



## Episode 35 - Transcript

### The evolving law in relation to institutional abuse

#### Intro

The law in relation to institutional abuse is evolving rapidly. Host Julian Morrow chats with Cath Power, Partner at Wotton + Kearney about a recent High Court decision looking at whether permanent stays should be granted, and the implications for lawyers advising institutions and victims of abuse.

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**Julian:** Welcome to Risk On Air. I'm Julian Morrow and we're joined today by Cath Power, partner at Wotton + Kearney, to discuss the High Court's decision in *GLJ v the Trustees of the Roman Catholic Church for the Diocese of Lismore*, which was handed down on 1 November 2023. Cath, welcome to Risk On Air.

**Cath:** Thanks, Julian. Thanks for having me.

**Julian:** I suppose we should signal to everyone listening that discussing this case means that we will be talking about sexual abuse, and that's an inherently distressing subject, but especially so for survivors and people whose lives have been affected by abuse, and so, of course, we understand that some people might feel it's better for them not to keep listening right now. As the High Court said, there is no historical child sex abuse while there's someone alive claiming to have suffered harm from the abuse. But with that said, we do need to refer to some of the key facts in the GLJ decision, some of which go all the way back more than half a century to 1968. But another crucial event for the case was in 2016, when the NSW Parliament passed the *Limitation Amendment Child Abuse Act 2016*. Could we start, Cath, by hearing about what that Act did and its significance for the GLJ case?

**Cath:** Of course. So that was one of the first pieces of legislation to pass following the *Royal Commission into Child Sexual Abuse*. One of the recommendations of the Commission was that limitation periods for claims involving child sexual abuse be abolished, and what that Act did was effectively that. It abolished the limitation period for anyone bringing a claim which related to child sexual abuse.

**Julian:** And that had significant consequences for GLJ (a pseudonym, obviously) and meant that a claim could be brought. Could you outline the nature of GLJ's allegations, and I suppose also some of the key facts about the person accused of the sexual abuse which really came into focus in the judgment?

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**Cath:** Yeah, that's right. So GLJ alleged that she was abused by Father Anderson, who was a priest of the Diocese of Lismore. She alleged the abuse occurred when she was 14 years of age and that the abuse occurred in the context of Anderson providing pastoral care to GLJ and her family. The abuse was alleged to have occurred in 1968 and her proceedings were brought in 2020. There hadn't been any prior notice of that claim to the Diocese of Lismore.

Despite the fact that there hadn't been any prior notice of this claim, however, there had been previous claims made against Father Anderson himself. He had what appears to have been a proclivity in respect of young boys and there had been numerous claims made against him both prior to his death and after his death. A significant factor in this case was the fact that the Diocese knew, before GLJ was assaulted in 1968, that Father Anderson had been accused of doing similar acts on young boys in the past and, importantly, those allegations had come to light before the alleged abuse occurred. So there was evidence given in the proceeding that Father Anderson had actually been referred to a psychiatrist for treatment of his "problem" in 1966. So that's two years before the alleged abuse occurred. Father Anderson was then laicised in 1970, and during the course of that laicisation other allegations made against Father Anderson came to light.

**Julian:** That's a funny term, laicisation, isn't it? But it means that he was no longer a priest.

**Cath:** That's exactly right.

**Julian:** So when GLJ brought her claim, the Diocese, the church, sought a permanent stay on the grounds that a trial at this point would just necessarily be unfair. They were unsuccessful in that at the first instance, but then the Court of Appeal said there couldn't be a fair trial, and that's now been overturned by the High Court. Could you just tell us, to begin with, why did the church say that the trial would necessarily be unfair, and what did the High Court ultimately determine about that?

**Cath:** Yeah. So the Diocese's main argument was that the alleged perpetrator, Father Anderson, was deceased, so there was no available contradictor to GLJ's allegations. In addition to that, they argued that every other person who might be able to give evidence with respect to the time period had also died. So the Bishop who would have been responsible for supervising, directing, placing Father Anderson at the Diocese was deceased. The priests who had worked alongside Father Anderson were deceased. The priests who worked in the Diocese and may have been able to give evidence about what role and function a priest performed and whether this pastoral role was part of a priest's function, were also deceased. So what the Diocese argued was that every person they may be able to rely on to give evidence about the matter was gone.

**Julian:** So they're saying they couldn't get instructions and the evidence just wasn't going to be there and so they couldn't get a fair trial. But we mentioned that change in the law and that was absolutely critical to what the High Court decided. What did they decide, Cath?

