INSTITUTIONAL LIABILITY LIST CPD – STAYS, SETTLEMENTS AND SELF-INCRIMINATION[1]

1. This paper looks at three of many complex, but legally-interesting, issues arising in proceedings in the Supreme Court of Victoria's Institutional Liability List:

   a. permanent stays of proceedings;

   b. setting aside previous settlement agreements and judgments;

   c. the operation of the privilege against self-incrimination.

PERMANENT STAYS

2. In 2015,[2] in an Australian first,[3] Parliament enacted legislation removing limitation periods for claims founded on death or personal injury of a person resulting from an act or omission in relation to the person when the person was a minor that was physical abuse or sexual abuse and psychological abuse (if any) that arises out of that act or omission.[4] This followed the Victorian Royal Commission's 2015 *Redress and civil litigation* report.[5] The report said that, "given the length of time that many survivors of child sexual abuse take to disclose their abuse", the existing limitation periods were "inappropriate".

3. About the risk of an unfair trial by Courts hearing historical claims, the report noted:[6]

   Removing limitation periods may create a risk that courts will interpret the removal as an indication that they should exercise their powers to stay proceedings in a more

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1 This is a written paper to a presentation given to the Victorian Bar on 28 November 2021 chaired by Aine Magee QC with co-presenters her Honour Justice Incerti and David Seeman, looking at legal issues arising in the Supreme Court of Victoria's Institutional Liability List.

2 Commencing 1 July 2015.

3 See Redress and Civil Litigation Report (2015) | Victorian Government (www.vic.gov.au).

4 Section 27O of the *Limitation of Actions Act 1958* (Vic).

5 See Redress and civil litigation | Royal Commission into Institutional Responses to Child Sexual Abuse (childabuseroyalcommission.gov.au).

6 At page [52].

limited fashion. We consider that it should be made clear that the removal of limitation periods does not affect the courts' existing powers.

4. Section 27R of the *Limitation of Actions Act 1958* (Vic) specifically addresses this point, stating that the removal of the limitation period does not affect the Court's "inherent jurisdiction, implied jurisdiction or statutory jurisdiction" and offers an example where a proceeding may be summarily dismissed or permanently stayed where, "the lapse of time has a burdensome effect on the defendant that is so serious that a fair trial is not possible".

5. Section 24 of the *Charter of Human Rights and Responsibilities Act 2006* (Vic) provides that a party to a civil proceeding (or a person charged with a criminal offence) has the right to have the proceeding decided by a competent, independent and impartial court or tribunal after a fair and public hearing. In this context, it is said that fairness:[7]

…is synonymous with the principle of 'equality of arms', which holds that a party must have a reasonable opportunity to put his or her case under conditions that do not place him or her at a substantial procedural disadvantage relative to the opposing party.

6. Rule 23.01 of the Rules of Court also provide the Court with power to stay or summarily dismiss a proceeding that is "an abuse of the process of the Court".

7. In the first decision in Victoria in the Court of Appeal considering this legislation, *Connellan v Murphy*,[8] the defendant successfully sought a stay of proceedings in respect of abuse alleged to have occurred almost 50 years earlier. In coming to its conclusion, the Court reviewed a number of authorities relevant to permanent stays. I will briefly review two of them.

8. In *Jago v District Court of New South Wales & Ors*,[9] a criminal case, the appellant was arrested and charges with numerous offences as a company director. There was some

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7 *Deputy Commissioner of Taxation (Cth) v Bourke* [2018] VSC 380 at [73].

8 [2017] VSCA 116.

9 (1989) 168 CLR 23, (1989) 87 ALR 577, [1989] HCA 46.

short delay in the matter proceeding to trial and, when it did, the appellant objected on the basis that he had a right to a speedy trial, which had not occurred. The Court held that there was no specific right to a speedy trial, but, according to Mason CJ, the touchstone to staying proceedings was the ability to have a fair trial.

