HIGH COURT OF AUSTRALIA

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Details of Filing

File Number:	B65/2023
File Title:	Willmot v. The State of Queensland
Registry:	Brisbane
Document filed:	Form 27E - Reply
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Important Information

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Form 27E – Appellant's reply

Note: see rule 44.05.5.

IN THE HIGH COURT OF AUSTRALIA
BRISBANE REGISTRY

BETWEEN: JOANNE EDITH WILLMOT
Appellant

and

THE STATE OF QUEENSLAND
Respondent

APPELLANT'S REPLY

PART I: CERTIFICATION

1. These submissions are in a form suitable for publication on the internet.

PART II: REPLY

2. Paragraph 7 of the Respondent's Submissions purport to differentiate between "facts" and "allegations" made by RS in her affidavit. An allegation is simply an unproven fact asserted by a witness. RS has sworn an affidavit about having witnessed the Demlin assaults, being in the same bedroom at the time of the assaults and that she was assaulted by Jack Demlin. Those are facts alleged by RS to have occurred and it is for the tribunal of fact to determine whether those facts are established to the requisite standard of proof.

3. As to paragraphs 8 and 9 of the Respondent's Submissions, the applicable standard for appellate review in the Court of Appeal, and this Court, is the correctness standard as per *Warren v Coombes*.[1] It is the duty of the appellate court to decide the facts as well

[1] *GLJ v The Trustees of the Roman Catholic Church for the Diocese of Lismore* [2023] HCA 32, [1]; [28].

as the law for itself.[2] The Trial Judge merely formed an impression on the admissibility of the evidence, for the purposes of considering whether a fair trial could be had (CAB, 13; [24]). Speculation about the potential admissibility of evidence at trial should not intrude upon the consideration about whether a trial can be fair.[3]

4. Paragraph 15 of the Respondent's Submissions allege that "[t]his case has far more in common with *Connellan v Murphy* [2017] VSCA 116 than with *GLJ*". The Appellant disagrees. As the High Court pointed out, there are likely to be differences between cases involving cases involving claims of child abuse arising from a private and domestic, as opposed to an institutional, context. [4] This claim relates to the latter.

5. Paragraphs 18 to 33, 36 and 43 – 48 of the Respondent's submissions refer solely to the impoverishment of evidence which the passing of time engenders, which the majority of this Court disavowed as attracting the quality of exceptionality in such cases.[5] Following GLJ, the intermediate Courts in Victoria and NSW have since confirmed that that the impoverishment of evidence – namely the unavailability of witnesses and documents – are not to be regarded as exceptional.[6]

6. Paragraph 34 of the Respondent's Submissions suggest prejudice on the basis that the Respondent has difficulty conferring with RS because she has her own claim. This is speculation. There is no evidence of a request by the Respondent for an interview with RS and a subsequent refusal.

7. In any event, a witness cannot be compelled to speak with a party prior to a trial. If a witness does not wish to speak with a party, he or she can be subpoenaed to appear to give evidence, and if called by the other party, the Respondent would have the right to cross-examine. These issues are not relevant in any way to the fairness analysis required when considering a permanent stay.

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2 *Warren v Coombes* [1979] HCA 9; (1979) 142 CLR 531 at 55.
3 GLJ at [74].
4 GLJ at [64].
5 GLJ, [52].
6 *Weiden v YZ (a pseudonym) & Anor (No 2)* [2023] VSCA 294 294, [66]; *CM v Trustees of the Roam Catholic Church of the Diocese of Armidale* [2023] NSWCA 313, [75].

8. Paragraph 40 of the Respondent's Submissions is founded on speculation. It cannot be concluded that the Respondent's "ability to meaningfully respond to the allegation is severely restricted" with knowledge that NW is alive, and no attempts have been made to obtain his recollection of events. It may be, if he was spoken to, that he has a clear recollection of the alleged events. Alternatively, he may vehemently deny them and be available to give evidence accordingly.

