

Abuse survivor takes case to the High Court after NSW Court of Appeal orders a permanent stay

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As many survivors of child sexual abuse will be aware, institutions responsible for perpetrating that abuse are trying to escape the need to provide justice through compensation to those survivors. One way they are doing this is by asking the Court to effectively 'throw out' a survivor's legitimate claim. But one survivor (known by the pseudonym 'GLJ') decided enough was enough and last week, took her case against the Catholic Church ("the Church") to the High Court of Australia.

Institutions increasingly applying for stay of proceedings

Institutions are increasingly applying for a "permanent stay" or "stay of proceedings" (sometimes also just referred to as a "stay"). They do this on the basis that they say they can't have a 'fair' trial. Generally, this argument is raised where the perpetrator of the abuse is no longer alive or able to be questioned about the allegations.

If a court grants this to the institution for that particular matter, then that claim cannot be continued, and the survivor is no longer entitled to common law damages. Unfortunately for survivors of child sexual abuse, the courts seem to be listening to these institutions and granting these permanent stays meaning many survivors' abuse compensation claims are being lost forever.

Our team of expert personal injury compensation and abuse lawyers considered each side's arguments in the High Court case of *GLJ v The Trustees of the Roman Catholic Church of the Diocese of Lismore* (held in early July 2023 and decision pending), to provide their specialist insight into what GLJ's chances of success might be.

What is so special about taking a case to the High Court?

As background, The High Court (as the name suggests) is the highest court in Australia (it's the Court featured in the iconic Australian film, 'The Castle'). It has the final say when it comes to many legal issues (criminal and civil).

It is not possible to go directly to the High Court with this question, so GLJ has had to go through two other courts to get to this point. Before going to the High Court, GLJ's case, and whether it should be permanently stayed, had been considered in two lower courts in NSW.

The overview of the decisions made by those courts in relation to the permanent stay of this abuse compensation case is below:

Supreme Court of NSW: the court did not allow the permanent stay and said that GLJ's case could continue;

Court of Appeal of NSW: court overturned the Supreme Court decision and allowed the permanent stay saying GLJ could not pursue her claim for compensation; and

The High Court of Australia has not yet made its decision to accept GLJ's request to overturn the decision of the Court of Appeal of NSW so that she can proceed with her claim for compensation.

Why was a permanent stay ordered in GLJ's abuse compensation case?

In a nutshell, the Church convinced the NSW Court of Appeal that because the alleged perpetrator, Father Anderson, was dead (he died in 1996), it was not possible for them to be able to properly defend GLJ's case against them and that this would be 'unfair'.

It is important to remember that the High Court is only considering the permanent stay order which the Church applied for. The High Court is not considering GLJ's actual abuse compensation claim or deciding whether GLJ is entitled to compensation or how much compensation would be appropriate.

Abuse survivor's submissions to the High Court

GLJ's lawyer, Mr Hertzveld, stated that he considered there were 'errors' made by the Court of Appeal when it granted the Church a permanent stay, including that the Court of Appeal incorrectly "focus[ed] on the lack of opportunity of the [the Church] to confront F. Anderson with the detail of [GLJ's] allegations, obtain instructions and call him as a witness".

He referred to various materials including:

A previous High Court case called *Walton v Gardiner* in which the court said, *"an unacceptable… unfairness... was necessary… for there to be a conclusion that there would be an unfair trial"*.

The legislative reform to remove the limitation periods (the time limits that abuse survivors have to make a claim for compensation) for matters of this kind stating:

> *"The legislative reforms… and the circumstances which prompted them are highly relevant in calibrating the application of [the Court's power to permanently stay a proceeding]. The passage of time will inevitably impoverish the evidentiary record, often including the death of the alleged perpetrator. The acts of abuse, of their nature, will often have taken place in private with no other witnesses. They are not unusual features of cases such as this. They are typical".*

This is, of course, only a small snippet of what was raised by Mr Herzfeld. But it goes to the essence of what GLJ raised initially for the Court to consider.

The Church's submissions to the High Court

On behalf of the Church, Mr Walker (senior barrister) strongly emphasised the Church's *"inability to obtain instructions"* (due to the death of Anderson). He submitted that to have a fair trial, the defendant must *"be in a position to be able to know what [they] can say in [their] defence".*

At one point during Mr Walker's submissions, one of the five judges who was hearing the case, Justice Gageler, raised the distinctions between this case and the case of the nominal defendant (the defendant who stands in the shoes of the dead or unidentified driver during a CTP claim after a motor vehicle accident).

