

IN THE SUPREME COURT OF VICTORIA
AT MELBOURNE
COMMON LAW DIVISION
INSTITUTIONAL LIABILITY LIST

S ECI 2019 02580

BETWEEN:

DANIEL MULQUINEY

Plaintiff

and

VINCENT REYNOLDS

First Defendant

and

STATE OF VICTORIA

Second Defendant

JUDGE:

Macaulay J

WHERE HELD:

Melbourne

DATE OF HEARING:

16 March 2020

DATE OF RULING:

16 March 2020

CASE MAY BE CITED AS:

Mulquiney v Reynolds & Anor (Ruling No 1)

MEDIUM NEUTRAL CITATION:

[2020] VSC 119

CIVIL PROCEDURE – Mode of trial – Where trial fixed for trial by jury – Where Court has suspended all new jury trials until further notice due to COVID-19 pandemic – Whether to dispense with jury and proceed as a cause or adjourn hearing for later jury trial – Where plaintiff had been granted an expedited hearing – Rule 47.02 of the *Supreme Court (General Civil Procedure) Rules 2015 (Vic)* – *Birti v SPI Electricity* [2011] VSC 566 considered - *Civil Procedure Act 2010 (Vic)* s 7 - Overarching obligation to facilitate just, efficient, timely and cost-effective resolution of the real issues in dispute - Trial to proceed as a cause.

APPEARANCES:

Counsel

Solicitors

For the Plaintiff

Mr T Seccull QC with
Mr J Gordon

Rightside Legal

For the Defendant

Ms M Britbart QC with

Minter Ellison

Mr B House

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HIS HONOUR:

- 1 The plaintiff, Mr Mulquiney, has brought a proceeding alleging that he was sexually abused whilst a student at a Victorian State primary school in 1988 and 1989 when he was 10 or 11 years old. The claim is against the alleged perpetrator and against the State of Victoria. The claim is for damages for psychiatric injuries and for economic loss consequent upon those injuries.
- 2 In August of last year, 2019, in response to an application for an expedited hearing, a judge of this Court ordered that this proceeding be tried on 16 March 2020 (today) before a judge and jury. In circumstances which I will shortly explain, the plaintiff has applied for the matter to proceed before a judge alone. The State opposes that course. The first defendant has filed no appearance in the proceeding, is currently incarcerated and is not expected to participate in the trial.
- 3 Over the weekend just passed it was reported in the media, accurately, that as of today no new jury trials will be commenced in Victoria until further notice in response to a worldwide pandemic known as COVID – 19 (coronavirus). Time does not permit me to explain in detail the nature of this emergency, but it is well known to all. Jury trials have been suspended due to the risk to jurors and others of the spread of the coronavirus through the close contact which jurors must have to one another throughout a trial. The purpose of containing the spread is to slow the rate of infection and thereby defer the time of peak infection to allow State medical resources to cope with those who need treatment. It is not currently known how long the suspension of jury trials will last. Doing the best I can, I think the projection is likely to be of the order of many weeks not just days. It could be a number of months.
- 4 Without other measures being adopted, the effect of court-wide suspension of jury trials for this sort of timeframe will be to put over a great number of trials scheduled to be heard during the period of suspension, to be added to the list of cases which are now being scheduled for hearing in the ordinary course over the ensuing months, through to 2021. In a court system already burdened with a significant

caseload, doing its best to manage that load in as timely a way as possible, any significant addition to the number of cases to be heard must necessarily cause greater strain on resources and inevitable delays over and above what ordinarily occur.

5 The question whether a trial should be heard other than by jury when a jury has been requested by a party is to be resolved pursuant to r 47.02 of the *Supreme Court (General Civil Procedure) Rules 2015 (Vic) (Rules)*, in accordance with the law developed around that power. The principles were conveniently stated by J Forrest J in *Birti v SPI Electricity* [2011] VSC 566. I will not read the summary of principles his Honour set out at [56] – it is well known. One of the principles is that the court has an overriding discretion to determine the mode of trial regardless of the wishes of the parties. Another, however, is that where a party has given notice that a trial by jury is required that will be the prescribed mode of trial unless the court is persuaded to dispense with the jury. The considerations which may influence a court to dispense with a jury trial are unfettered and the discretion may be exercised where it is warranted by the dictates of justice.

6 Quite fairly, the State does not contend that there is any particular reason why it is more appropriate for this matter to be heard by a jury than by a judge alone: the State rests upon its general right to a jury once a notice has been given. In this case, it was the plaintiff who originally sought a jury but the State has independently served a notice for jury in any event.

7 It is also important to note that the judicial power under r 47.02 of the Rules is to be exercised having regard to the overarching obligation pronounced in the *Civil Procedure Act 2010 (Vic)*, that is to say to facilitate the just, efficient, timely and cost-effective resolution of the real issues in dispute.¹

8 In my view, I should exercise my discretion to rule that this proceeding be heard by judge alone. The important circumstances bearing upon my consideration of where

¹ *Civil Procedure Act 2010 (Vic)* s 7.

the justice of the case lies are these:

- (a) First, this proceeding merits an expedited hearing due to the nature of the plaintiff's injuries and the adverse effects of the litigation process upon him as revealed in the medical reports used to obtain the expedited hearing;
- (b) Secondly, the unprecedented nature of the current coronavirus crisis means that it is totally uncertain when this case could be heard again before a jury, and logically it will be competing with many other cases for a hearing date in an unusual circumstance;
- (c) Thirdly, there is nothing particular about this case which would make it unjust to either party to have it determined by a judge rather than by a jury;
- (d) Fourth, on the other hand, there may be real injustice to the plaintiff by the delay and the uncertainty of when his trial might be resumed, if not heard now;
- (e) Fifth, the public interest in the disposition of cases before the courts in an orderly, timely and cost-effective way militates against the deferral of hearing cases in a climate of uncertainty, by one mode of trial, when a case may equally justly be heard via another mode straight away.

9 I add that I do not see any advantage in delaying a decision on this issue until, say, next week, as submitted by the State. As I understand the trend, matters are likely to get worse, not better, in that timeframe.

10 I order that the proceeding be tried by judge alone.