

THE MONTHLY



Clarity on the horizon or crystal ball gazing?

The news cycle might have reduced its COVID-19 coverage following the “freedoms” granted us by government but the scourge of this dreaded disease lingers.

Will case numbers and hospital admissions rise? Will the vaccination percentages be a sufficient buffer against the pestilence? Exactly when do I get a third shot?

It's the uncertainty of what lies ahead that feeds a pervading uneasiness.

Yet, we rally around the science and encourage each other to take part in what we hope will be a solution.

Driven by that hope we take on new and exciting things, like eating out at restaurants and going to the movies!

Even credible COVID-19 commentators are reluctant to predict what the future might hold – bullied into stumbling guesses by a virus which seems to bend and twist in the winds of the season, threatening new variants. Who could blame them for not wanting to get COVID on their faces?

For many, there couldn't be a better season than spring for the relaxing of restrictions. The days are getting longer and warmer, a preview to the coming attraction that is summer.

Meanwhile, political manoeuvres around emission reductions targets and Climate Change conferences, feel like a lot of hot-air blowing in our faces. We can't even imagine what the world will be like in 2050, when these targets are scheduled to be met ... if they're met.

And still, surrounded by intensifying natural disasters like bushfires and tornadoes, people continue being people!

Despite the uncertainty of action on climate, and the fight against COVID-19, clarity does now exist for survivors of sexual abuse in NSW who wish to revisit historic settlements of child abuse claims and for people who suffered abuse while detained in a juvenile detention centre.

This edition of The R3 Monthly features an update on the recent changes to the Civil Liability Act 2002 following the passing of the Civil Liability Amendment (Child Abuse) Bill and a few practical tips for getting through the final few weeks of the year.

Civil Liability Amendment (Child Abuse) Act 2021

Earlier this month the NSW Government passed the Civil Liability Amendment (Child Abuse) Act 2021, which will:

- give NSW courts the power to set aside settlement agreements for historical sexual and serious physical abuse; and
- remove restrictions that had prevented survivors from bringing civil claims if the abuse had occurred while they were in custody in juvenile justice facilities.

In announcing the changes, Mark Speakman, Attorney General and Minister for Prevention of Domestic and Sexual Violence, said:

"The NSW Government introduced reforms in 2016 and 2018 that remove barriers for survivors seeking civil justice in response to recommendations from Royal Commission into Institutional Responses to Child Sexual Abuse. These included eliminating limitation periods for child abuse claims and abolishing the legal technicalities that shielded some institutions from lawsuits.

The Civil Liability Amendment (Child Abuse) Act 2021 goes beyond the Royal Commission's recommendations by allowing survivors impacted by these legal barriers to have the same access to justice as those who brought a claim after the Government's 2016 and 2018 reforms."

To be set aside, the settlement agreement will need to fall within the definition of an "affected agreement" under the proposed Section 7C of the *Civil Liability Act* and the Court must find that it is just and reasonable to set aside the affected agreement

What is an "affected agreement"

The Bill defines an affected agreement as an agreement that:

- “prevents the exercise of an action on a cause of action for child abuse if the agreement was entered into when a limitation period applying to the cause of action had expired or when an organisation that would have been liable for the child abuse was unincorporated.” - **ie. agreements entered into before March 2016 which is when the NSW Limitation Act was amended**
- was entered into at a time that the organisation that would have been liable was not incorporated.
- was entered into before the introduction of Part 1B of the Civil Liability Act and in circumstances where it is just and reasonable to set aside the agreement.

What will the Court consider as relevant to whether it is just and reasonable to set aside an affected agreement?

The proposed Section 7D(3) outlines that the Court may consider the following in making its decision to set aside the affected agreement--

- (a) the amount paid to the applicant under the agreement,
- (b) the bargaining position of the parties to the agreement,
- (c) the conduct in relation to the agreement of--
 - (i) the parties other than the applicant, or
 - (ii) the legal representatives of the parties other than the applicant,
- (d) any other matter the court considers relevant.

This brings NSW more in line with other Australian jurisdictions, which have for some time provided the Court with the power to set aside settlement agreements in relation to historical child abuse claims. We will have to wait for guidance from the Court as to how the legislation will be interpreted, however much can be gleaned from decisions such as *WCB v Roman Catholic Trusts Corp for Diocese of Sale (No 2)* and *Magann v Trustees of Roman Catholic Church for Diocese of Parramatta*

To read more on how the Court have approached setting aside settlement agreements to date, see the article **Julie Somerville** and **Kerry Hogan-Ross** published in the December edition of the **Australian Alternative Dispute Resolution Bulletin** in December 2020: "[Historical Child Abuse claims - setting aside past settlements](#)"

Managing the final push to the long awaited Christmas break

While some of us are tentatively stepping foot back inside an office, the vast majority are still combining working at home and office time. Combine that with the usual flurry of reporting, settlement conferences and mediations before the Christmas break, I am hearing many people complaining of:

- **longer hours** ... work time bleeding into home time;
- **blurring of boundaries** ... it's hard to tune out the emotions of the settlement discussions if, visually, it all took place within a few metres of where you are sitting eating your evening meal;
- **burnout** how many of us have *really* had a decent holiday this year???

