

IN THE SUPREME COURT OF VICTORIA
AT MELBOURNE

2002 Nos 4877, 878, 909, 7910, 7911

BETWEEN:

ANTHONY FOSTER & ORS

Plaintiffs

and

NOREEN HARRISON & ORS

Defendants

ADVICE

1. I acted on behalf of the defendants in the above proceedings at a mediation on 7 November 2005. At the mediation settlement of all five proceedings was reached for the total sum of \$750,000 together with solicitor/client costs, and an indemnity in respect of any amounts required to be paid to the Health Insurance Commission. I recommended that settlement. Subsequent to the mediation terms of settlement were agreed and executed dated 3 March 2006. By those terms of settlement the settlement sum of \$750,000 was apportioned between the five plaintiffs as set out in clause 2(1) as follows:

Emma – the sum of \$450,000

Katherine – the sum of \$220,000

Anthony – the sum of \$25,000

Christine – the sum of \$25,000

Aimee – the sum of \$30,000

2. The apportionment of the global settlement sum as between the plaintiffs was a matter largely decided by the plaintiffs' counsel, and does not necessarily reflect an assessment of the claims of each of the five plaintiffs.
3. I am instructed that the clients I was briefed to represent at the mediation are in discussions with insurers in respect of recovery of all or some of the amounts paid pursuant to the terms of settlement. I am instructed that the insurers have sought written confirmation of the advice I gave recommending the settlement at mediation.

4. The global settlement sum of \$750,000 was recommended on an assessment that the exposure to all five plaintiffs greatly exceeded that sum. I do not presently have all of the material that was available to me at the time of the mediation, and cannot now reproduce the calculations upon which the assessment was based. However, the amount was substantially less than what in my opinion the claims would assess at, and included a discount for the risks the plaintiffs faced on issues of liability, and litigation contingencies. I set out below some of the critical matters which were taken into account in deciding that the settlement should be recommended.

Matters going to liability

5. The particulars of negligence in the amended statements of claim included allegations of failure to properly investigate and act on specific complaints made concerning inappropriate behaviour by Father O'Donnell in relation to children, which complaints had been made some time prior to the sexual assault by Father O'Donnell of Emma and Katherine.
6. The claims by Katherine and Emma's parents Anthony and Christine, and sister Aimee, were claims for damages for psychological injuries suffered as a result of the sexual assault of Emma and Katherine by Father O'Donnell. I formed the opinion that a duty of care was owed to each of Anthony, Christine and Aimee in accordance with the principles established in *Tame v State of New South Wales*; *Annetts v Australian Stations Pty Ltd* (2002) 211 CLR 317. There was sufficient evidence to establish that each of Anthony, Christine and Aimee had suffered psychological injuries.

Matters relating to quantum

Emma

7. The medical reports provided confirm that Emma had suffered significant psychological injuries and was very seriously affected as a result of the sexual abuse of her by Father O'Donnell. General damages would be substantial, as it affected Emma's ability to cope generally, and to form relationships. Emma has suffered from anorexia, depression and drug abuse. She has had multiple

psychiatric hospitalisations and attempted suicide. She has been under the care of psychiatrists and psychologists since 1995. It was likely that her earning capacity was significantly diminished and would remain so for effectively her working life, as a result of the impact of the abuse on her psychological condition and ability to cope with education. Although there were no past earnings or any basis to quantify the loss of earning capacity, it was likely to be assessed at a significant amount given that it would be affected for her whole working life. Her medical expenses were continuing at approximately \$250 per month for medication alone. In my opinion Emma could have obtained a verdict well in excess of the total amount of the settlement.