**Cath:** They overturned the decision of the NSW Court of Appeal and said that this proceeding could go ahead because there was no manifest unfairness to the Diocese. The judgment is really significant for a couple of reasons, but the main being that it diverges considerably from what was a growing body of case law at the appellate level in both NSW and QLD, which set out what is or, up until this point, has been required for a court to make a decision to permanently stay a proceeding.

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The majority judgment effectively says that there's a need for justice to conform to contemporary values. This was a huge divergence from where the case law was at up until this point. Just drilling down a little bit further on that, the majority referred to what they termed a new world in which we're now operating. That was, a world post the *Royal Commission into Child Sexual Abuse* and post the removal of limitation periods for child sexual abuse claims. So, what they said is, in this new world, parliament had imposed its own normative requirements on proceedings which Judges must respect.

Some of their key findings were based on this concept of a new world, a new world in which the limitation period for child sexual abuse claims had been abolished, and what they said is that there's been a fundamental change to the legal context in which the power to order a permanent stay is exercised.

They found that the mere passing of time is no longer a potential consideration relevant to the exercise of that power. The passing of time is simply of no consequence anymore. This means that the inevitable fading of memories and loss of evidence are, in this new world, routine and unexceptional outcomes of the harm caused by the alleged act. It also means that the inevitable impoverishment of evidence which occurs with the passing of time can no longer be characterised as an exceptional circumstance sufficient to warrant a permanent stay of proceedings. They said that in deciding a permanent stay application, there needs to be a qualitative and not a quantitative assessment undertaken in the context of S6A, which is, of course, the section that removes the limitation period for these claims.

**Julian:** And that really is a big change and, as you say, some of the language is really striking. The majority describes it as a radically new context and, as you've said, that has huge implications in terms of factors that previously would have been really significant: the passage of time, the loss or dilution of evidence. Are those matters now entirely irrelevant?

**Cath:** I don't think so. Every case, and this is a classic sound bite for lawyers, every case turns on its facts.

**Julian:** ...stop the press!

**Cath:** I think the facts as we've gone through in this case are fairly unique. Certainly, in the area of historic child sexual abuse claims, the set of circumstances faced by the Diocese of Lismore were not normal. What we would generally see in a historic child sexual abuse claim is no records, zero records, a deceased perpetrator who, prior to their death, had no allegations of abuse made against them and, generally speaking, 20, 30, 40 years after their death, allegations start to appear. So, while this judgement is very significant in that the High Court has made it clear that the passing of time itself is of no consequence, there still will be cases, I am confident, where a defendant is unable to get a fair trial based on more than just the passing of time.

**Julian:** And Cath, it's interesting as well that the court has made very clear what the nature of the decision involved is when you're granting a permanent stay, because it's sometimes been thought of as a discretion, but the High Court said that's not the case, haven't they?

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- Cath:** That's exactly right. It isn't a discretion. There are factors which can stack up and enable a court to come to a decision based on a collection of facts, a collection of circumstances and the relative positions of the party to respond based on that collection of facts and circumstances.
- Julian:** And significantly that changes the test that applies on appeal if you're appealing against the decision for a grant of a permanent stay or otherwise.
- Cath:** That's correct, and the High Court goes into quite some detail about the fact that this isn't a *House v King* situation. It's not a discretionary decision that the court needs to make. It is one based on very objective measurable facts.
- Julian:** So, Cath, what implications does the *GLJ* decision have for practitioners who might be asked to advise about applying for a permanent stay in the context of a child abuse damages claim?
- Cath:** Significant implications, I would think. First and foremost, this is a decision that all practitioners who are practising in this area absolutely must know about and must be familiar with. It is important for all practitioners in this area to understand that now the death of an alleged perpetrator will not of itself amount to an exceptional circumstance sufficient to warrant a stay being granted. It's important for practitioners to realise that the lack of or the impoverishment of evidence cannot be characterised any longer as an exceptional circumstance by itself and that the mere passing of time is of no consequence. So, solicitors acting for institutions now face an even heavier burden than previously in establishing that the facts of a case make it exceptional in terms of the oppression that their client faces in defending a claim. Practitioners will need to understand that any permanent stay application in this new world is going to be very risky and it's going to be very uncertain. But, as I mentioned before, every case remains very fact specific, and I think it's important for solicitors acting for plaintiffs to realise that the potential for a stay application to be made and granted is not a moot point now, based on this decision. Those solicitors need to be closely considering the dissenting judgements which highlight the fact specific nature of the majority's decision here, and defendants' solicitors, those acting for institutions, obviously need to understand that great caution has to be exercised in advising their clients on the merits of a permanent stay application, but that all is not lost, I suppose, as a result of the *GLJ* decision. Defendants' solicitors should also obviously be advising and encouraging their clients to undertake early investigations as soon as a claim is first notified, with a view to securing any available evidence as soon as possible. I think another thing that lawyers practising in this space need to realise is that a plaintiff is still required to prove their case on the balance of probabilities. So just because there is only one available witness, it doesn't mean that a court is bound to accept the uncontradicted evidence of that witness. And a court still must of course exercise caution in drawing inferences or conclusions from the only evidence that it has at hand.
- Julian:** And, as you've foreshadowed, when we were talking about 'the court' before, we were talking about the majority judgment which held the day. But there are those two separate dissents from Justice Steward and Justice Gleeson. Is there anything in those dissents that you'd particularly highlight?