9. In *Batistatos v Roads and Traffic Authority of New South Wales*,[10] this time a civil case, the High Court considered a claim brought by a severely injured man in a motor accident in 1965. A claim was brought in 1994 against the Roads and Traffic Authority and the Council based on negligence in the construction, maintenance and marking, lighting and signage of the road. The defendants brought a stay application, which the trial judge refused. The Court of Appeal and High Court by majority[11] considered that the claim was an abuse of process under the Court's inherent jurisdiction and permanently stayed the claim.

10. The majority said that there are no closed categories of what may amount to an abuse of process, but lapse of time was one such factor. Relevant factors the majority took into account included:

    a. the inability to obtain police records of investigations into the incident;

    b. the inability to obtain hospital or medical records;

    c. the loss of documents relating to the design and construction of the road;

    d. the difficulty in identifying maintenance to the road;

    e. the inability to locate an insurer on risk;

    f. that the road's state had changed significantly.

11. Citing Bryson JA in the Court of Appeal, it was noted:

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10 (2006) 226 CLR 256, (2006) 227 ALR 425, [2006] HCA 27.

11 Kirby, Callinan and Heydon JJ dissenting.

To my mind the simple and overwhelmingly clear position is that no useful evidence is available upon which to conduct a trial into the question whether the plaintiff's injuries were caused by negligence of the defendants, and no further search or inquiry is in any way likely to locate any such evidence; so that a trial of the proceedings could not rise above a debate about the effect of scraps of information, and it is impossible to inform the debate with any realistically useful information

12. Having reviewed the authorities, the Court in *Connellan* noted that a defendant bears a heavy onus in establishing a stay and that the fundamental test is whether, in the circumstances, the proceeding would be manifestly unfair to the defendant or would bring the administration of justice into disrepute among right-thinking people.[12]

13. In *Connellan*, the Court of Appeal noted that the defendant and his brother, an alleged witness, were available to give evidence at trial, matters in favour of the matter proceeding to trial. However, all the circumstances needed to be considered, and important factors in that case that warranted a stay included:

    a. the defendant (and his brother was in a similar position) were being asked to remember events when he was 13, when he was now 62;

    b. the defendant's mother, a key witness, was deceased;

    c. the defendant's house had been destroyed, which was relevant to testing the evidence of where the abuse allegedly occurred.

14. In *WCB v Roman Catholic Trusts Corporation for the Diocese of Sale (No 2),*[13] Keogh J considered a stay application on the basis of alleged abuse of process. The trial judge noted that a party is entitled to a fair trial, but not a perfect one, and held that there was no abuse of process in this case, noting:

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12 At [54].

13 [2020] VSC 639, to which I will return on the issue of previous settlements.

a. there was no deficiency in the documentary records resulting in any significant prejudice to the defendant;

b. there was a substantial body of evidence relating to the relevant alleged abusers;

c. although the abuse was alleged to have occurred in 1977 to 1980, the defendant was on notice of the allegations by 1986 and at that time witnesses were alive, with one exception;

d. the defendant had not undertaken adequate investigations to identify additional potential witnesses and evidence.

15. In *Grant v Bird*,[14] Keogh J heard another application for a permanent stay. In this case, the plaintiff alleged abuse in 1980 or 1981 on one occasion when he was an altar boy. The alleged abuser died in 1985. The plaintiff first reported the abuse in 2003. The only possible witness to the abuse died in 2010. There was no evidence that the perpetrator had allegedly abused anyone else. The defendant made its application for a permanent stay weeks from trial, which the plaintiff submitted was itself an abuse of process. By agreement, the trial date was vacated and the permanent stay was heard in its stead. The plaintiff's submissions about the timing of the application were rejected on the basis that it was a fundamental requirement that the trial be conducted fairly, such that the application had to be determined on its merits. Further, the judge determined to stay the proceeding permanently.

