SUPREME COURT OF QUEENSLAND

CITATION:	*Chalmers v Leslie & Anor* [2020] QSC 343
PARTIES:	**TIMOTHY BRUCE CHALMERS** (plaintiff) **v** **HAMILTON WILLIAM NATION LESLIE** (first defendant) **HELEN FRANCES CHALMERS** (second defendant)
FILE NO:	BS No 5039 of 2020
DIVISION:	Trial Division
PROCEEDING:	Application
ORIGINATING COURT:	Supreme Court at Brisbane
DELIVERED ON:	20 November 2020
DELIVERED AT:	Brisbane
HEARING DATE:	2 November 2020
JUDGE:	Martin J
ORDER:	**1. Pursuant to r 16(g) of the *Uniform Civil Procedure Rules* 1999 (Qld), the proceeding is permanently stayed.** **2. The plaintiff pay the defendants' costs of the application.**
CATCHWORDS:	PROCEDURE – STATE AND TERRITORY COURTS: JURISDICTION, POWERS AND GENERALLY – INHERENT AND GENERAL STATUTORY POWERS – TO STAY OR DISMISS ORDERS OR PROCEEDINGS GENERALLY – where the first defendant is the plaintiff's maternal grandfather – where the second defendant is the plaintiff's mother and the second defendant's daughter – where the plaintiff claims damages for personal injuries as a result of intentional unlawful sexual assaults committed upon him by the first defendant – where the first defendant has severe dementia – where the first defendant is incapable of providing instructions or giving evidence – where the defendants apply for a permanent stay on the grounds that a fair trial of the proceeding is not possible – whether the proceeding should be permanently stayed *Limitation of Actions Act* 1974 *Moubarak by his Tutor Coorey v Holt* (2019) 100 NSWLR 218, applied

R v Presser [1958] VR 45, applied
Williams v Spautz (1992) 174 CLR 509, cited

COUNSEL: BF Charrington for the applicant/defendants
SD Anderson for the respondent/plaintiff

SOLICITORS: Creevey Russell Lawyers for the applicant/defendants
Restore Legal for the respondent/plaintiff

[1] The defendants seek an order that these proceedings be stayed because a fair trial of the proceeding is not possible.

The parties

[2] The plaintiff was born in 1990.

[3] The first defendant was born in 1926 and is the maternal grandfather of the plaintiff.

[4] The second defendant is the daughter of the first defendant and mother of the plaintiff.

The claim

[5] The plaintiff seeks damages for personal injuries for consequential loss as a result of intentional unlawful sexual assaults committed upon him by the first defendant.

[6] The plaintiff seeks damages against the second defendant on the basis that she owed him a duty of care at all material times to avoid him suffering harm, and in particular, harm in the form of psychiatric injury arising from physical and sexual abuse.

[7] The plaintiff alleges that over a period of time commencing in 1995, the second defendant caused the plaintiff to be placed in the sole care of the first defendant for extended periods of time. During those times, the plaintiff alleges that the first defendant sexually abused him.

[8] The plaintiff alleges that the second defendant knew, or ought to have known, that the first defendant had sexually abused other young boys and that, with this knowledge, placed the plaintiff in the first defendant's care. It is also alleged that the second defendant knew, or ought reasonably to have known, that the first defendant was sexually abusing the plaintiff.

[9] The plaintiff alleges that as a result of the conduct of the first defendant he has suffered a psychiatric injury and claims damages in the order of $1.5 million.

***Limitation of Actions Act* 1974**

[10] The *Limitation of Actions Act* 1974 was amended in 2016 in a number of respects. Relevantly for the purposes of this application, the limitation periods for child abuse actions were removed with retrospective effect. Thus, there is no impediment to the action that has been brought by the plaintiff purely on the basis of the time since the alleged acts took place.

[11] The amendments to the *Limitation of Actions Act* preserved the power of the court to dismiss or stay proceedings. Section 11A(5) of the Act provides:

> "This section does not limit—
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> (a) any inherent, implied or statutory jurisdiction of a court; or
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> (b) any other powers of a court under the common law or any other Act (including a Commonwealth Act), rule of court or practice direction.
>
> *Example—*
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> This section does not limit a court's power to summarily dismiss or permanently stay proceedings if the lapse of time has a burdensome effect on the defendant that is so serious that a fair trial is not possible."

The condition of the first defendant

[12] The first defendant has a Litigation Guardian and, through him, has filed a defence. In that pleading he alleges that he is unable, by reason of severe dementia, to provide instructions in relation to the claim or to give evidence about the allegations or to give instructions during any trial.

[13] The plaintiff admits that the first defendant is unable, by reason of his severe dementia, to provide instructions in relation to the claim.

[14] The first defendant began displaying symptoms in 2009 which can now be seen as being consistent with the onset of dementia. He was admitted to an aged care facility in 2013 and was assessed as having moderate cognitive impairment in December 2015. At that time he was engaging in socially inappropriate behaviour and would, for example, refuse to change into his night attire because he wanted his wife to assist him. His wife had died in 1997.

