

Case Note: *Villan v State of Victoria* [2021] VSC 354

6 October 2021

By Hannah Hall, Law Graduate

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	3 May 2021
Date of Judgment	18 June 2021
Plaintiff	Jade Villan
Defendant	State of Victoria
Considered	<i>Evidence Act 2008 (Vic), s 128(4)(b), (5) — Lucciano v The Queen [2021] VSCA 12 — R v Lodhi (2006) 199 FLR 328 — X7 v Australian Crime Commission (2013) 248 CLR 92.</i>

Background

The Plaintiff alleged that on multiple occasions in about 1986 and 1987, when he was a student in a state high school operated by the Defendant, he was sexually assaulted by a person referred to in the proceeding by the pseudonym EFG. The Plaintiff brought these proceedings alleging that there was negligence by an officer or officers of the Defendant which was a cause of the abuse and consequent injury suffered by him, and that the Defendant was vicariously liable for the acts perpetrated by EFG.

On the third day of the trial, the jury asked whether there had been a criminal case against EFG. The answer was no. When asked about this issue, the Plaintiff said that he had not made a complaint to police about the conduct of EFG but would do so on the advice of his lawyers. The following morning, Counsel for the Defendant informed the Court that in light of the evidence given by the plaintiff, EFG wished to obtain independent legal advice about whether he should give

evidence in the trial. Counsel for the Defendant applied for the jury to be discharged, and for the proceeding to be adjourned to allow EFG to obtain advice, which was granted.

The proceeding was relisted to 3 May 2021, after EFG had obtained legal advice, to determine whether, and in what circumstances, he would give evidence at trial.

The key issue in this case was whether the interests of justice required EFG to give evidence in abrogation of the common law privilege against self-incrimination. The relevant statutory provision to this end is 128 of the Victorian *Evidence Act* ([here](#) for reference).

Held

Justice Keogh ultimately found that, balancing all relevant considerations, it was not in the interests of justice to require EFG give evidence at a trial in this proceeding when it is likely the allegations against him by the plaintiff would be the subject of a criminal investigation.

Ratio

[15] The effect of s 128 of the Evidence Act is to abrogate the common law privilege against self-incrimination. The object of s 128 is to strike a balance between upholding an objection by a witness to giving evidence which may tend to prove they have committed an offence and requiring the witness to give the evidence with the protection of a certificate under s 128(5).

[17] Even if the possibility of prejudice to the witness is established, it may still be in the interests of justice to require that they give evidence. Whether or not that is so will depend on all the circumstances of the case. A relevant consideration is whether criminal proceedings against the witness are pending or likely.

[21] The main argument between the parties, to which much of the evidence at trial will be directed, is whether or not the abuse occurred. The defendant cannot defend the case brought by the plaintiff without the evidence of EFG. Because of the matters that will be traversed at trial, and the impact on any future criminal proceedings, it is not in the interests of justice that EFG be required to give evidence.

[29] ...The critical fact in issue in this trial and in any potential criminal prosecution is identical. EFG's evidence would be central to the determination of that issue in this proceeding. I conclude that the departure from the accusatorial system of criminal justice which would result means that it is not in the interests of justice to require that EFG give evidence at a trial in this proceeding until any criminal investigation and resulting prosecution of EFG has run its course.

[30] It is tragic that, having commenced his evidence before a jury, the plaintiff will now be denied a trial for an indefinite period. However, the integrity of the system of criminal justice must be preserved. Steps should be taken in other cases with similar circumstances to identify and resolve such issues well prior to trial.