16. One of the key arguments by the plaintiff was that the defendant was responsible for the difficulties it now faced because it did not undertake sufficient investigations following the first report of the abuse in 2003. This was rejected on the basis that the relevant files were reviewed at that time with no evidence to substantiate the allegations or require further investigations at the time.

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14 [2021] VSC 380.

Effect of the case law to date

17. The following important factors can be gleaned from the decisions to date:

    a. a defendant bears a heavy onus in establishing a permanent stay;

    b. the question is not whether the trial will be a perfect one, but a fair trial;

    c. the factors to be taken into account are many and varied and are not fixed. Whether a stay should be granted is determined on a case-by-case basis;

    d. before a permanent stay application is made, a defendant is likely going to be required to establish that it has conducted exhaustive inquiries to obtain documents and locate witnesses;

    e. the death or inability to call key witnesses may well be a significant factor the Court considers;

    f. a significant elapse in time between alleged abuse and proceedings may assist a defendant, but this without more will not assist a defendant;

    g. a lack of other complaints about an alleged perpetrator may assist a defendant;

    h. changes in the layout of premises where the abuse occurred may affect the outcome of a permanent stay application;

    i. missing documents will also be of importance, but if those documents are missing due to the inaction on the part of the defendant to investigate the allegations of abuse when those allegations first surfaced, that may assist a plaintiff. If an institution had a demonstrated history of not recording allegations or abuse or the like, this may also be relevant to an application for a permanent stay and would appear to go to a question of 'fairness';[15]

[15] In this regard, see also *The Council of Trinity Grammar School v Anderson* [2019] NSWCA 292 at [492].

j. missing medical records may be relevant, but one must bear in mind the restrictions to obtaining and disclosing medical records in this area by virtue of the confidential communications provisions in the *Evidence (Miscellaneous Provisions) Act* 1958 (Vic).

SETTING ASIDE PREVIOUS SETTLEMENT AGREEMENTS & JUDGMENTS

18. On 18 September 2019, Parliament enacted provisions, incorporated into the *Limitation of Actions Act 1958* (Vic), permitting the setting aside of judgments, dismissed proceedings by reason of the expiry of a limitation period, or settlements for claims founded on death or personal injury of a person resulting from an act or omission in relation to the person when the person was a minor that was physical abuse or sexual abuse and psychological abuse (if any) that arises out of that act or omission. The legislature requires the Court to determine whether it is "just or reasonable" to set aside the previous determination or agreement.

19. The Court of Appeal decision of *Roman Catholic Trusts Corporation for the Diocese of Sale v WCB*[16] provides practitioners with helpful guidance on the application of these provisions. In this case, the plaintiff, then aged 11, alleged "repeated abuse…of a most horrific kind", which had occurred in 1977, when he served as an altar boy. In 1996, the proceeding settled for $32,500 plus costs, when the parties entered into a Deed of Release. A term of the agreement barred the proceeding and thus the plaintiff needed to set aside the Deed to prosecute the new claim. The trial judge set aside the Deed and his Honour's decision was upheld on appeal.

20. In 1996 when the parties reached agreement, there were two significant factors standing in the way of the plaintiff's claim. One was the limitation period, which had expired.

[16] [2020] VSCA 328.

Another was that there was no viable defendant capable of being sued. The latter was the result of the so-called "Ellis defence", that an unincorporated church entity was not capable of being sued in its own right.[17] Both impediments have now been removed, the first, because of the removal of the limitation period discussed above, and the second because of the introduction of the *Legal Identity of Defendants (Organisational Child Abuse) Act 2018* (Vic).

21. The Court held that there did not need to be 'clear and compelling' reasons to set aside a settlement agreement, rejecting the defendant's submissions to that end, but rather the Court is required to make an "appropriate evaluative judgment that it is 'just and reasonable' that such an order be made", applying the words of the statute and Parliament's intention in revisiting such claims.[18]

22. In coming to its decision, the Court relied heavily on the two barriers standing in the way of the plaintiff when he settled his claim in 1996 and noted that it was both appropriate and necessary that the Court take that into account in determining whether it was 'just and reasonable' to set aside the Deed.