[15] In June 2019, Dr Hunter, a staff physician at Redcliffe Hospital, diagnosed the first defendant as suffering from, among other things, severe dementia. He observed:

- "On examination, he had significant deficits mainly in short-term memory, as well as really no orientation in time. He scored only 18/30 on MMSE".[1]
- "It is clear he lacks capacity in all decision making".

[16] In December 2019, the first defendant was assessed by Dr Yelland, a geriatrician, who concluded that the first defendant had severe dementia and needed assistance in all activities of daily living. She said that he was not physically strong enough to tolerate any prolonged period of questioning, and his cognitive impairment meant that he was not able to accurately or reliably answer any questions, and would be quite suggestable if he was asked to give simple yes or no answers to questions.

[17] Dr Yelland's observations included:

- That the first defendant thought he was 65 years old – he was 93 at the time.

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1 Mini Mental State Examination.

- He recalled a son and daughter and four grandchildren but could only name one.
- He recalled being a teacher but thought he had begun teaching in 1937 – when he would have been nine years old.
- He recalled living at Sandgate but did not respond when asked about Ascot which was another area in which he had lived.
- He thought he had been in the nursing home for a year – he had been there for six years.
- He answered questions very slowly and tired during the half hour interview.

[18] Dr Yelland also said that dementia is a degenerative condition and there is no prospect of him improving.

[19] In an assessment carried out in February this year, a PAS-CIS Cognitive Skill Assessment could not be undertaken "due to severe cognitive impairment". The assessment found that with respect to his memory "only fragments of past events remain".

[20] The material is consistent. The first defendant began to suffer from dementia in at least 2009. Consistently with that condition he has deteriorated over time. His memory is so damaged as to be completely unreliable. He is unfit to provide instructions. He is unfit to give evidence or be cross-examined. He is unfit to participate in a trial.

What principles should be applied?

[21] The power of a court to control its proceedings and to stay those which constitute an abuse of process is well-known.[2]

[22] In *Moubarak by his Tutor Coorey v Holt*,[3] the New South Wales Court of Appeal dealt with a broadly similar set of circumstances. In that case a woman had commenced proceedings in the District Court against her uncle for damages alleging that he had sexually assaulted her on four occasions when she was 12 years old. The proceedings were commenced 40 years after the assaults were alleged to have occurred. By that time, the defendant had severe dementia and was incapable of giving evidence or instructions to counsel. An application to permanently stay the proceedings, on the basis that the defendant could not receive a fair trial because of his condition, was dismissed. On appeal, the Court of Appeal considered the circumstances that can give rise to an order staying proceedings in circumstances similar to these. Bell P (with whom Leeming JA and Emmett AJA agreed) said that one circumstance in which a permanent stay will be appropriate is where it is demonstrated, on the balance of probabilities, that it will not be possible to obtain a fair trial. His Honour observed that:

> "[89] In the context of discussing the possibility or otherwise of a fair trial, it should be noted that a fair trial is not synonymous with a perfect trial. … although an accused may have

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2 *Williams v Spautz* (1992) 174 CLR 509.
3 (2019) 100 NSWLR 218.

> conducted his or her defence in a better way had suitable medical treatment or medication be provided, or had the accused had greater intelligence or acuity of mind, this did not carry the consequence that a trial would not be fair. So, too, the absence of a witness or witnesses who may be regarded by a party as important, whether through death, illness, loss of memory or inaccessibility … will not mean that a fair trial cannot be obtained."

[23] Bell P engaged in a detailed consideration of the relevant authorities and noted that claims for civil liability for damages for sexual assault – questions of the standard of proof apart – bear a strong affinity with a criminal charge of sexual assault. He said:

> "[108] … If the defendant was not fit to face criminal charges in respect of the plaintiff's complaint to police because 'the minimum requirements for a fair trial' … would not be present, it would, in my opinion, offend commonsense simultaneously to maintain that the defendant could secure a fair civil trial in relation to identical factual allegations."

[24] This was said in the context of consideration of the well-known decision of Smith J in *R v Presser*,[4] where the issue of whether the accused, because of a mental defect, failed to come up to certain minimum standards so that he could be tried without unfairness or injustice to him. Smith J said:

> "He needs to be able to plead to the charge and to exercise his right of challenge. He needs to understand generally the nature of the proceeding, namely, that it is an inquiry as to whether he did what he is charged with. He needs to be able to follow the course of the proceedings so as to understand what is going on in court in a general sense, though he need not, of course, understand the purpose of all the various court formalities. He needs to be able to understand, I think, the substantial effect of any evidence that may be given against him; and he needs to be able to make his defence or answer to the charge. Where he has counsel he needs to be able to do this through his counsel by giving any necessary instructions and by letting his counsel know what his version of the facts is and, if necessary, telling the court what it is. He need not, of course, be conversant with court procedure and he need not have the mental capacity to make an able defence; but he must, I think, have sufficient capacity to be able to decide what defence he will rely upon and to make his defence and his version of the facts known to the court and to his counsel, if any."[5]

Application of the principles to this case

[25] It is not surprising that many of the features which were considered in *Moubarak* are present in this case. Dementia does not distinguish among its victims. As the disease progresses the symptoms become more acute. In *Moubarak*, Bell P found that there were a number of prominent features which justified granting a permanent

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4 [1958] VR 45.