While I don't profess to be a wellness coach or have any particular expertise, here are a few tips I have picked up along the way from my discussions with people that can assist us in maintaining the balance between work and home and avoid burnout at this time of year:

- **debrief** with colleagues or a psychologist, irrespective of whether you are feeling overwhelmed
- at the end of a day, close the door to your home office (or if you don't have one, **close your laptop** (hide it under a magazine) and pack away your files/notes so they are not in direct eyesight
- change out of your work clothes (if you have been dressed up for Zoom) or even just **changing into exercise gear** can help you "switch out of work mode"
- get outdoors for some **exercise and fresh air** and resist the urge to come back to the computer once you get back inside.
- have a scented **candle** you light, and/or a **drink** you pour that sends a message to your brain that it's time to switch modes.

A snapshot of developments in the practice areas R3 commonly mediates

Settlements generally

The drafting of Calderbank letters and Deeds of Release are often the subject of judicial consideration. :

- For consideration of whether it should be implied in a judgment order that no interest should run on judgment monies until all statutory releases have been received - see Jeanette Jana BHT Ronald Jana v Western Sydney Local Health District trading as Westmead Hospital
- Whether, in a mediation that lasted for a total of 7 minutes, the parties were participating in "good faith" - see Murphy v State of NSW

Historical child abuse

Another busy quarter for judgments in this area of law, including:

The NSW Supreme Court dismissed an application for a permanent stay in GLJ v The Trustees of the Roman Catholic Church for the Diocese of Lismore [2021] NSWSC 1204. *The Court was not satisfied*, on the balance of probabilities that the continuation of proceedings would be unjustifiably oppressive to the defendant, or that it was impossible for a fair trial to take place

Following the NSW decision of A & B v Bird it appeared that the fact that someone was a volunteer was not an impediment to a finding of vicarious liability. However a recent Victorian Supreme Court suggests otherwise. In PCB v Geelong College [2021] VSC 633, *the Court doubted "the correctness of the relevant passage of reasoning in A & B*.

Public liability

The importance of reviewing carefully all available evidence, including medical records, was highlighted in the District Court of NSW decision of Foti v Biordi [2021] NSWDC 496. In that case Judge Gibson did not accept the 76 yo retirees evidence as to how an accident occurred as it was inconsistent with what was recorded clinical records of the hospital.

Medical negligence/insurance

The interplay of the *Insurance Contracts Act* and Section 5 of the *Civil Liability (Third Party Claims Against Insurers) Act 2017* (NSW) was considered in Avant Insurance Ltd v Burnie [2021] NSWCA 272. Avant successfully appealed the District Court decision to join it to the proceedings. The Court of Appeal found that the Avant medical indemnity policy did not contain any contractual obligation to notify Avant of circumstances and therefore the insured, Mr Blackstock In the absence of any notification to Avant, Mr Blackstock had no entitlement to indemnity for any negligence in the treatment provided to Ms Burnie.

What's coming up?

Now ...

We are in the final push, at the end of a very long past 6 months, and the 5 weeks to Christmas will no doubt be very busy for everyone.

Nevertheless, it is a time that we need to look out for ourselves and one another. If you are in the depths of burnout, or feel yourself teetering on the edge, Beyond Blue has published a helpful article which you can access [here](#) ... personally, I will be adopting some of the strategies I outlined above, and re-reading the really helpful book - "[Rest](#)" by [Alex Soojung-Kim-Pang](#)

The next three months ...

As incredible as it seems ... the calendar is now filling for **March and April 2022** bookings, so now is the time to review your matters and see which matters should proceed to mediation before the end of the financial year.

Bookings for half or full day **mediations**, face to face or online, can be made via the [R3 Resolutions website](#), or by contacting us directly on 0421 048 456 or by email, jsomerville@r3resolutions.com.au

If, despite your best efforts, matters have not resolved and you are now tasked with organising expert conclaves. [R3 Resolutions](#) now provides services as an independent facilitator of expert conclaves.

Facilitators can add great benefit by chairing the expert conclave, managing the competing interests and personalities of the experts, encouraging discussions, explores areas of agreement and records the opinions of the experts on the questions asked in a written report.

Click the calendar to check availability and book and online mediation

