

**MONAHAN + ROWELL****LAWYERS**

2 June 2009

*Via email: howard\_harrison@codea.com.au*

**Attention: Mr Howard Harrison**  
 Carroll & O'Dea Lawyers  
 DX 183  
 SYDNEY

Dear Howard,

**RE: Assessment of Quantum – Trustees of the Marist Brothers cases****Our Ref: pjm/sec/080580**

We refer to the upcoming mediations in the Marist matters, and the discussions as to indemnity.

We now provide you with our assessments on quantum for the 7 Marist matters to be mediated.

For the purposes of analysis, we have categorised each of the Marist cases into one of the following categories:

- a. Category 1 Sexual comments or jokes / Massaging / Cuddling / Accidentally brushing against the victim
- b. Category 2 Perpetrator exposing / touching himself  
Perpetrator touching victim's genitals outside clothing
- c. Category 3 Perpetrator touching victim's genitals underneath / without clothing  
Victim touching perpetrator's genitals  
Perpetrator masturbating the victim
- d. Category 4 Oral sex performed by victim upon perpetrator  
Oral sex performed by perpetrator upon victim  
Digital anal penetration of victim by perpetrator
- e. Category 5 Penal anal penetration of victim by perpetrator  
Penal anal penetration of perpetrator by victim

In association with Colin Biggers & Paisley - Sydney

080581/sec/519780/1

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We provided to Mr Robert Crowe SC of the Canberra Bar four cases which were “representative” of the types of cases we have in Marist and Daramalan cases, with varying levels of abuse. Mr Crowe was given two Daramalan cases which were in category 4 and 5 respectively, and the cases of AAE [redacted] (category 3) and AAV [redacted] (category 2).

Our assessments on quantum are largely based on the advice of Robert Crowe SC. We note we have already provided you with copies of his advice. As such, where we have ascertained that a certain claim may only involve touching outside the clothing, we have placed that in category 2 as a starting point. We have then looked to ascertain the psychological impact, and whether this was similar to a category 2 claim, or rather a more severe psychological reaction was suffered, and whether this should move the claim up to a category 3. We have also then looked at any premorbid factors which should be taken into account.

Whilst we understand that the categorisation system is very loose, it is our assessment that the advice of the Canberra silk is the best assessment on quantum we have at this time. It should also be noted that very limited information on economic loss was available at the time of assessment.

Mr Crowe assessed the claims as follows:

❖ Category 2	AAV [redacted]	<b>\$96,700 to \$168,400</b>
❖ Category 3	AAE [redacted]	<b>\$181,700 to \$323,400</b>
❖ Category 4	Daramalan	<b>\$344,500 to \$547,500</b>
❖ Category 5	Daramalan	<b>\$260,600 to \$439,000</b>

There were features specific to the category 4 case which increased the assessment on quantum. We consider that all claims to be mediated on behalf of the Trustees of the Marist Brothers fall within category 2 to 3.

The salient features of AAV [redacted] claim were as follows:

- (a) Assault: By Br Kostka-Chute – touching penis on outside of trousers whilst aged 16 years. Two instances of assault.
- (b) Economic loss: AAV [redacted] owns a graphic design business with one other partner. Alleges but for the abuse would have completed an Associate Diploma at Tafe and a University degree in graphic design. Would have obtained employment in top tier graphic design or advertising firm and risen to executive or partnership level.
- (c) Medical Opinions:
  - (i) Dr Walton – Chronic post-traumatic stress disorder. Requires counselling. Cost \$2,600 to \$3,200.
  - (ii) Dr Kornan – Adjustment disorder with anxiety. Personal disorder not otherwise specified. 40% of difficulties cause by abuse.
  - (iii) Substance abuse – mild marijuana usage at age 18-23, however this ceased when interfering with AAV [redacted] work.
- (d) Substance abuse:- Mild marijuana usage at age 18 – 23, however this ceased when interfering with AAV [redacted] work.

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The salient features of AAE claim were as follows:

(a) Assault by Brother Kostka – touching penis and testicles from both inside and outside the trousers (regularly) both in the religion class room, during class and in Brother Kostka's office (regularly). Assaults of a touching nature also occurred at Friday night movie club in Brother Kostka's room in the seminary and near the sports oval. Assaults occurred over a three year period.

(b) Economic loss: Self employed as a carpet cleaner.

(c) Medical opinions:-

(Dr Klug)

Dysthymic disorder

Sexual disorder not otherwise specified

Recent alcohol abuse (since disclosure)

Severe cannabis dependence (in remission)

Comprehensive psychiatric treatment required over the medium to long term.

(Dr Roberts)

Adjustment disorder (unspecified)

Alcohol and drug abuse (in remission)

GAF of 65

Treatment - 25 sessions of clinical psychological/psychiatric treatment.

AAK

When one compares the psychiatric diagnosis with Dr Roberts and Dr Klug this would appear to be a very limited claim. However, Dr Klug does leave some room to manoeuvre. Although he says he is unable to make a formal psychiatric diagnosis there are various difficulties which suggest a non-specific personality defunction which may be in part attributable to the abuse. Dr Roberts' view is that the claimant does not meet the criteria for any diagnosable emotional disturbance attributable to the abuse).

On our category scale dealing with the type of abuse alleged, this matter would fit within our category 3.

As you know we had Senior Counsel Bob Crowe of the Canberra Bar consider four claims. In the category three class he assessed the claim of AAE. According to Counsel the range of damages a Court might award was from \$181,700 to \$323,400. This included an award of \$80,000 to \$120,000 in general damages and an award of \$35,000 - \$150,000 for past loss of earning capacity. It is unclear how he arrived at these figures.

In AAE case he sustained abuse over a number of years and both Dr Klug and Dr Robert's reports were similar in that they both found psychiatric disorders and the need for future psychiatric treatment.

Using Mr Bob Crowe's assessment as a guide, we consider the claimant's claim is probably within the range of \$50,000 - \$100,000.

### **Damien De Marco**

On our quantum scale dealing with type of abuse alleged, this matter would fit within our category 3 or category 2.

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As previously advised the categories were based on the physical acts of abuse alone and not the psychiatric injuries allegedly flowing therefrom.

Category 2 Abuse – AAV [redacted]

Counsel also provided advice on the claim of AAV [redacted] which we considered was a Category 2 claim. According to Counsel the total range of damages a Court might award in the AAV [redacted] matter was from \$96,700 to \$168,400. This included an award of \$50,000 - \$75,000 of general damages and an award of \$30,000 - \$60,000 for past loss of earning capacity. Again, it is unclear from Counsel's advice how he arrives at these figures.

The salient features of the claimant, Damien De Marco's claim are as follows:

- (a) **Assault:** By Br Kostka – Whilst hugging the claimant he placed his hand inside (or outside) the claimant's trousers and fondled his penis and testicles – one instance of abuse.
- (b) **Economic loss:** Seems to be on a parenting allowance whilst wife retrains as a physiotherapist.
- (c) **Medical opinions:**
  - (i) **Dr Klug:** Severe cannabis abuse and dependence  
Dysthymic disorder.
  - (ii) **Dr Roberts:** Probable impulse control disorder  
Possible hypochondriasis  
Cannabis abuse, sleep terror disorder,  
adjustment disorder with depressed mood.

Based on Mr Bob Crowe's advice and considering the claim more as an assessment only, we view quantum in the range of \$300,000 - \$324,000.

AAQ [redacted]

On our assessment, the claim of AAQ [redacted] fits within category 3 abuse.

The claim of AAQ [redacted] relates to abuse by both REDACT [redacted] and Brother Kostka-Chute, and as such this may be used as an argument to increase any settlement figure. We have previously assessed AAQ [redacted]'s claim for damages at \$180,000 to \$200,000 based on Dr Phillips' report.

Based on the advice of Bob Crowe SC, we advise that the reserve in relation to this claim should be raised to \$323,000, plus costs of \$50,000.

Please note that Porters Lawyers have advised they will not be providing further particulars of economic loss prior to the mediation in relation to AAQ [redacted] claim.

ACD [redacted]

Based on 4 loose categories, the complaint of ACD [redacted] falls into category 3 abuse.

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Given that the abuse in [AAE] claim occurred over a sustained period of time, and involved a similar level of abuse, we would categorise the claim of [ACD] within the same band. This is also the fact given that [AAE] has a number of similar diagnoses to those of [ACD]

We note that Porters Lawyers have advised they will not be providing further particulars of economic loss prior to the mediation. To that end, however, we note that the claimant has had a history of continuous employment, and owns his own production company EarthWalker Productions, which has successfully produced and sold 117 episodes of a backpacking style show to the Travel Channel.

On this basis, we recommend that a reserve of **\$370,000** be maintained, inclusive of \$50,000 in costs. However, given that [AAE] cannabis usage is remission, and the claimant's usage is not, that may push this claim into a higher range of quantum.

[ACK]

On our category scale, dealing with the type of abuse alleged, this matter would fit within Category 2.

The features of [ACK] claim are:

- (a) Assault: By Br Kostka Chute – touched [ACK] on the groin outside trousers during Friday night Movie Club and placed claimant's hand on his genitals (three times). Assault occurred over the space of one night only.
- (b) Economic loss: [ACK] an APS Level 5 in international agreements, international branch of the Department of Families, Housing, Community Services and Indigenous Affairs. But for the abuse would have completed tertiary education and be a higher grade within the APS. Claim for economic loss.
- (c) Medical opinions:-
  - (i) Dr Phillips –
    - Chronic Adjustment Disorder unspecified type.
    - Sexual abuse by Kostka perceived by the claimant on a high level psychological shock and it materially contributed to his psychological condition.
  - (ii) Dr Roberts –
    - No diagnosable emotional disturbance.
    - Position of his current functioning attributable to abuse but does not meet criteria for psychological disorder.
- (d) Substance abuse: Nil.

Using Bob Crowe's assessment as a guide we consider the claimant's claim is probably within the range of \$96,700 to \$168,400 plus costs.

[ACM]

Based on Dr Peter Klug's report dated 29 October 2008 we had previously assessed the claim in the range of \$200,000 to \$250,000 inclusive of costs. Our assessment did not take into account a claim for economic loss, although Dr Klug thought that the claimant's working capacity had been affected by his

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psychiatric problems and that he has almost certainly underachieved. However we noted that the claimant was a self-employed businessman running a pool maintenance business with a partner and two employees and that business appears successful.

We have now received Dr Wendy Roberts' report. If the claimant's version of events is valid she thought the majority of his complaints appeared to relate to the assaults. His complaints are adjustment disorder with anxiety and depression and personality features of possible disconnection from reality, depressed mood and some obsessional features but she was concerned about the exaggeration and inconsistencies displayed by the claimant.

In line with those concerns and taking into consideration that probably the only claims the claimant may make out are some claims of fondling outside the clothing by REDA and Kostka whilst at school and maybe fondling by Greg Sutton, we consider it reasonable to look at this claim as falling within our category 2 claims. Bob Crowe SC assessed the claim of AAV [redacted] (which we regarded as a category 2 claim). For assessment purposes only, Bob Crowe SC indicated AAV [redacted] figure were in the range of \$96,700 - \$168,400 (\$50,000 - \$75,000 general damages and \$30,000 - \$60,000 past economic loss). However, because this claim has many unique features we consider Counsel should be briefed to give particular advice on quantum for the claim.

ACO [redacted]

As you are aware, Bob Crowe SC of the Canberra Bar was provided with 4 different "categories" of cases. Based on that comparison, the complaint of ACO [redacted] falls into category 3 abuse.

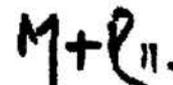
Given that the abuse in AAE [redacted] claim occurred over a sustained period of time, and involved a similar level of abuse, we would categorise the claim of ACO [redacted] within the same band. Furthermore, ACO [redacted] is externally employed, and has a less severe psychological diagnosis.

We note that Porters Lawyers have advised they will not be providing further particulars of economic loss prior to the mediation.

On this basis, we recommend that a reserve of **\$370,000** be maintained, inclusive of \$50,000 in costs.

Please do not hesitate to contact our offices should you wish to discuss this advice.

Yours faithfully,

  
**MONAHAN + ROWELL**

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