Mr Walker said that the nominal defendant was, in fact, the exception that proves the rule as it shows that parliament considered that the insured persons in that position should not be deprived of being able to make a claim for compensation.

Still considering this analogy, another judge, Justice Steward noted *"in cases of the nominal defendant it is normally fairly clear that something has happened… Whereas one of the issues you face is you don't know whether that is alleged happened or not."*

Mr Walker agreed with His Honour's observation in this regard. Justice Steward also made reference to language from a previous High Court decision, observing that the defence was "utterly in the dark".

We consider this is essentially the crux of what the Church was wanting the High Court to accept. In other words, that because Father Anderson was dead and the Church could not discuss the allegations with him, the Church was *"utterly in the dark"* about the case it was being asked to defend.

Another judge, Justice Jagot, had further questions about the position the Church took that it was *"utterly in the dark"*, noting that there were five (5) formal complaints regarding Father Anderson's sexual proclivities made in the late 60' and early 70s.

She said:

> *"it seems plain that just because you have five… complaints, that is not going to be all of them, but it's very likely that this person has been otherwise perpetrating these kinds of criminal behaviours on children… I am just not following why there would not have been*

> *adequate opportunity to [investigate]… if you wanted to know?"*

She seemed later to again highlight that there seemed to be notice to cause the Church to investigate allegations of the kind made by GLJ prior to Father Anderson's death.

Mr Walker drew a distinction, though, between a response to other allegations of the kind and a response to the specific allegation made by GLJ (which was not ever put to Father Anderson). He said, *"we will never be able to make the forensic decision, whether to call this person, notwithstanding he refuses to be conferenced, for example".*

GLJ's response to the Church's submissions

GLJ's lawyers were then able to make some further submissions in response.

Picking up on something that Justice Jagot had raised, Mr Hertzveld highlighted the other allegations that had been put to Mr Anderson in 1971 and that the Church could have investigated those allegations then or reported it to the police to allow them to investigate the allegations. Mr Hertzveld observed that where there *"is an evidentiary gap to which the defendant has contributed, it can hardly be said by that defendant that being exposed to that evidentiary gap is unfair."*

He then observed that the Church seemed to accept that the real forensic disadvantage is the inability to put the particular complaint related to the abuse compensation claim by GLJ to Father Anderson and call him as a witness.

Mr Herzfeld then suggested this was not different to many other defendants, providing the example of a person who claims against an insurance policy for damage to their property which had no other witnesses. He observed that if the insurer denied the claim and was sued, they could not possibly say *"I cannot have a fair trial because there is no other witness".*

Picking up on the phrase referenced earlier by both the Church and Justice Stewart, Mr Hertzveld highlighted that in that situation the insurer was also *"utterly and entirely in the dark"*, except that isn't truly the case *"because it can investigate and potentially test in other ways what occurred."*

Justice Steward responded to observe that this was *"[m]uch like the cows that get struck by lightning."*

Mr Herzfeld noted that there is *"no difference in principle"* between these insurance situations and *"the unfairness which the Respondent here points to"* and that those scenarios *"provide the same forensic disadvantage that the respondent suffers under here."*

"… defendants conduct litigation every day - they do their best with the material that is available."

He concluded by observing what we considered to be a very strong point:

> *"[What is said by the Respondents] rather reveals the confected bewilderment at the heart of the respondent's case. I say it's 'confected' because its ability to make decisions about*

> *cases of this kind is evidence[d] by its own response to the Professional Standards Office complaints [in 1971].'*

So, what happens now?

After hearing submissions from both sides, the High Court 'adjourned' and will now consider the arguments and make a decision. Typically, the High Court takes some months to properly consider the arguments of each side and the legal principles that need to be applied. This is especially true in cases involving child sexual abuse, where the legal issues can be quite complex.

In our opinion, the abuse survivor in this case has raised some very important and legally legitimate matters for the High Court to consider and it is now a matter of waiting to see whether the High Court agrees. Time, as they say, will tell.

Get help from an abuse compensation lawyer

Abuse compensation claims are often highly complicated. There are generally two compensation options available for survivors to pursue:

1. Child sexual abuse compensation – National Redress Scheme
2. Common law claims due to child sexual abuse

Each of these options can come with complexities. Survivors should also be aware that the compensation payable under the Redress Scheme is generally far less than that available under a common law claim.

It's crucial that survivors of child sexual abuse obtain legal advice before pursuing any claim and definitely before agreeing to accept any offer to settle their claim.

This article is of a general nature and should not be relied upon as legal advice. If you require further information, advice or assistance for your specific circumstances, please contact us.