



## COURT OF APPEAL OF NEW ZEALAND

### TE KŌTI PĪRA O AOTEAROA

**8 March 2024**

**MEDIA RELEASE — FOR IMMEDIATE PUBLICATION**

***John Atcherley Dew v Discovery NZ Limited* [2023] NZCA [2023] NZCA 589**

PRESS SUMMARY

**This summary is provided to assist in the understanding of the Court’s judgment. It does not comprise part of the reasons for that judgment. The full judgment with reasons is the only authoritative document. The full text of the judgment and reasons can be found at [www.courtsofnz.govt.nz](http://www.courtsofnz.govt.nz).**

#### **Summary**

Today, the Court publicly releases its judgment dismissing the appeals of Cardinal John Dew, Sister H and Mrs R (the appellants). The appellants sought to prevent the television broadcast of a programme alleging serious sexual abuse by Cardinal Dew and others who, at relevant times, were priests and sisters in the Roman Catholic Church (the Church). The appellants were unsuccessful in applications for an injunction to restrain the broadcast in the High Court, but interim relief was granted to enable them to appeal to this Court.

The Court delivered its judgment to the parties only on 23 November 2023, subject to suppression orders that prohibited publication pending the determination of any application to the Supreme Court. The Court now releases the judgment in light of the Supreme Court decision declining leave, publicly delivered on 7 March 2024.

## **The allegations**

Cardinal Dew was ordained as a priest in 1976 and became a Cardinal in 2015. Until his retirement on 5 May 2023 he was the Archbishop of Wellington, a role which he had since 2005. In that capacity he was also the Metropolitan of New Zealand, and a member of Te Rōpū Tautoko, which has coordinated engagement between the Church and the Royal Commission. As a recently-ordained priest in 1977 he served at St Joseph's Parish in Upper Hutt. The St Joseph's community comprised a convent, an orphanage and a nearby school, all of which were under the auspices of the Wellington congregation of the Sisters of Mercy New Zealand (the Sisters of Mercy).

The victims of the alleged sexual abuse are Mr Steven Carvell and his sister Ms Linda Carvell. They were aged eight and seven at the time of the events, which are said to have occurred at St Joseph's Orphanage (the Orphanage) where they stayed over a 12-day period from 1 to 12 November 1977, some 46 years ago. Mr Carvell gave evidence to the Royal Commission of Inquiry into Historical Abuse in State Care and in the Care of Faith-based Institutions (the Royal Commission) about what he said happened. In Mr Carvell's own words, his allegations are namely that he was the victim of "a repeated series of sexual assaults and physical and psychological torture", that he was "raped (sodomised) and forced to perform oral sex", and that he "was also forced to witness both another boy and his sister being raped". Mr Carvell alleged that the perpetrators of these crimes were Cardinal Dew, Sister H, and several other priests. The Royal Commission referred his evidence to the police, who were engaged in an investigation of the complaints at the time the judgment was written.

Sister H is named by Mr Carvell as having been involved in some of the offending. At the relevant time Sister H was a teacher at a school in Palmerston North, but the High Court found it was possible she was present at the Orphanage as claimed by Mr Carvell. She is now 82 years old and has severe dementia. She resides in a secure dementia ward at residential facility and is not able to defend herself due to her medical condition.

Mrs R was a member of the Wellington congregation of the Sisters of Mercy between 1967 and 1986. Between 1967 and 1969 she was a novice alongside Sister H. She trained as a teacher and in 1977 she went to work at the Orphanage, looking after children there until 1985. In 1977 she was responsible for the boys' dormitory, which accommodated boys from the age of seven upward. She slept in a bedroom at the end of the dormitory.

## **The documentary**

Mr Micheal Morrah, a journalist employed as an investigations correspondent for Newshub, heard about Mr Carvell allegations made against Cardinal Dew from contacting SNAP (the Survivors Network of those Abused by Priests). Mr Morrah interviewed Mr Carvell, Ms Carvell and Mr Carvell's wife. Mr Morrah intended those interviews to be aired on TV3 (as well as other media platforms associated with Discovery NZ Ltd) as part of the programme.

Following the interviews, Mr Morrah investigated the complaints over a two-month period, attempting to verify them. He conducted research on memories and trauma in historic sexual abuse cases, attempted to verify information in relation to the Orphanage, sought the response of Sister H, and contacted the police.

On 3 August 2023, Mr Morrah attempted to contact Cardinal Dew by phone call, text message and email. On 6 August, the Cardinal's lawyer wrote a letter to Discovery, for the attention of Mr Morrah, attaching statements of Cardinal Dew and Mrs R. Both strongly refuted the allegations.

## **Procedural history**

Cardinal Dew sought confirmation that the broadcast of the programme would not proceed, and when he did not receive this, commenced proceedings in the High Court on 7 August alleging defamation and invasion of privacy in respect of an ongoing police investigation. At the same time, Cardinal Dew applied for an interim injunction that would restrain publication of the allegations. On that day, the High Court declined the application for the interim injunction, but granted one temporarily, pending the determination of an appeal.