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- Cath:** Well, I think the fact that Justice Steward's dissent was so forceful is interesting. He uses some pretty strong language when talking about the majority decision, for example, saying that that decision itself risks weakening the fundamental principle of our common law. What he says is that why the law should be distorted for these types of cases wasn't persuasively explained by either the appellant's solicitors or the majority decision in this matter, and that the dilution of standard which this case brings with it is unsupported by authority or principles.
- And what he says is that it actually sanctions trials which are unfair. He was obviously completely against the principle of a greater tolerance for imperfection, which the majority decision expounded, and he says that in circumstances where we have the Royal Commission's findings expressly emphasising that the power to prevent unfair trials should not be limited, we then have S6A, which is the section that removes the limitation period, which has a very obvious note in the same section that says S6A does not limit a court's power to permanently stay proceedings where the lapse of time has a burdensome effect on the defendant that is so serious a fair trial is not possible. And what he says is that in light of those two things, there is no support for this new world which the majority talks about, which tolerates this impoverishment of evidence. So pretty forceful judgement.
- Julian:** Yeah, it certainly is. There's a quote from Arthur Miller's *The Crucible* thrown in and Justice Steward says that a plea for justice to conform to 'contemporary values' is, with the utmost respect, he says it's dangerous. To be fair to the majority, they don't just cite this principle, they do actually go through the evidence on the particular facts of this case, which is why they say it is possible for a fair trial to occur. But it is a noticeably strong dissent, if nothing else.
- Cath:** Yeah, you're right. To be fair, the majority do go through and outline some pretty forceful evidence that they had to hand in deciding this case and decided that the trial when it proceeded would not be unfair because Anderson himself was not a defendant. There was evidence available that if these allegations had been put to him, he would have denied them, and there was evidence that the Diocese, during the laicisation process, had the opportunity to investigate and did not, and that the Diocese had settled other claims against Anderson. So, they did have a good body of material to rely on. The dissent was forceful and within a couple of weeks of this decision being handed down, the High Court actually allowed a special leave application in another case involving a permanent stay application. That is a matter of *Willmot v The State of Queensland*. Interestingly, in that case one of the two deliberating judges was Justice Steward, so understanding his reasoning in allowing that special leave application to proceed would be interesting to know. It would be interesting to see the outcome of that hearing.
- Julian:** Yes, so *Willmot v The State of Queensland*, and that's not even the only case in the High Court's pipeline. So, it's fair to say that this area of permanent stays and vicarious liability for institutions is very much up for grabs.
- Cath:** That's right, and I think one of the most important messages for lawyers practicing in this area is that it is an area of law that is constantly evolving. Every practitioner in this space needs to absolutely stay on top of the case law. They need to know about *Willmot*. They need to know you've alluded to it about the matter of *DP v Bird*, which concerns vicarious liability and specifically whether a Diocese can be vicariously liable for a priest who is not an employee of the Diocese. So it is vitally important for lawyers in this area to understand what's going on in this space. It's a moving feast.

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**Julian:** And while obviously the context of these cases is “historical sex abuse claims”, the principles about permanent stays and vicarious liability are more general than that.

**Cath:** That’s exactly right. The matter of *DP v Bird* in particular will have far reaching implications. So the court is not going to be confined to looking at particularly a priest in a Diocese, but what positions that don’t constitute employment roles could be found to be akin to an employment role.

**Julian:** Cath Power thanks so much for speaking with us on Risk on Air.

**Cath:** Thanks so much for having me.

**Julian:** Cath is a partner at Wotton + Kearney and the decision of the High Court we’ve been discussing is *GLJ v Trustees of the Roman Catholic Church for the Diocese of Lismore*.

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**Outro**

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