proceedings; to understand the substantial effect of evidence; and to be able to provide instructions to make their defence. Bell J held that although *Presser* originated in a criminal context, it provided “powerful insight” regarding the key issue in the civil proceedings, namely whether the defendant could obtain a fair trial.

Finally, Bell J reviewed other recent authorities³ on the question of whether proceedings should be permanently stayed, to illustrate the point that such applications are “intensely fact dependent”. In one such case, *Judd*, the Court noted that the alleged perpetrator in that matter, deceased at the time of the application, had admitted to the abuse before he died.

¹ *Brisbane South Regional Health Authority v Taylor* (1996) 186 CLR 541; [1996] HCA 25

² (1995) 57 FCR 512

³ *Connellan v Murphy* [2017] VSCA 116 in which a stay was granted; *Estate Judd v McKnight (No 4)* [2018] NSWSC 1489, in which a stay was refused; and *Anderson v Council of Trinity Grammar School* [2018] NSWSC 1633 in which a stay was also refused.

Bell J distinguished that matter (in which the stay was not granted) on that basis. Bell J distinguished another case, *Anderson*, on the basis that the defendant, a school, had not satisfied the court that it had exhausted all attempts to obtain available evidence.

Application of principles

In the *Moubarak* matter, Bell J held that it would not be possible for the defendant to obtain a fair trial. At [158]:

“Whilst it is correct that a number of forensic steps would have been open to the defendant’s tutor in defending the proceedings ... none of these matters, in my opinion, would make up for the fact that the defendant was, because of his mental condition, at all relevant times utterly in the dark about the allegations made against him and quite unable to give instructions in relation to them. Nothing that a trial judge could do in the conduct of the trial could, in my opinion, relieve against these consequences...”

Such a conclusion does not imply any level of culpability on the plaintiff’s part in bringing her claim when she did or in making her complaint to the police at the time she did. But the (non-culpable) delay that s 6A of the Limitation Act retrospectively permits carries with it the possibility (realised, in my opinion, on the facts of the present case) that a fair trial will not be possible.”

Bell J went on to list the salient features that, in his opinion, taken together, warranted the granting of a stay, including:

- The defendant was never confronted with the allegations before the onset of his dementia, and as such there is no record of his response.
- The defendant was never questioned by police, as the allegations were made after the onset of his dementia.
- The defendant had advanced dementia at the commencement of proceedings.
- There were no witnesses to the assaults.
- The defendant was incapable of giving instructions both regarding the pleaded defence and in the trial itself.
- The defendant could not give evidence.
- Other potentially relevant witnesses were dead or unavailable.
- There was no relevant documentary evidence.

In a final note, in his concurring judgement, Leeming JA added at [193]:

“There will be other cases which are different and less clear-cut... The exercise of the discretionary power preserved by s6A(6) will fall to be worked out case by case.”

WHERE TO FROM HERE?

Difficulties arising from the passage of time in the context of historical sexual abuse claims are well known. This decision indicates that an application for a permanent stay, on the grounds of unfairness, is something that the courts are willing to entertain.

It must be acknowledged though that the bar is a high one. In this matter it was crucial that the defendant had never, and never would, have the opportunity to respond to the allegations. It was also significant that there was no documentary evidence or other available witnesses.

The court has emphasised that each application for a permanent stay must turn closely on its own facts. It remains to be seen whether intermediate appellate courts would be as willing to stay proceedings brought against institutional defendants.

Finally, if such an application is made, care must be taken to focus on the prejudice to the defendant, rather than the culpability of the claimant, for making a claim significantly after the event.

NEED TO KNOW MORE?

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