

12. Jun. 2008 15:40

PORTERS LAWYERS

No. 1705 P. 2

Form 2.6 Amended Statement of claim—general*Court Procedures Rules 2006*

(see r 50 (Originaling claim—content etc), r 303 (Third-party notice—content etc))

In the Supreme Court of the Australian Capital Territory

No SC 171 of 2008

AAE

Plaintiff

TRUSTEES OF THE MARIST BROTHERS

Defendant



The plaintiff claims damages for personal injury in relation to the defendant's breaches of duty.

Details of the claim are as follows:

1. The defendant is a body corporate duly incorporated pursuant to section 4 of the *Roman Catholic Church Community Land Act, 1942 (NSW)* and is able to sue and be sued in its corporate name and style.
2. At all material times the defendant by its servants and/or its agents operated and had the management and control of a school at Marr Street, Pearce, in the Australian Capital Territory known as Marist College Canberra ("the school").
3. From 1985 to 1988 the plaintiff was a student at the school.

Filed on behalf of the Plaintiff by:-

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4. At all material times, the defendant by its servants and/or its agents was responsible for the supervision of those who taught at the school.
5. From at the latest 1979 until at the earliest 1993, John William Chute known as Brother Kostka and Brother Kostka-Chute ("Brother Kostka") was engaged to teach and taught at the school.
6. At all material times the defendant owed the plaintiff a non-delegable duty of care arising from the relationship between it and the plaintiff.
7. Alternatively, in the facts and circumstances set out below, the defendant owed the plaintiff a duty of care to prevent or minimise the risk of harm to him flowing from being sexually assaulted by Brother Kostka.
8. In or about 1970 the defendant knew through its then Principal that a Brother at the school had sexually assaulted a child whilst he was a child whilst at the school.
9. The then Principal was informed by a parent that a Brother had sexually assaulted her child by forcing him to sit on the Brother's lap, placing his hands inside her child's trousers, touching the child's penis and penetrating her child's anus with his finger.
10. In or about 1978, whilst children from the school were on a rugby tour to New Zealand, a Brother who taught at the school sexually assaulted two children from the school in a hotel room.
11. Each of the children, whilst still on the tour, complained of the sexual assault to a lay teacher employed by the school.

12. Each of the children who were sexually assaulted informed the Principal of the sexual assault immediately after returning to Canberra.
13. At or about the same time, that is, shortly after the return of the rugby tour, the lay teacher informed the Principal of the sexual assaults on the two children.
14. In or about 1979, a mother of a child of the school informed the then Principal that Brother Kostka was showing children pornography in his class.
15. In or about 1979, the said mother of a child of the school informed the then Principal that Brother Kostka was taking children into his office and forcing them to sit on his lap and comb his hair.
16. In or about 1979, the said mother of a child of the school informed the then Principal that Brother Kostka was masturbating under his cassock in class in view of the children.
17. In or about 1979, the said mother of a child of the school told the then Principal that Brother Kostka should be removed from the school because he posed a danger to the children.
18. The said Principal told the said mother that he was already aware of the said conduct of Brother Kostka as described in paragraphs 14, 15 and 16.
19. In or about 1979, the said Principal informed the said mother that he (the Principal) had informed the Provincials of the Marist Brothers of the said conduct of Brother Kostka.
20. In or about 1979, the said Principal told the said mother that he had requested of the Provincials that Brother Kostka be removed from the school.