23. Moreover, the Court said it was axiomatic that, when determining whether it was 'just and reasonable' to set aside the Deed, it was relevant to consider whether the Deed "constituted a just and fair resolution of the claim made by the plaintiff."[19] The Court then said it was clear that, when the plaintiff entered into the Deed, it was at a "significant discount".[20] About this, the Court said:[21]

It might fairly be posited that the settlement sum would be a fraction of the damages which would have been awarded to the plaintiff. The primary judge, who has had

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17 Named after *Trustees of the Roman Catholic Church for the Archdiocese of Sydney v Ellis* [2007] NSWCA 117; (2007) 70 NSWLR 565.

18 At [98].

19 At [117].

20 At [118].

21 *Ibid*.

longstanding and significant experience in such claims, expressed the view that the settlement sum involved in the Deed was not a reasonable assessment of the plaintiff's loss and damage in 1996.

24. A principal argument of the Defendant's was that critical witnesses and documents were now missing, such that the Court should refuse to set aside the Deed given the elapse of time. However, the Court noted that these provisions focussed on whether it was 'just and reasonable' to set aside a previous Deed, not to the lapse of time since the accrual of a plaintiff's cause of action. In context, there was no particular relevant delay, because the plaintiff brought the current proceeding shortly after the law changed, enabling him to seek to set aside the previous Deed.[22] In saying that, the Court said that prejudice, and the elapse of time, may be relevant and that it is important to consider what is just and reasonable from both parties' perspectives, including:[23]

> *whether it would be just and reasonable for the defendant to lose the protection of the terms of settlement and not be exposed to a further claim on it by the plaintiff.*

25. In this case, however, the Court determined that the delay and loss of evidence were not such as to make it likely that the trial would be unfair to the defendant and hence their Honours found that the Deed should be set aside in all the circumstances.[24]

Conclusions to be drawn from the decision

26. Based on the Court's decision, the following are relevant factors when a Court weighs whether it is 'just and reasonable' to set aside a Deed (or judgment):

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22 At [122].

23 At [124].

24 *Ibid*. and the discussion under Ground 3 from [134]-154].

a. whether in a previous settlement (or judgment) the defendant had taken the *Ellis* defence or raised a limitation period defence. In some instances, before the legislative changes, institutional defendants had stopped relying on these defences;

b. how much the case settled for and how reflective was it of a settlement based on the circumstances of injury and loss;

c. whether there was any demonstrable prejudice to the defendant, such as by the loss of documents or death of witnesses;

d. how much the previous case had settled for and whether this was a reasonable settlement considered in the light of all the circumstances and subsequent legislative changes.

Off-setting an earlier settlement amount from a subsequent damages claim

27. As a general rule, a plaintiff cannot be compensated twice for the same loss and thus at first sight it makes good sense that any previous settlement amount, if a settlement deed or judgment is set aside, must be taken into account in the second claim and off-set from the damages in the later proceeding. However, section 27QE of the *Limitation of Actions Act 1985* (Vic) states that a Court "may" take a previous settlement into account in assessing the case, not "must".

28. This issue arose in *Lonergan v Trustees of The Sisters of Saint Joseph & Anor*.[25] After payment of his legal fees, the plaintiff received $28,000 from the settlement of an earlier claim. The defendant sought that that amount be offset from the settlement. The plaintiff submitted, among other things, that because there had been a breach of the terms of the confidentiality of the earlier settlement by the defendant,[26] and the previous settlement

[25] [2021] VSC 651.

