

MONAHAN + ROWELL

LAWYERS

23 December 2008

Via e-mail: jbucci@ccinsurances.com.au

Attention: Mr Joe Bucci
 Catholic Church Insurances
 DX 30577
 South Melbourne

Dear Joe,

RE:	REPORT NO:	1
	CUSTOMER:	Trustees of the Marist Brothers, Marist College Pearce, ACT
	CLAIMANT:	AAQ
	CCI CLAIM NO:	2651073
	CLAIM RESERVE:	\$150,000 inclusive of costs
	DEFENCE COSTS RESERVE:	\$20,000 - \$30,000
	DEFENCE COSTS INCURRED:	TBA
	NET DEFENCE COSTS RESERVE:	TBA
	RELEVANT DATES:	1986, 1987 and 1988

Our Ref: pjmhob/070988

1. INTRODUCTION

AAQ (the claimant) now aged 36 years alleges he was sexually abused by Brother Kostka and by REDACTED in 1986 whilst he was a student at Marist College Pearce, ACT.

2. CURRENT STATUS

- 2.1 The claimant has filed Supreme Court proceedings which, by agreement with Porters, have been stayed until February 2009.
- 2.2 We are in receipt of a report of Dr Jonathan Phillips obtained by Porters Lawyers (see paragraph 3.3).
- 2.3 The claimant was assessed by Dr Roberts on 22 October 2008 and we are awaiting her report.

In association with Colin Biggers & Paisley - Sydney

070988/sec/495682/1

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3. FACTS

3.1 Statement of Claim

In the claimant's Statement of Claim he alleges that in 1986 he was sexually assaulted by Brother Kostka and REDACTED as follows:

- (a) During 1986 Brother Kostka took him into his office at the school and showed the claimant a pornographic video. He then sexually assaulted the claimant on two occasions by touching the claimant's penis and testicles from outside the claimant's trousers. He further assaulted the claimant by putting his (Brother Kostka's) hand in the claimant's trousers and touching the claimant's penis and testicles. Brother Kostka also exposed his erect penis and placed the claimant's hand on his (Brother Kostka's) erect penis.
- (b) During 1986 Brother Kostka further assaulted the claimant by exposing his erect penis to the claimant. Brother Kostka then put his (Brother Kostka's) hand inside the claimant's trousers and touched the claimant's penis and testicles. He then placed the claimant's hand on his (Brother Kostka's) penis and made the claimant fondle Brother Kostka's penis.
- (c) During 1986 REDACTED took the claimant into the music room at the school where he lowered the claimant's trousers and REDACTED then exposed his penis to the claimant. REDACTED then masturbated the claimant and made the claimant place his hand on REDACTED penis and masturbate him.
- (d) During 1986 REDACTED took the claimant into a science room in the school where he exposed his erect penis and put his hand into the claimant's trousers and fondled the claimant's penis. REDACTED then placed the claimant's hand on his REDACTED erect penis.

(According to the claimant's particulars supplied prior to the issued proceedings, there were no witnesses to the assaults).

3.2 Defence

As you know a number of persons have been added as Defendants to the proceedings including Provincials of the Marist Brothers and Principals of the school and CCI because the Ellis defence has been raised.

This defence substantially means that the claimant has to prove liability against individuals to succeed in his claim. The claimant's causes of action against the defendants, excluding CCI, are framed as breaches of duties of care, vicarious liability and breaches of fiduciary duty. As against CCI, it is alleged that as the other defendant's insurer it is obliged to indemnify them.

As previously advised we have informed the claimant's solicitors that we intend to make a further request to strike out their existing Amended Statement of Claim because of the "rolled up" nature of the pleadings which makes it difficult, if not impossible, to work out what claim(s) each of the defendants have to meet.

We have also raised in the defence that the claim(s) are barred under the *Statute of Limitations Act*.

3.3 Medical Reports

(a) Dr Jonathan Phillips

We have now received the report of Dr Jonathan Phillips from Porters Lawyers.