21. In or about 1979, the said Principal told the said mother that the Provincials had told him that they would not take any action in relation to Brother Kostka.
22. In or about 1982, the defendant became aware or alternatively, ought to have become aware, that Brother Kostka had been surprised in his office by a cleaner employed by the defendant who observed Brother Kostka and a child who was a student at the school, standing face to face close to each other and each pulling up their respective trousers.
23. In or about 1982, the then Principal was informed by the parents of a child of the school that a lay teacher had taken children from the school, had the children stay overnight at his house, required the two children to sleep with him in his bed and had sexually assaulted her child, by touching that child's penis.
24. In or about 1982, the then Principal of the school was informed that the same lay teacher referred to in paragraph 23 had, subsequent to the night he had had the two children sleep with him, sexually assaulted the same child at the child's home by touching the child's penis.
25. In or about 1986, the then Principal of the school was informed by the parents of a child of the school that Brother Kostka, during a "Friday Film Night", had sexually assaulted their child by touching the child's genitals.
26. Upon being informed by the parents of the matter referred to in paragraph 25 above, the then said Principal informed the said parents of the said child that he recommended that the matter not be reported to the police.
27. In or about 1986, upon the said school Principal being informed by the said parents of the sexual assault referred to and, having recommended that the

assault not be reported to the police, said words to the effect that the school would deal with the matter and that it would never happen again.

28. In or about 1986, a child who was then a pupil of the school told a teacher who was responsible for the pastoral care of children of the school that he, the said child, had been sexually assaulted by Brother Kostka in 1981.
29. At no time between the first information about Brother Kostka in 1979 and the sexual assaults by Brother Kostka upon the plaintiff in 1985, 1986, 1987 and 1988, did the defendant take any steps to remove Brother Kostka from positions of immediate access to children whilst at the school.
30. At no time between the first information about Brother Kostka in 1979 and the sexual assaults by Brother Kostka upon the plaintiff in 1985, 1986, 1987 and 1988, did the defendant take any steps to direct Brother Kostka to abstain from sexual assaults upon children who were pupils of the school.
31. At no time between the first information about Brother Kostka in 1979 and the sexual assaults by Brother Kostka upon the plaintiff in 1985, 1986, 1987 and 1988, did the defendant inform the plaintiff, then an infant, through his parents that his presence at the school at the same time as Brother Kostka carried with it a real risk that he would be sexually assaulted by Brother Kostka.
32. At no time between 1970 and 1988, did the defendant take any or any sufficient measures to prevent Brother Kostka from sexually assaulting children who were pupils at the school, including the plaintiff.
33. At no time between 1970 and 1988, did the defendant take any or any sufficient steps to institute and maintain a system of mandatory reporting of known or

suspected cases of sexual assault of children of the school to external authorities.

34. Between 1979 and 1988, the defendant knew or ought to have known of Brother Kostka's propensity towards sexual assault of children at the school.

35. Given the premises of paragraph 34 above, the defendant failed to take any or any sufficient steps to protect the plaintiff from this propensity.

36. At no time between 1970 and 1988, did the defendant install and maintain any program to educate children at the school in relation to their rights to be free of sexual abuse at the school and to report any sexual abuse to an appropriate designated person or persons or alternatively to his parents or to the police.

37. In accepting the plaintiff as a child at its school, the defendant was under a duty of care to take all reasonable steps and to avoid so far as possible all omissions in terms of its conduct which might increase the risk of injury to the plaintiff whilst at the school.

38. In having the plaintiff as a child at its school, at the same time as continuing to permit Brother Kostka to have daily unsupervised contact with the plaintiff, the defendant represented to the infant plaintiff, through his parents, that he would be safe from harm whilst in the care of the defendant whilst Brother Kostka was present.

39. Were it not for the representations made by the defendant as to the safety of and care for the plaintiff whilst at its school and whilst in the presence of Brother Kostka, the infant plaintiff, through his parents, would not have attended the school and entrusted his care to, inter alia, Brother Kostka.

40. In continuing to have Brother Kostka as a teacher at the school and to represent him to the infant plaintiff, through his parents, as a person who could be trusted to teach and provide pastoral care to the plaintiff, the defendant increased the risk that Brother Kostka would be able to, and in fact did, sexually assault the plaintiff.
41. During 1985, 1986, 1987 and 1988 the plaintiff was sexually assaulted by Brother Kostka.

