

The Ellis Defence: How the Church Avoided Paying Child Sexual Abuse Victims

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Sydney Criminal Lawyers

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By Paul Gregoire and Ugur Nedim

John Ellis was a senior altar boy at the Christ the King Parish of the Catholic Church in Bass Hill, when in 1974, then Archbishop of Sydney James Freeman appointed Father Aidan Duggan to work at the church.

Soon after his arrival, Father Duggan took a special interest in 13-year-old Ellis. The Benedictine monk from Scotland began to invite the boy into his room to tell him stories about his life in his own country and to teach him Latin.

Then after a couple of months the priest began touching and hugging the boy. And this led to an incident in Duggan's bedroom, where the priest removed both of their clothes and suggested they masturbate each other.

And the sexual abuse escalated from there and it continued on until Mr Ellis turned 18 years old. Over this time, Duggan explained to Ellis that they were in a relationship that others wouldn't understand. And he went on to pursue the young man well into his 20s.

But, when Mr Ellis finally sought justice, the NSW Court of Appeal found there was no entity that could be held responsible. Known as the Ellis Defence, this legal loophole set a precedent that had allowed the Roman Catholic Church to avoid being sued by the survivors of child abuse.

Cash to keep it out of court

At the age of 41, Mr Ellis told the Roman Catholic Archdiocese of Sydney about the abuse that he had suffered at the hands of the Scottish monk and how it had continued to damage his life. Ellis sought acknowledgement from the church, along with its support.

Then Archbishop of Sydney and now convicted paedophile George Pell accepted that Ellis was a victim of abuse. And he and the Archdiocese trustees offered him a discounted settlement via the church's Towards Healing protocol, as long as he gave up his legal right to sue the church.

Seeking an extension of limitations

Mr Ellis refused to sign away his right to sue. And on 30 August 2004, he filed a statement of claim with the NSW Supreme Court. Ellis had to seek an extension to do this as sections 14 and 52 of the Limitation Act 1969 effectively barred him from taking action six years after the incidents occurred.

In the 2006 case Ellis versus Pell, Mr Ellis sought to take legal action against two defendants over the breach of fiduciary care. The first being Cardinal Pell, as head of the Archdiocese at the time, as well as the Trustees of the Roman Catholic Church for the Archdiocese of Sydney.

The Trustees of the Archdiocese is a body corporate established under the Roman Catholic Trust Property Act 1936, which holds property for and on behalf of the church.

Initially, Mr Ellis had also planned to sue Father Duggan. However, he died on 5 October 2004 prior to the proceedings. And as the priest had taken a vow of poverty, Ellis did not want to proceed against Duggan's estate.

On 3 March 2006, NSW Supreme Court Justice David Patten found that Mr Ellis could not sue Pell as head of the church. But, his Honour did find that the plaintiff could take legal action against the church trustees and he extended the period of limitation so he could do this.

Can't be sued, as it doesn't exist

In 2007's Trustees of the Roman Catholic Church versus Ellis and Anor, Pell acting on behalf of the Archdiocese of Sydney appealed Justice Patten's decision. And NSW Court of Appeal Justices Keith Mason and Ruth McColl ruled in the church's favour.

The court found that the trustees were not responsible for the conduct of the clergy. And there was no legal entity that could be sued in regard to misconduct carried out by a member of the clergy except for themselves.

It was also ruled that as the church is an unincorporated association, with its assets held in a protected trust, it didn't legally exist.

"An unincorporated association cannot – at common law – sue or be sued in its own name because, among other reasons, it does not exist as a juridical entity," the court decision reads.

As Dr Andrew Morrison SC explained in 2014, the Church had previously treated its trustees as the appropriate body to be sued, “but John Ellis and those who came after him were the unfortunate victims of a change of policy consequent upon Cardinal Pell’s wish to protect Church finances”.

And so, the Ellis Defence was established and served as a warning to all survivors of child abuse that proceeding against the Catholic Church in these matters was no longer viable.

And just for good measure, the lawyers representing the Church, sent a letter to those working on behalf of Mr Ellis, stating that the Church would forgo the estimated \$480,000 to \$550,000 in court costs their client owed it in exchange for Ellis not pursuing the matter any further.

A royal commission recommendation

The Royal Commission into Institutional Responses to Child Sexual Abuse was established in 2013, amid rising allegations of child sexual abuse in a number of institutions throughout the country, especially the Catholic Church.

In its Redress and Civil Litigation report, the commissioners outlined that a proper defendant needs to be identified in these cases, as survivors might also want to sue the institution in which they were abused, along with the actual perpetrator.

The commissioners further stated that they were satisfied that a survivor of child sexual abuse should be able sue “a readily identifiable church” and they recommended that states and territories legislate to provide a clearly defined defendant.

A new duty of care

Passed last October, the Civil Liability Amendment (Organisational Child Abuse Liability) Bill 2018 created a new duty of care for institutions, which is breached if a child is subjected to abuse. And courts now have the power to appoint trustees to be sued if institutions fail to nominate one.

The legislation also makes an organisation liable for child abuse committed by either an employee or someone in a position akin to an employee. And it further permits the survivors of child abuse to take action against unincorporated organisations, like the Catholic Church.

And on 1 January, the Ellis Defence was abolished. Mr Ellis said it was “momentous” as institutions won’t “be able to put that roadblock in the way of survivors.” And as for Pell, he’s been sitting in gaol since 27 February, after having been convicted of sexually abusing two choirboys in 1996.