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PRM/JD/CATH4300-9006837

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14 December 2004

Private and confidential

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Partner
Paul McCann

Dear Michael

Ellis v Duggan and Ors

1 Introduction

1.1 We have received an offer of settlement from the Plaintiff for $750,000 plus costs. Pursuant to part 22 of the Supreme Court Rules, this offer will be open until 3 January 2005.

1.2 If we reject this offer and the Plaintiff obtains a judgment that is no less favourable than the terms of the offer of compromise, the Plaintiff will be entitled to costs on an indemnity basis against us. Because of this rule, we have a duty to consider carefully the Plaintiff's offer.

1.3 We have therefore considered our prospects of success at the forthcoming limitation argument and the merits of accepting the Plaintiff's offer at this stage of the proceedings.

2 Prospect of success at the hearing to extend the limitation period

2.1 We now know that central to Ellis' case to extend the time limits is his apparent lack of awareness of the nature and extent of his injury and the causal connection between the injury and the alleged abuse. Ellis says (at paragraph 26 of his affidavit) that such awareness did not emerge until September 2001.

2.2 The date of Ellis' awareness is borne out to an extent by the reports of Pleur Bishop and John Murray. These reports are evidence that Ellis only began to 'open up' about the abuse in August 2001. Nicola Ellis will also support the date of her husband awareness.

2.3 The preliminary report of Dr Phillips, who has yet to examine Ellis and, it seems was not told of the 'abuse' after Ellis turned 18, nor the abuse of Ellis by his own father in his letter of instruction, is based on an acceptance of the assumption that

Ellis would not have comprehended the relationship between the abuse and the symptoms until the time of his therapy with Fleur Bishop (August 2001).

3 The Test

3.1 Ellis must show that notwithstanding his qualifications in psychiatric nursing and in law and his wife's employment as a lawyer working within the Child Protection Department of the Church, he was unaware of the effects of the abuse until August 2001. In our view, this will be a startling proposition to make out.

3.2 Ellis must show that he has a personal injury and either that he was unaware of the injury per se or that he was unaware of the complications, implications or consequences of the injury until August 2001. Clearly, the Plaintiff's medical evidence will be important in this regard.

3.3 The majority of Ellis' evidence is self serving. The psychologists, psychiatrists and his wife can only report back what they have been told by Ellis previously. Ellis admitted to the Church's assessor, Michael Ecclestone, that he had previously disclosed the nature of the abuse on a weekend retreat 1996 or 1997.

3.4 As much of the evidence on this point will be medical in nature, and we are expecting a further, more comprehensive report from Dr Phillips, on balance, we would say that our prospects of succeeding on this point are above average.

4 Just and Reasonable

4.1 Even if Ellis is successful in persuading the Court of the date of his enlightenment, he must then go on to prove that an extension of the limitation period is just and reasonable pursuant to section 60G(2) of the Limitation Act 1969. The most important factor in our favour in this regard is the fact that Duggan and practically every member of the Canonical chain of command are now deceased. In *Brisbane South Regional Health Authority v Taylor*[1], McHugh stated that when a Defendant is able to prove that he will not now be able to fairly defend himself then the case is no longer one of presumptive prejudice and society is best served by barring the Plaintiff's action. Ellis knew of the deterioration in Fr Duggan's health in 2002, if not before.

4.2 The test is whether a fair trial can still take place notwithstanding the Plaintiff's delay in bringing the proceedings. In our opinion, our chances of success in the this respect are very good.

5 Value of the Claim

5.1 The claim has yet to the quantified. However, Ellis seems to suggest that any damages to which he is entitled, should include his medical costs for the past 3 ½ years. Ellis is also claiming the cost of renting a second residence for his wife (who apparently has moved out due to Ellis' behavioural problems). By far the greatest claim is for loss of earnings. Ellis claims that he will not return to work for between 12-18 months, and then, in a much lower paid job. Ellis earned $17,000

[1] (1996) 139 ALR1

per month as a salaried partner ($290,000) which, if he were promoted to international partner, would raise to between $500,000 and $750,000 per year. Ellis claims he was in line for promotion to equity partner in July 2005 or at the latest July 2006.

5.2 This claim is, however, not borne out by the subpoenaed Baker & McKenzie documents. Whilst Ellis' more senior partners praise his technical skills they raise concerns about his client base eg in a partner review meeting on 6 March 2003, states:

"Practice Development – not happening, to be a partner you need to add to the business and therefore the current situation is not acceptable" and "JE acknowledges practice development is not his area of talent".

5.3 If Ellis is successful and the Court accept Ellis' evidence regarding his promotion prospects, the claim would be substantial and an award in excess of the current offer of $750,000 plus costs would be likely. The award would involve monetary compensation for pain, suffering and loss amenity plus loss of past and future earnings plus past and future medical costs[2].

6 Worst Case Scenario

6.1 If Ellis is granted leave to prosecute the substantive claim, this case would be difficult to defend as there is no contradictor to the claim.

6.2 The Church still however has the option to defend the claim based on the 'proper defendant' argument and the principles set down in the case of *Lepore*[3]. In *Lepore,* the High Court held that an institution would rarely be held vicariously liable for sexual assault committed by a staff member. This area of law however is relatively new and untested. In *Lepore,* the majority in the High Court was divided in their reasoning and there appears to be little judicial certainty as to when an employer can be held liable for the actions of an employee.

6.3 One thing is clear we would certainly have to think carefully about our strategy should Ellis be successful on the limitation argument.

7 Advice

7.1 Having reviewed our prospects of success at the limitation hearing, we would advise you not to accept the Plaintiff's offer of $750,000.

7.2 As you know, you are entitled to put on a counter-offer. In considering this, we note that Ellis has forced you to outlay a significant amount of money on defending this matter. Accordingly, we would advise, at this stage, not to make any counter-offer to him. Also, in our view it would be a strategic mistake to indicate that the Church will be prepared to 'negotiate', as he will see this as a fallback position he can retreat to at a convenient time.

[2] There maybe some reduction for the effects of any contribution to his injury caused by the physical abuse he suffered at the hands of his father

[3] New South Wales v Lepore (2003) 195 ALR 412

7.3 If you have any queries, please contact John Dalzell on (02) 9210 6160, or myself on 9210 6241

If you have any queries, please contact John Dalzell on (02) 9210 6160.

Kind regards

Paul McCann
Partner

attachments

Offer of compromise from the Plaintiff dated 3 December 2004