9. Paragraph 42 of the Respondent's Submissions purports to shift the onus on to the Appellant to establish that a trial would *not* be unfair. The onus of proving that a trial will be unfair – described as a 'heavy' onus – is with the Respondent.[7]

10. Paragraph 51 of the Respondent's Submissions allege that the Appellant's pleaded case is *'all or nothing'*. This is simply not true. The Plaintiff's case is that her injuries are *'a result'* of all of the alleged sexual assaults.[8] Should it be found that only one or some of the sexual assaults created a tortious liability on the Respondent, it would be on the Appellant would be obliged to establish that her injuries are caused or materially contributed to by that tortious conduct.[9]

11. Paragraphs 52 to 54 of the Respondent's submissions maintain that, because Dr Pant considers it "…difficult to disentangle the effects of the individual abuse incidents as they are so intertwined".

12. There is no suggestion that this difficulty is brought about by the timing of events that occurred. In any event, it is not controversial that the appropriate task is for the Plaintiff to prove, on the balance of probabilities, that the defendant's negligence materially contributed to the present symptoms. Once this is satisfied, if the defendant shows that there was a real chance that the Plaintiff would have developed similar symptoms in any event, the Court can make a greater reduction than normal to reflect this increased chance.[10]

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7 GLJ at [21].
8 AFM, no 1, paragraph 17 of amended statement of claim.
9 *March v E & M H Stramare Pty Ltd* [1991] HCA 12; (1991) 171 CLR 506 at 514 [16] per Mason CJ, Toohey and Gaudron JJ agreeing at 524-525; *Amaca Pty Ltd v Booth; Amaba Pty Ltd v Booth* [2011] HCA 53; (2011) 246 CLR 36 at 62-63 [70] per Gummow, Hayne and Crennan JJ.
10 *DC v State of New South Wales* [2016] NSWCA 198, [351] – [355].

13. Paragraphs 55 to 57 of the Respondent's Submissions refer to the "process of the common law found to be available to the respondent in GLJ…are not available to the Respondent in this case." The Appellant submits that this is not correct. Paragraph 55 of the Respondent's Submissions refer to documentary evidence available and a failure to act upon allegations made at various times in GLJ. These are not "Common Law Techniques" that the Courts regularly use to deal with claims based on incomplete evidence. These are simply matters and materials that were available in the GLJ case.

14. As to paragraph 56 of the Respondent's Submissions, this Court in GLJ noted that the Courts and the Common Law "…incorporates other principles in recognition of the fact that, in the adversarial system, cases are always decided within the evidentiary framework the parties have chosen and are often decided on incomplete evidence…";[11] "…has developed techniques addressing the problems in civil trials associated with the recollection of events which occurred long in the past";[12] "…is not bound to accept uncontradicted evidence.

15. Uncontradicted evidence may not be accepted for any number of reasons including its inherent implausibility, its objective likelihood given other evidence, or the trier of fact simply not reaching the state of "actual persuasion" which is required before a fact may be found"[13] and "…have also developed techniques to enable proceedings to be heard and determined despite the identifiability, death or legal incapacity of a party."[14]

16. These are all techniques that remain available in this case.

Dated: 29 February 2024

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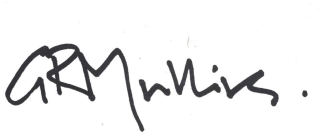
11 GLJ at [58].
12 GLJ at [59].
13 Reasons, [60].
14 Reasons, [61].



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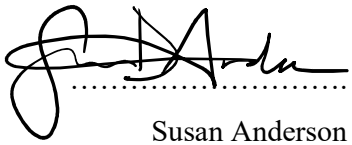
Gerard Mullins KC

T: (07) 3236 1882

E: gerrymullins@qldbar.asn.au



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Susan Anderson

T: (07) 3221 1359

E: susan.anderson@chambers33.com.au

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Philip Nolan

T: (07) 3521 5641

E: pnolan@qldbar.asn.au