Particulars of sexual assault

- a) During 1985 Brother Kostka taught the plaintiff religion. During religion classes, Brother Kostka regularly sexually assaulted the plaintiff by either touching the plaintiff's penis and testicles from outside his trousers, or by placing his hand inside the plaintiff's trousers and touching the plaintiff's penis and testicles.
- b) During 1985, 1986 and 1987 Brother Kostka regularly sexually assaulted the plaintiff in his office by either touching the plaintiff's penis and testicles from outside his trousers, or by placing his hand inside the plaintiff's trousers and touching the plaintiff's penis and testicles.
- c) During 1985, 1986 and 1987 Brother Kostka regularly sexually assaulted the plaintiff on sports afternoons when the plaintiff was assisting Brother Kostka with the operation of the "pie wagon". Brother Kostka sexually assaulted the plaintiff by either touching the plaintiff's penis and testicles from outside his trousers, or by placing his hand inside the plaintiff's trousers and touching the plaintiff's penis and testicles.

- d) During 1985, 1986 and 1987 Brother Kostka regularly sexually assaulted the plaintiff on Friday nights when the plaintiff was assisting Brother Kostka with the operation of the "Friday Film Night". Brother Kostka sexually assaulted the plaintiff by either touching the plaintiff's penis and testicles from outside his trousers, or by placing his hand inside the plaintiff's trousers and touching the plaintiff's penis and testicles.
- e) During the middle of 1988 Brother Kostka sexually assaulted the plaintiff in Brother Kostka's room in the seminary when the plaintiff visited him to pick up a bike frame. Brother Kostka sexually assaulted the plaintiff by touching the plaintiff's penis and testicles from outside his trousers.

42. As a result of the assaults described in paragraph 41, the plaintiff was injured and has suffered harm.

Particulars of Injury

a) Psychiatric injury.

43. The plaintiff's injuries were caused by, or materially contributed to by, the defendant's negligence.

44. Further, the plaintiff's injuries as alleged, were caused by, or materially contributed to, by the misrepresentations made by the defendant to the infant plaintiff through his parents.

45. Further, the plaintiff's injuries were caused by the defendant's failure to discharge the obligations cast upon it by its being, in the circumstances, in a special position of trust and authority in relation to the infant plaintiff.

46. Further, the plaintiff's injuries as alleged were caused by, or materially contributed to, by the defendant's failure to discharge the obligations cast upon it as a fiduciary to the benefit of the plaintiff's parents and the plaintiff.
47. At the time and in the circumstances when Brother Kostka assaulted and injured the plaintiff, he, Brother Kostka, was an employee of the defendant.
48. The assault upon and injury to the plaintiff by Brother Kostka occurred in the course of his said employment.
49. Alternatively, at the time and in the circumstances when he assaulted and injured the plaintiff, Brother Kostka was acting as an agent of the defendant for the purpose of the pursuit and furtherance of its business, namely, the education of children.
50. Further and in the alternative, at the time and in the circumstances when Brother Kostka assaulted and injured the plaintiff, he was part of a joint common enterprise in concert with the defendant namely the education of children and the defendant's school.
51. In the premise, the defendant is vicariously liable for the acts of Brother Kostka in assaulting the plaintiff.
52. In the premises, the defendant's conduct fell so far short of acceptable standards as to represent a contumelious disregard for the plaintiff's legal rights and a violation of his rights to personal and bodily integrity.

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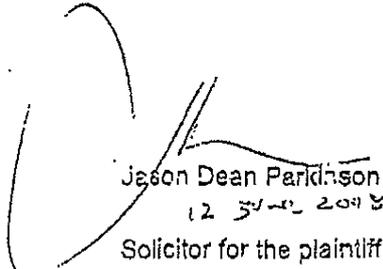
Particulars of the claim for exemplary damages

The plaintiff relies on the facts and circumstances pleaded above in their entirety.

AND the plaintiff claims:

- a) Damages.
- b) Exemplary damages.
- c) Interest.
- d) Costs.

Date: 26 February 2008



Jason Dean Parkinson
12 Feb 2008
Solicitor for the plaintiff