The assessment was conducted by Dr Phillips of [REDACTED], and a copy of his report dated 18 April 2008 is attached.

From this report, we draw your attention to the following matters:

- (a) The Claimant is currently 36 years of age (DOB [REDACTED], is married and has two children [REDACTED]
- (b) He is employed as a [REDACTED]. He was previously employed in numerous jobs in the liqueur and hospitality industry, but had been unsatisfactory in his work until 2001. Since that time he has improved.
- (c) The Claimant attended Marist College Pearce from 1985 (year 5) to 1988 (year 10). He then attended Stirling Independent College in year 11 and 12 but did not qualify for his Higher School Certificate.
- (d) The Claimant allegedly met Brother Kostka Chute in year 8, and was abused 3 times by him. In the first instance, the Claimant was called into Brother Kostka's office. Brother Kostka approached him from behind, and began to massage him. Kostka then massaged the Claimant's penis through his trousers for 2 to 5 minutes. The incident was not disclosed to anyone, and the Claimant did not feel particularly concerned about the incident. The abuse was first disclosed in September 2007, and the Claimant has attended 3 to 4 sessions at SAMSSA (a sexual assault service) which he has found useful.
- (e) The second episode was one month later, when the Claimant was called into Brother Kostka's office and watched a movie with him, however there was no sexualised interaction at this time.
- (f) The third episode was in the middle of that year, when Kostka caressed the Claimant from behind. He massaged the Claimant's penis, and placed the Claimant's hand on his own penis. Kostka then exposed his erect penis. The Claimant developed an erection also, and the interaction lasted 10 to 15 minutes. Kostka told the Claimant "if you tell anyone... you will be expelled".
- (g) The Claimant was also abused by [REDACTED] on two occasions. On the first occasion, [REDACTED] asked the Claimant to remain behind for tutoring purposes. He told the Claimant he would be given a 'sex lesson'. [REDACTED] placed the Claimant's hands on his penis and placed his own hands on the Claimant's penis. There was mutual masturbation, but neither party ejaculated.
- (h) The second episode occurred later that year, when [REDACTED] asked the Claimant to remain behind after school. [REDACTED] placed the Claimant's hand on his penis and then touched the Claimant's penis. There was no masturbation. The Claimant told [REDACTED] he would not engage in this activity, [REDACTED] said if he told anyone people would think he was gay.

[It is to be noted that in the Statement of Claim it is alleged that the abuse occurred in 1986. At that time the claimant would have been 14 years. According to this report, the abuse occurred in 1988 and the claimant would have been 16 years].

- (i) The Claimant advised Dr Phillips that there was a deterioration in his academic performance as a result of the abuse by Kostka and RED ACT. He received mostly Cs and Ds in Year 8.
- (j) The Claimant stated there was a rumour about him during year 9 that he was "a poofter...faggot" and he was teased for several months.
- (k) The Claimant also questioned his sexuality. He developed nightmares in year 8 and year 9 about Kostka and RED and dreamt about them simultaneously penetrating him. The Claimant lost his friends and found his home life difficult. He began to experiment with cannabis in year 9 and 10. He has used hazardous amounts of alcohol in the past. He used to drink 1 to 1.5 bottles of wine at home by himself. Now he has 1 glass of wine in the evening and has 2 alcohol free days per week. He does not currently use illicit drugs.
- (l) The Claimant advised as a result of the abuse, he had difficulties in communication, was excessively anxious and unable to relax, suffered from episodic ongoing nightmares, was paranoid about security, lacks trust in others, avoids intimacy and is episodically depressed. He contemplated killing himself at various times in the past.
- (m) REDACTED
- (n) Dr Phillips found the Claimant to be moderately depressed and anxious, but not overtly irritable. He was not paranoid in attitude. He received a score of 38 on the Beck Depression Inventory II test which is within the severe range for depression. He scored moderate to high scores on pessimism, self dislike, tearfulness, agitation, loss of interest, indecisiveness, altered sleeping patterns, impaired concentration and loss of interest in sex.
- (o) The Claimant also completed a Beck Anxiety Inventory Score and had a total score of 40 which is in the range for concern. This included moderate to high scores for alteration in heart rate, feeling terrified, fears of losing control, indigestion, hot and cold sweats.
- (p) Dr Phillips noted that the history of abuse provided to him by Porters Lawyers differs from that given by the Claimant. However he further commented that he did not think the discrepancies in the history given would be of importance. He considered it was difficult for a person to be precise when the sexual abuse occurred some time ago.
- (q) Dr Phillips found there was no evidence of difficulties in the Claimant's early childhood. He found that after the abuse the normal pattern of psycho/social/sexual development became difficult and chaotic. There was a pattern of demoralization during this time. The Claimant had ongoing problems "*across the domains of his life and he was symptomatic at the time of my consultation*".
- (r) Dr Phillips finds that the Claimant meets the criterion for posttraumatic stress disorder. His symptoms are chronic and pervasive. They interfere with his everyday life and reduce significantly the quality of his life. Dr Phillips states the Claimant has "*highly significant unmet treatment needs*" but is not a good candidate for treatment as he is not psychologically orientated and his symptoms have been present for many years.
- (s) Dr Phillips states the Claimant should be offered 50 hours of psychotherapy, with monthly follow up for two years. In the absence of this, Dr Phillips feels the Claimant will remain as he is