Katherine

8. Katherine had been diagnosed as suffering from a post traumatic stress disorder caused by the sexual abuse she suffered at the hands of Father O'Donnell, with a secondary diagnosis of a major depressive disorder. Professor McFarlane, in a report prepared following a consultation with Katherine prior to her motor vehicle accident but prepared after the accident, attributed excessive alcohol usage by Katherine to the psychological conditions she suffered from as a result of the sexual abuse by Father O'Donnell.
9. On 28 May 1999 Katherine was staying at a friend's place overnight, and became involved in heavy drinking. When crossing a road with a group of other girls she was hit by a car and suffered very serious head injuries. Katherine was very seriously disabled as a result of those injuries, and had been assessed as having a 90% incapacity. Katherine was in a coma for 3 or 4 months. Katherine's disabilities are now very severe and are attributable to the motor vehicle accident.
10. The fact that the motor vehicle accident was the result of excessive drinking by Katherine, and that the excessive drinking was the result or at least aggravated by psychological injuries suffered as a result of the sexual abuse by Father O'Donnell would be an argument advanced at trial on behalf of Katherine. Ultimately, it would no doubt have been difficult for the necessary causal relationship to be established. Nevertheless, it is likely that it would, at least unconsciously, have influenced the assessment of damages by a jury. In any

event, it was apparent that Katherine's young life was from the date of the abuse until the motor vehicle accident very seriously affected by the sexual abuse.

Christine and Anthony

11. Reports by Dr Michael Epstein confirmed that each of Christine and Anthony had suffered psychological injuries as a result of becoming aware of the sexual abuse of their daughters by Father O'Donnell, and the effects of that abuse on them. Mr Epstein diagnosed Christine as suffering from a chronic adjustment disorder with depressed mood and anxiety. Mr Epstein thought it likely that Christine would require some psychiatric or psychological treatment indefinitely. He considered her future was bleak. I formed the view that a jury would be sympathetic to Christine whose family had suffered greatly as a result of the sexual abuse of Emma and Katherine.
12. Mr Epstein's opinion was that Anthony had also developed moderate adjustment disorder with depressed mood. Mr Epstein expressed the opinion that Anthony was a strong character, but was struggling to cope with the situation he found himself in, and would require continuing psychological treatment. Again, it was my opinion that a jury would be sympathetic to Anthony whose daughters had been severely damaged as a result of sexual abuse by Father O'Donnell.

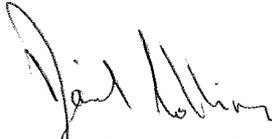
Aimee

13. Although the effect of the abuse of her elder sisters on Aimee was less profound it was clear that it had impacted on her. Mr Epstein diagnosed her as suffering from social phobia manifested by difficulty in public speaking and a heightened level of anxiety in public places, and as suffering from chronic dysthymia, which is chronic depression. Although he formed the view that her social phobia appeared to have been present throughout much of her life, her chronic dysthymia had occurred in the context of the major family disruption caused by the behaviour of Katherine and Emma as a result of the sexual abuse they had suffered and Katherine's motor vehicle accident. It was my opinion that Aimee's claim was less certain to succeed than the claims by the other family members, and was likely to be assessed at a lower amount for quantum if successful.

General Considerations

14. I was apprehensive that in assessing damages a jury would be generous to the plaintiffs. There is naturally a sympathy for victims of children who are sexual abused, and for their families. Emma had obviously suffered greatly as a result of the abuse and had a very bleak future. Katherine, whose present very severe disability was attributable to the motor vehicle accident, had also suffered significant psychological injuries as a result of the sexual abuse. Katherine and Emma's parents were obviously devastated by the difficulties their daughters had encountered, and had suffered significant psychological injury as a result of learning that their daughters had been sexually abused and the effects of the sexual abuse on their daughters. Anthony spoke of the effect that Father O'Donnell's sexual abuse of his daughters had had on his family at the mediation. I formed the view that he and his wife would be good witnesses, and would make a good impression on a jury.
15. As a result of these matters I recommended the settlement of the five proceedings for the global sum of \$750,000 together with solicitor/client costs and an indemnity in respect of any amounts required to be refunded to the Health Insurance Commission.

10 November 2006


DAVID COLLINS
Latham Chambers