[26] The settlement was disclosed by the defendant to the plaintiff's cousin.

was manifestly inadequate, there should be no setoff.[27] The Court accepted the plaintiff's submissions and the earlier settlement was not taken into account to reduce the damages awarded to the plaintiff. The Court also noted the effect of inflation on the award for past economic loss damages, being assessed at the time of the loss, and that interest was not claimable from the date of these losses, but only from issuing the proceeding, and thus the plaintiff suffered a financial disadvantage.[28]

29. In other words, it is not as clear-cut as submitting to the Court that there would be double compensation if the previous settlement amount was not taken into account. Again, it seems that each case will have to be assessed on its own facts, such as the amount of money involved and the timing of the previous settlement/judgment and the dates of any relevant losses.

Defence of self-incrimination

30. The final subject of this paper is the timing of a civil versus a criminal proceeding and how this might affect the claim of privilege against self-incrimination.

31. Section 128 of the *Evidence Act 2008* (Vic) applies to witnesses who object to giving evidence generally, or on a particular matter, on the ground that the evidence may tend to prove that the witness has committed an offence or is liable to a civil penalty. The Court may determine that the person is not required to give evidence or be given a certificate such that the evidence given cannot be used against that person in a future prosecution (save in respect of the falsity of the evidence).

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27 At [216].

28 Unlike New South Wales, for example, section 60 of the *Supreme Court Act 1986* (Vic) permits interest from the date of the issuing of proceedings. Justice Keogh noted that this did not achieve the purpose of interest to ensure that a plaintiff was put back into the position as nearly as possible as if the tort did not occur, but that his Honour was bound to apply the Act (noting that there is no right to interest at common law.

32. Two cases are important in this area, highlighting the care practitioners must take in the timing of a civil trial, where a criminal prosecution is, or may be, waiting in the wings.

33. First, in *Lucciano (a pseudonym) v The Queen*,[29] the Court of Appeal considered the effect of an accused in a criminal prosecution, having already given evidence in a civil trial with the same subject matter the year prior, and being ordered to pay the complainant a sum of $215,000 in damages for his alleged conduct. The accused's evidence in the civil trial formed part of the criminal investigation. Among other things, the Court was concerned about the complainant, having sat through the accused's evidence, using that knowledge to craft her evidence in the criminal trial. The accused's appeal on his conviction in the criminal trial was allowed.

34. Secondly, in *Villan v State of Victoria*,[30] during his evidence in his trial seeking damages, the plaintiff said that he had decided he would report the alleged abuse by "EFG" to police, having been made aware that there were no time bars in doing so. EFG was to be called by the defendant to give evidence, but objected on the basis of section 128 of the *Evidence Act 2008* (Vic). Justice Keogh noted that the witness bears the onus of satisfying the Court that it is in the interests of justice to require the evidence to be given.

35. His Honour noted that this section effected a change to the common law position, and provided a mechanism for giving a witness protection by way of a certificate. The Court accepted that the granting of a certificate was not a panacea for the concern a witness may have. For example, the learned judge cited *X7 v Australian Crime Commission*,[31] in which Hayne and Bell JJ noted:

> *Even if the answer cannot be used in any way at the trial, any admission made in the examination will hinder, even prevent, the accused from challenging at trial that aspect*

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29 [2021] VSCA 12.
30 [2021] VSC 354.
31 (2013) 248 (CLR) 92.

of the prosecution case. And what would otherwise be a wholly accusatorial process, in which the accused may choose to offer no account of events, but simply test the sufficiency of the prosecution evidence, is radically altered.

36. Concerned to preserve the criminal justice system, his Honour adjourned the plaintiff's case, noting:[32]

It is tragic that, having commenced his evidence before a jury, the plaintiff will now be denied a trial for an indefinite period. However, the integrity of the system of criminal justice must be preserved. Steps should be taken in other cases with similar circumstances to identify and resolve such issues well prior to trial.

37. While these concerns will probably mostly affect alleged perpetrators giving evidence in a civil case, it could affect other witnesses, if they might face criminal charges for failing to report abuse to authorities at the time, for example.

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1 November 2021

[32] At [30].