## **Court of Appeal decision**

### ***Cardinal Dew***

*Should publication be restrained on the basis that it is defamatory?*

The Court had to be persuaded that there was no reasonable possibility of the defences raised by Discovery succeeding. It was not.

In respect of the defence of truth, it was clear to the Court that it could not conclude that there was no reasonable possibility of the defence of truth succeeding. The substance of the allegations had been put before the Court and, should the proceedings go to trial, determining

the truth of the complainants' allegations/Cardinal Dew's denials would be a matter for the fact finder. This was a factual question that could not be resolved at this interim stage.

Nor, in terms of the defence of responsible communication on a matter of public interest, could the appellant establish there was no reasonable possibility of success: the subject matter was of public interest, and the allegations were extremely serious and of considerable importance. There was no urgency, and it was not possible to make any findings about reliability, the tone of the programme or its balance. Those were issues that would need to be assessed in deciding at the trial whether the broadcast was responsible.

*Should publication be restrained on the basis it would interfere with the administration of justice?*

Though publication of the allegations would likely result in intense and lasting publicity, that did not justify prior restraint. The jury, if a trial eventuates, will be required to put pre-trial publicity out of mind, to avoid prejudice and to decide the case based only on what they have heard in the courtroom. The justice system is predicated on an assumption that juries comply with the instructions they are given. It cannot be assumed that a fair jury trial could not take place; to do so would call into question the aforementioned assumption. The Court was not satisfied that suppression orders would be made if charges were brought and, in any event, it was not possible to assess the probability that charges would be laid.

*Should publication be restrained on the basis it amounts to an invasion of privacy?*

Cardinal Dew could not claim a reasonable expectation of privacy in respect of the allegations because he denied the alleged conduct occurred. Moreover, if the allegations were true, any privacy claim Cardinal Dew had must yield to the complainants' right to speak about serious wrongdoing which occurred to them. The programme's reference to an ongoing police investigation would not amount to an interference with a reasonable expectation of privacy: the programme will focus on Discovery's investigation, not the police's.

For the above reasons, Cardinal Dew's appeal was dismissed.

## **Mrs R and Sister H**

*Should publication be restrained on the basis that it is defamatory?*

There were two imputations said to arise from the programme: first, that either Mrs R or Sister H were the unnamed sister who was mentioned as having participated in the alleged abuse; and secondly, that Mrs R, as the person overseeing the boys' dormitory of the Orphanage at the relevant time, must have known about what allegedly occurred, and failed to put a stop to it.

Neither of the appellants would be identified, and therefore defamed, by the first imputation. The programme will not allege that the person responsible for the abuse resided at the Orphanage (indeed, it is clear that Sister H did not reside there at the relevant time, even though she was the person originally named by Mr Carvell). Provided the programme itself does not do so, there would be no room for any inference that Mrs R was the unnamed sister. In any event, evidence about the layout of the dormitory fell well short of the kind of extrinsic evidence that would be necessary to establish that Mrs R was the unnamed sister. As for Sister H, who will not be named in the programme, unless the programme includes details which might reasonably lead people acquainted with her to believe she is the unnamed sister referred to, all persons familiar with her history could do would be to speculate. She was simply one of many members of the Sisters of Mercy across the country who did not live at the Orphanage at the relevant time. Although interviewees had been asked about her and people familiar with her might therefore speculate she was the unnamed sister, that is all it would be.

As for the second imputation, it was possible that viewers with knowledge of Mrs R's role at the Orphanage may infer she must have been aware of the alleged abuse, if the allegations were sufficiently particularised in the story. She had provided evidence that the abuse described could not have occurred without her being aware of it, which is the kind of evidence that Discovery has indicated it would include in the programme. Should it do so, identifying Mrs R would not involve impermissible speculation.

It was therefore necessary to consider Discovery's defences to a claim in defamation by Mrs R. Both defences had reasonable prospects. In terms of the defence of truth, the allegations which potentially implicate Mrs R are substantially derived from what is alleged against Cardinal Dew. If Discovery succeeds in establishing the truth of its allegations against him, it will necessarily have gone a long way to establishing the truth of the imputation against Mrs R.

The additional facts it would need to successfully claim truth against her would be that she knew of Cardinal Dew's conduct and did nothing to prevent it. In relation to those additional facts, Discovery could rely on her own evidence, in which she effectively claims that if Cardinal Dew had acted as Mr Carvell alleges, she would have known.

In terms of the defence of responsible communication on a matter of public interest, the story is in the public interest, and, in assessing whether the communication is responsible, an additional consideration would be that the imputation was not put to Mrs R. But that additional factor did not mean the defence had no reasonable prospect of success.

For the above reasons, Sister H and Mrs R's appeals were dismissed.