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Mr P Monahan
Monahan & Rowell
Lawyers
GPO Box 4542
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Dear Mr Monahan

MARIST CANBERRA – CCI

We refer to your letters of 15 May and subsequent discussions.

Our client agrees with the approach proposed in respect of the management of the mediations in June but would suggest that given the current state of the indemnity issue CCI should continue to fund settlements at least in part.

We are instructed to work closely with you on the mediations in June.

Our Mr Harrison will liaise with Sister Angela Ryan in relation to PR issues.

The Marist Brothers understand the rationale for CCI's reservation of rights but will argue that there should be ongoing insurance support in relation to these claims.

There are substantial reservations as to the accuracy of Brother Chute's recollections of discussions with previous Provincials and the actual nature of the interaction which did take place at the various times and Brother Alexis is preparing a memorandum on this topic. We note the inconsistency between his version and the apparent recollections of Brother Charles.

It is most important that one look at the actions of former provincials in the light of the culture and knowledge that existed at the time on these psycho-sexual issues, that is, the industry standard rather than imposing an unrealistic retrospective approach to de facto corporate culpability.

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In the meantime, we note that the factual investigation process continues and we suspect that by June, there will be clearer information available as to these alleged discussions which occurred so many years ago.

In the meantime, we are instructed to submit that the legal approach proposed by CCI in this type of "prior knowledge" situation is not straightforward and should be resolved in favour of the insured.

1. The Policies

We note that public liability policies were on foot during most of the relevant period and that indemnity has been sought under these policies and the special issues ETL policy.

We note that under the public liability policy in general terms indemnity is to be provided where the insured becomes legally liable to pay for compensation in respect of bodily injury occurring during the period of insurance as a result of an accident and happening in connection with the business carried on at and from any place specified in the schedule.

It is obviously the case that the insurance in question was taken out by the Province not by the alleged perpetrator and that the perpetrator of the act is not the embodiment of the insured and the insured would not be criminally liable for the acts of the alleged perpetrator.

2. The Issue

As we understand it, CCI may seek to refuse indemnity on the basis that the Marist Brothers had "prior knowledge" of the propensities of Brother Chute and by sanctioning his continued involvement in a school environment where he could re-offend his subsequent offending behaviour was brought outside the rubic of an "accident".

Accordingly, the meaning of the term "accident" is critical in this type of analysis.

3. Accident

In *Australian Casualty Co Limited -v- Federico* (1986) 160 CLR 513, Gibbs CJ reviewed relevant decisions involving interpretation of the phrase "caused by an accident" in relation to a personal accident policy. The Chief Justice held that the words "an accident" can apply either "to an event which happens fortuitously or to the consequences of an event".

The alleged facts giving rise to the Plaintiffs claim in our view amount to an accident from the viewpoint of the insured.

In *S & Y Investments (No 2) Pty Limited (in liq) -v- The Commercial Union Assurance Company of Australia Limited* 44 NT reports 14, the Court of Appeal of the Supreme Court of the Northern Territory dealt with a case involving a claim in respect of the death of an individual killed by the manager of a hotel business. The owner claimed indemnity under its public liability policy. The

issue arose as to whether the insurer was entitled to deny liability on the basis that the fatal shooting was "not as a result of an accident or happening in connection with the business carried on" by the operator of the hotel business.

The Court held that the circumstances of the shooting did constitute an accident.

Asche, J said: "It seems to me that "an accident" in the ordinary sense of the word is no less an accident if it occurs in culpable circumstances. The meaning of the word does not change although the blameworthy circumstances in which the accident happened may render a person liable to civil or criminal proceedings for his failure to take due care for the safety of others."

We argue that that is precisely the position in connection with the current cases.

Further, it was in S & Y Investments held -

"If the appellant is not criminally liable for the acts of Holmes (the manager), I can see no way in which it could be suggested that is was blameworthy in the sense that public policy would disentitle it to claim under the policy. There is nothing to show that it recklessly chose Holmes as its manager knowing that he had a propensity to violent or stupid action; and there is really nothing else to take this out of the ordinary principles of a claim under a policy for an accident to a person caused by the negligence (albeit criminal negligence) of its agent."

Meaning of Unexpected – Objective or Subjective Test

We submit that it is irrelevant whether a reasonable person in the position of the insured would have foreseen the risk, but that the insured must, as a reasonable person, have expected to anticipated the result of injury that was actually incurred. We have advice to the effect that when properly understood

> “the test connotes a strong degree of recklessness or probability, so that the degree of risk was appreciated by the Insured, or should have been appreciated, and was deliberately undertaken. So the Insured knew of the nature of the acts that were to occur and knew, or from the objective facts, should have known, of the prospects of damage and took the risk. It is a matter of degree when the deliberate taking of the risk amounts to courting a danger, and prior experience of injuries or damage may render the conduct unacceptable as a risk”.

Application of Above Principles to Present Case.

These issues would have to be looked at closely on a case by case basis to see what actually was expected from the point of view of senior persons within the Marist Brothers given the approach taken with Brother Chute and what was known about his difficulties and the treatment or help that he had sought and was obtaining.

We would submit that in most instances, the injuries to subsequent boys did occur as a result of an accident.

There is no doubt that the former Provincials did not intend that Brother Chute being allowed to continue in a school situation, would inflict bodily injury on any students.

As to what former Provincials expected, this must be judged against the actual understanding of what they had at the time of the nature of the problem which, as we broadly understand the evidence, is consistent with the understanding held at the time by other persons in such a position namely, that a reported incident of a sexual nature between a Brother and a student was a moral failing which, provided the Brother was otherwise of good character, repentant and prayerful and appropriate counselled, could be assumed would not reoccur.

We suspect that evidence will emerge indicating that the application of this approach to other instances did not result in re-offending.

We will submit that when these complaints came forward it amounted to a mishap, disaster or unfortunate event rather than something the former Provincials either subjectively or objectively expected to occur.

Accordingly, it will be strongly argued that the bodily injuries suffered to the boys arising from the alleged conduct of Brother Chute and resulting in the current litigation in Canberra, occurred “as a result of an accident” within the meaning of the Policy.

In summary:

(a) we need to work together to attempt to resolve these claims now for reasonable figures and to achieve a resolution of the indemnity issue;

(b) the factual position on prior knowledge is far from clear;

(c) any argument in respect of corporate failure or “courting the danger” must have regard to the then state of knowledge and industry norm and CCI’s involvement for many years as insurer-broker risk management adviser to the Marist Brothers;

(d) we would submit that it is far from clear at this stage that evidence is available suggesting conduct or knowledge on the part of prior Provincials which would justify CCI in denying indemnity given the nature of the principles to be applied,the nature of the relationship between CCI and the Marists (trusted advisor) and all of the difficult circumstances.

We look forward to discussing matters with you further and confirm that this is a preliminary discussion paper only for the purposes of putting a number of isssues on the record prior to the June mediations.

Yours faithfully
Carroll & O'Dea
Per: