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**From:** Br Michael Green [REDACTED]

**Sent:** Tuesday, June 03, 2008 4:28 PM

**To:** provincial

**Subject:** Re: legal defence

We have little control over the methods being used by the plaintiffs' lawyer, but we are wholly in charge of our own legal defence, and have the right, if not rresponsibility, to mount it within the full protection of the law. As you have said, it is their call that the case is being detremined in the courts, not ours. What they have to wear from that choice is the reality that the process of the law is essentially an amoral thing. They can't take the legal path on one hand, and argue from moral standpoint in the public arena on the other.

I think the important thing for us is to have a consistent and morally defensible position which is continually put out in both fora. But that should not diminish our efforts to exercise every legal defence we have available to us, if that's the way the choose to play it. The financial costs to us in this matter are obscenely out of proportion to the crimes committed, and that is enough reason for me to defend the charges as we are.

M

*Michael Green FMS*

[REDACTED]

----- Original Message -----

**From:** provincial <[REDACTED]>  
**To:** Anthony Robinson <[REDACTED]>; Bill Sullivan <[REDACTED]>;  
 Graham Neist 2 <[REDACTED]>; Michael Green  
 <[REDACTED]>; Peter Carroll <[REDACTED]>; Peter Corr  
 <[REDACTED]>  
**Sent:** Tuesday, 3 June, 2008 1:24:25 AM  
**Subject:** legal defence

Brothers,

I spoke with our lawyers today about the content of the article in the Canberra Times.

It is a fact that the Trustees are in court on Wednesday. What is to be heard is a petition from our side that the complaint lodged by Parkinson is not in the correct form for argument before the SC. We accept that there are claims to be argued but the imprecise, deficient approach of Parkinson does not allow this our lawyers used words like embarrassing, vexatious, oppressive

Regarding whether Kostka was an agent, this is a question that was determined in the 2007 case *Ellis vs Trustees of the Archdiocese of Sydney*. (See the accompanying article). The short of it is that for cases before 1986, Church groups such as ours are not to be held legally liable for the action of their members. We accept our moral liability by encouraging people to go through the Towards Healing process and we will reach mediated settlements as well but not with punitive or exemplary damages for negligence. It is these damages that Parkinson really wants and hence his attempt through the media to challenge the previous court of appeals decision. There is a possibility that at some time governments will change the law (even retrospectively) but for the moment the law holds that the Trustees were not legally responsible.

This leaves the moot question as to who was. Are we simply passing the responsibility to the former Headmasters? According to the lawyers, no. I must admit that I am a bit concerned that in our case with schools, the *Ellis* judgement is not so clear. There you had the situation of a priest and the Trustees of the diocese no intermediary authority. In our case, we have the Brother and the Trustees but the local school authority as well. Yet, as we all know, prior to changes in Child Protection legislation, the headmaster referred matters to the Provincial and deferred to his judgement. Now the headmaster is head of agency and the Provincial must defer (at least in the short term!).

Our basic line is that if the Trustees (not Kostka) are taken to court then we will use the full force of the law to defend ourselves. We will use the *Ellis* judgement. Hearsay, unsubstantiated or exaggerated claims will be challenged. We have done our own investigation and this gives us an important set of facts. Unfortunately Marshall McMahon has been in hospital with acute blood pressure (and some amnesia!). His recollections re conversations with Kieran in 1979 are crucial.

The result of the proposed line of argument is that the Trustees will not be liable for negligence. Compensation payments will still be made, hopefully through mediation.

But we Trustees can expect to be pilloried in the press for hiding behind the *Ellis* judgement, seeking immunity. This is exactly what Victor Violante is up to in his piece: Because there was no contract of employment, Marist Brothers did not owe a duty of care to his victims. This sounds wrong but it is legally correct! The only way we can hold our heads up and argue this way is if we are publicly seen to be engaging in identifying victims, compensating them and seeking their best interests.

We are trying to do this through our final press release for Kostka. The relevant paragraph reads:

The Marist Brothers are determined to right the wrongs of the past. Any person who has suffered abuse at Marist College, whether sexual, physical or emotional, is encouraged to come forward to either the Marists, the Catholic Church Professional Standards Office or the Police. Media claims to the contrary notwithstanding, the Marist Brothers will continue to do everything possible to ensure every victim without exception receives healing. The Towards Healing report line is 1 300 369977.

Do you have any comment to make on all this: using the Ellis judgement, the press release?

Howard Harrison (Carroll & O Dea) and Patrick Monaghan (CCI lawyer) could be at our next meeting or extraordinary meeting (tele-conference?) if we want to clarify matters. What do you think?

Meanwhile, Kostka gets sentenced on Thursday. He is as ready as one could be.

Regards,

Jeff