5 *R v Presser* [1958] VR 45 at 48.

stay of the proceedings. Many of them are present in this case also. I will refer to them, not because findings of fact in another case can bind this court, but because the application of the principles to similar facts provides guidance. In *Moubarak*, as well as in this case, the following features are present:

(a) At no time prior to the onset of his dementia was the first defendant ever confronted by the plaintiff with the allegations of sexual assault. As a result, there is no record of his response to them.

(b) The first defendant had advanced dementia before any proceedings, including any pre-trial proceedings, were taken.

(c) There was no complaint made to the police and so there is no police statement which might have been obtained had a complaint been made at an earlier time.

(d) The first defendant had advanced dementia at the time of the commencement of these proceedings.

(e) There is no reliable evidence of any persons who could give direct evidence of the alleged assaults. There are some vague suggestions in the material about people who might know something but it goes no further than that order of generality.

(f) It is agreed by the plaintiff that the first defendant is unable to give instructions as to the allegations for the purposes of the defence.

(g) It is agreed that, because of his mental condition, the first defendant would be unable to give evidence in the proceedings.

(h) It is agreed that, because of his mental condition, the first defendant would be unable to give instructions during the course of any trial.

(i) There is no suggestion that there is any documentary evidence which might be able to be used with respect to the likelihood or otherwise of the alleged assaults having taken place.

[26] In *Moubarak*, Leeming JA summarised his reasons for agreeing to the granting of a permanent stay in the following terms:

> "[188] I regard this is a clear case for the exercise of the discretion expressly preserved by section 6A(6)[6] to order a stay. A fair adjudication of the serious allegations made against Mr Moubarak is not possible. So far as the evidence discloses, Mr Moubarak was never confronted with the detail of those allegations while of sound mind. He cannot admit or not admit or deny them. He cannot give testimonial evidence. He cannot give instructions as to the conduct of his defence. *Batistatos* is significant because in circumstances where (a) there was no suggestion of any personal fault on the part of Mr Batistatos in his 29-year delay prior to the expiry of a 30-year limitation period, and (b) it was accepted that his claim was not so

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6 The equivalent provision of s 6A(6) of the *Limitation Act* 1969 (NSW) is s 11A(5) of the *Limitation of Actions Act* 1974 (Qld).

> tenuous that it should be struck out, a permanent stay was ordered."

[27] Emmett AJA said:

> "[205] It is clear that, having regard to his mental condition, the appellant would not have a fair trial, insofar as he is incapable of giving evidence and giving instructions to Tutor and his legal representatives."

The plaintiff's argument against the stay

[28] In the plaintiff's written submissions it is put that the first defendant "had motive and opportunity to sexually abuse" the plaintiff when he was a child. The reference to "motive" was altered during argument and the plaintiff contended that the first defendant's history was able to be used as evidence of tendency.

[29] The first defendant pleaded guilty in 2003 to three charges of indecent assault. These offences had occurred while he was a teacher at a school in Brisbane. The sentencing judge, Botting DCJ, said:

> "It seems to me that the matters that make these offences particularly serious beyond the actual conduct engaged in are two-fold in this case. The first, the significant age difference that existed between you and the complainants and, secondly, the relative positions that you held, you being a school master, and the complainants, pupils."

[30] These offences were committed when the first defendant was 34 years old. He was dealt with in respect of them when he was 77 years old. He was sentenced, in respect of each count, to a term of imprisonment of 12 months with each sentence being wholly suspended for a period of two years.

[31] Similar fact evidence is admissible in civil proceedings. But where, as here, the circumstances of the first defendant have rendered a trial impossible of being conducted fairly, the admission of evidence about which the first defendant can give no instructions, would only render the trial more unfair.

[32] It was also suggested that this was a case where the plaintiff's evidence could be tested in cross-examination. It might be the case that there is no challenge, on the pleadings, to the locations and times at which the plaintiff says he was abused by the first defendant. But that is consistent with the evidence that the first defendant is incapable of giving instructions. Nothing of any moment could be put to the plaintiff about the allegations because the first defendant cannot give any instructions.

[33] It was suggested that some of these issues could be explored with the second defendant at a trial of this matter. There are at least two problems with that. First, without a finding that the first defendant abused the plaintiff in the way alleged, there can be no finding of liability on the part of the second defendant. Secondly, it is not suggested that the second defendant could give any direct evidence about the alleged abuse. An unfair trial cannot be made fair on the basis that something might emerge from cross-examination of another party. The first defendant is just as

incapable of giving instructions with respect to that kind of evidence as any other evidence.

Conclusion

[34] The first defendant's medical condition would render a trial of this action so unfair to him as to require that the action be stayed.

[35] I will make an order in the terms sought. The plaintiff should pay the defendants' costs of the application.