now or deteriorate, in which case his prognosis will be very poor. He doubts the Claimant will ever make a full recovery.

- (t) The Claimant "*would probably have experienced a more successful working life in the absence of sexual abuse by Kostka and RED* He is likely to remain somewhat handicapped in his working life." The Claimant suffered psychological problems as a direct result of the sexual abuse. He has deeply entrenched symptoms and his prospects for improvement at best "*will remain guarded*".

4. INDEMNITY

You have advised that the relevant policy is the Trustees of the Marist Brothers Public Liability Policy for the 1985/1986 period and that the sum insured is \$25 million plus costs.

You have further advised that indemnity has been granted based on the facts and information known to date and continued indemnity remains subject to the terms and conditions of the policy. You have also informed the Trustee's solicitors that there is a duty of disclosure of matters that they know or reasonably should be expected to know as relevant to the claim.

5. CONTRIBUTION

Nil.

Theoretically in this case there would be contribution from the perpetrator, Brother Kostka who is presently in jail but he has no assets.

Also there would have been contribution from REDACTED ED However he suicided in 2000 and his Estate has been wound up.

6. LIABILITY

This is to be the subject of a further report. As you know, the Ellis defence raises complex questions about liability for the claim. There could also be questions of liability to indemnify the insured in relation to any prior knowledge they or the individual defendants may have had about Kostka's sexual behaviour.

7. QUANTUM

On the basis of Dr Phillips report we assess the claim for general damages at \$180,000 - \$200,000. We will review quantum on receipt of Dr Wendy Roberts' report which we expect to receive shortly.

8. CASE STRATEGY

Once we are in receipt of Dr Wendy Roberts' report, we will inform you of the contents and will probably suggest that we attempt to mediate this matter as soon as possible.

9. FUTURE CONDUCT

Refer to paragraph 8 above.

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10. DISPUTE RESOLUTION

Refer to paragraph 8 above.

11. RESERVES

We recommend that the reserve of \$150,000 inclusive of costs, which reserve was set in about July 2008 be maintained for the present. However, on Dr Phillips' report we expect the reserve will need to be increased. The reserves on this claim and others will be reviewed in January 2009. Further we recommend a defence costs reserve up to and including mediation at \$20,000 - \$30,000.

12. POLICY UNDERTAKING ISSUES

Nil.

13. RISK MANAGEMENT RECOMMENDATIONS

Nil.

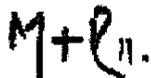
14. RECOMMENDATIONS

See paragraphs 8 and 10.

15. INSTRUCTIONS SOUGHT

Nil.

Yours faithfully,



MONAHAN + ROWELL

Encl.

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