

## Case Note: *Grant v Bird* [2021] VSC 380

6 October 2021

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A full copy of the case can be accessed [here](#).

### Background

Judge	Keogh J
Held	In the Supreme Court of Victoria at Melbourne, Common Law Division, Institutional Liability List
Date of Hearing	1 March 2021
Date of Judgment	29 June 2021
Plaintiff	Darren Grant
Defendant	Bishop Paul Bird
Considered	Limitation of Actions Act 1958 (Vic), s 27R — <i>Connellan v Murphy</i> [2017] VSCA 116 — <i>Longman v The Queen</i> (1989) 168 CLR 79 — <i>Brisbane South Regional Health Authority v Taylor</i> (1996) 186 CLR 541 — Civil Procedure Act 2010 (Vic)

### Background

The Plaintiff alleged that on one occasion in 1980 or 1981, when he was aged about eight or nine years old, he was sexually abused by Catholic priest Father Daniel O’Brien after a mass performed by Father O’Brien. The Plaintiff alleged that he was an altar boy on this occasion.

In a medico-legal report from psychiatrist Dr. Adlard, it was recorded that the Plaintiff remembered the abuse while he was engaging in *transcendental meditation*. The Plaintiff said that he *physically felt muscular convulsions around his abdomen and chest, and then he saw a “white light” coming up from his stomach/chest. He said he then he had a clear vision* of the abuse...

The Plaintiff claimed that there was negligence by the Diocese, which was a cause of the abuse and resulting injuries suffered by him, and that the Diocese was vicariously liable for the act of sexual

abuse perpetrated by Father O'Brien. Bishop Paul Bird was named as the appropriate defendant pursuant to the *Legal Identity of Defendants (Organisational Child Abuse) Act 2018 (VIC)*.

Father O'Brien died in 1985 and the Mr. Grant first reported the abuse in 2003. The only person identified by Mr. Grant as a possible witness to the abuse died in 2010. There was no evidence of Father O'Brien abusing other children.

The Defendant applied to have the proceedings permanently stayed on the on the ground that it is an abuse of process due to the lapse of time since the alleged events had occurred, and the death of crucial witnesses, meant that a fair trial was not possible.

## Held

The Court found that, having regard to the effect on the quality of justice and the reliability of memory of the lapse of time since the alleged abuse occurred, the death of O'Brien before he was confronted by the allegation of abuse, the death of the only potential witness Mr Powell, the vagueness of the date on which the abuse was alleged to have occurred and the absence of evidence of surrounding circumstances against which the allegation could be tested, that it was manifestly and unjustifiably unfair to require the defendant to meet the case brought against him.

Mr Bird's application for a permanent stay of the proceedings was therefore granted.

## Ratio

[50] The plaintiff first reported the alleged abuse more than 20 years after he said it occurred. Because decades had already passed the defendant could not investigate the alleged abuse and surrounding circumstances at a time when memories were fresher and could be expected to be more reliable. That difficulty is compounded by the vagueness of the plaintiff's allegation that the abuse occurred in about 1980 or 1981. The combination of delay and the uncertain timing mean there is no opportunity for the defendant to explore the surrounding circumstances of the alleged abuse and determine whether those circumstances contradict or corroborate the plaintiff's allegation.

[50] The plaintiff may have an honest recollection of the alleged abuse. However, as the judgment of McHugh J in *Longman* demonstrates, that honest recollection may not be reliable. There are three reasons for this. First is the lapse of time between the alleged abuse and the plaintiff's recall of the event in 2001, and the further lapse of time until trial. Second, the plaintiff's recollection of an event which occurred when he was a child may be particularly susceptible to error. Third is the plaintiff's recall of the alleged abuse during transcendental meditation after having no specific thoughts of it for about 20 years.

[54] Because it cannot now know what Father O'Brien or Mr Powell would say in response to the allegation of abuse, or test the allegation by timely investigation of surrounding circumstances, the defendant cannot effectively defend the case brought by the plaintiff. The most the defendant can hope to achieve is to challenge the plaintiff's account because he did not report the abuse for over two decades, only recalled it during transcendental meditation, and has given histories which the defendant argues are materially inconsistent. The defendant has no real opportunity to participate in the hearing by contesting the allegation of abuse, or admitting it on an informed basis.

[55] Prejudice to the defendant extends beyond the issue of whether the abuse occurred. The defendant will also face difficulties, because of the lapse of time, investigating and contesting at trial

the allegations of breach of duty, the claim based on vicarious liability, causation of the plaintiff's mental health conditions, and assessment of damages.