

KATHLEEN MONICA BILES & ORS v STATE OF NEW SOUTH WALES**OPINION IN RELATION TO All [REDACTED]'S OFFER OF COMPROMISE****INTRODUCTION**

1. By Statement of Claim filed 15 July 2008, Kathleen Monica Biles and a number of other plaintiffs, including All [REDACTED], sued the State of New South Wales.
2. In broad terms, the plaintiffs alleged that the State of New South Wales was responsible at law for injury allegedly suffered by each plaintiff when subjected to physical, mental, emotional and sexual abuse perpetrated by Bert and Edith Gordon and Colin Gibson.
3. By document entitled "Particulars Provided Pursuant to the Orders of Judge BJ Knox SC – dated 11 May 2009" the plaintiffs provided particulars of the allegations made generally against the State of New South Wales, together with allegations made in each particular case.
4. In relation to All [REDACTED], it is asserted that she was assaulted repeatedly by Colin Gibson between 1977 and 1984. Colin Gibson pleaded guilty to indecently assaulting All [REDACTED], and was convicted and sentenced.
5. It is not alleged that either Bert Gordon or Edith Gordon physically or sexually assaulted All [REDACTED].
6. My instructing solicitor is well aware of the substance of the allegations that are pleaded in the Statement of Claim.
7. For the purposes of this Advice, it can generally be accepted that the State of New South Wales has available to it additional grounds for defence (factual and legal)¹ in relation to those plaintiffs whose allegations relate solely to the conduct of Colin Gibson.

¹ For example, significant doubt exists re whether the state of New South Wales is vicariously liable for any conduct of Colin Gibson.

8. The State of New South Wales has reasonable prospects of success in relation to each claim brought against it by each Plaintiff. The State of New South Wales is, however, at risk of a verdict or verdicts against it in relation to some or all of the allegations that are pleaded against it.
9. It is in this context that I turn to consider the Offer of Compromise served on behalf of All [REDACTED].

OFFER OF COMPROMISE

10. Materially, the Offer of Compromise reads as follows:

"The Plaintiff, All [REDACTED], offers to compromise her claim against the Defendant in whole on the following terms:

1. *Verdict for the Defendant.*
2. *Each party to bear its own costs.*

This offer shall remain open to be accepted until 4.00 pm on 8 June 2012.

This offer is made on a without prejudice basis.

This offer is made on behalf of the Plaintiff, All [REDACTED], only and is without prejudice to, nor can it be taken to have any effect on the claims made by the other Plaintiffs in these proceedings.

This Notice of Offer of Compromise is made in accordance with Rule 20.26 of the Uniform Civil Procedure Rules, 2005 (NSW)."

11. The Rules specifically provide for the making of an Offer of Compromise on the basis of a "verdict for the defendant and that the parties are to bear their own costs".
12. The Offer made on behalf of All [REDACTED] complies with the Rules and is a genuine attempt to compromise the proceedings². This is particularly so given that the Offer is made by the plaintiff and involves an entire abandonment of any entitlement she might otherwise have to damages.
13. The defendant's professional costs and disbursement as at 15 May 2012, are said to total \$628,651.60 exclusive of GST.

² *Melchior v Sydney Adventist Hospital Ltd (No. 2) [2009] NSWSC 65*

14. It is my understanding that such costs relate to the totality of the allegations brought against the State of New South Wales, and not just to those brought by All [REDACTED].
15. Whilst some of the costs incurred to date may relate solely to All [REDACTED] All [REDACTED], such costs would be relatively small.
16. I am not briefed with any information as to All [REDACTED]'s capacity to satisfy any cost order made against her. If a cost order was made against All [REDACTED], the cost of assessment and enforcement may well outweigh any reasonable expectation of recovery of a substantive costs amount. A question may also arise as to whether any such cost order would be sought and/or enforced. It is not necessary to give any detailed consideration to that issue at this stage.
17. If the defendant were to succeed in totality in its defence of the allegations contained in the Statement of Claim, it would be entitled to seek an order for the payment of its costs as and from each plaintiff. Each plaintiff would be jointly and severally liable for payment of the defendant's costs (or at least those costs relating to the general allegations). As such, it is theoretically possible that All [REDACTED] could be liable for close to the totality of the costs incurred by the State of New South Wales³.
18. As such, at least theoretically, acceptance of the Offer of Compromise involves a detriment to the State of New South Wales that may be greater than a mere assessment of the costs that relate solely to defence of the claim brought by All [REDACTED].
19. Nevertheless, on the other hand, the State of New South Wales, if the Offer of Compromise was accepted, gains significant benefits. These benefits are:
 - Resolution of the proceedings without a further exposure to a claim for damages.
 - Savings in investigation costs.

³ For example, this would occur if she was the only plaintiff with assets sufficient to meet the costs order.

- Savings in trial costs (including but not limited to Notice of Motion for extension of limitation period).
20. The savings in expenditure and the removal of a potential claim for damages in my opinion far outweigh as a benefit to the State of New South Wales the theoretical detriment outlined above.
 21. In the premises, I recommend acceptance of the Offer of Compromise.
 22. It is possible that other plaintiffs may wish to give consideration to also abandoning the claims which they have brought against the State of New South Wales. The analysis set out above would apply equally to such plaintiffs.
 23. If any further Offer of Compromise is served, in the same or of similar terms, I recommend acceptance of it.
 24. In addition, I recommend that the State of New South Wales serve upon each remaining plaintiff an Offer of Compromise in the terms provided for by UCPR r.20.26(2), vis verdict for the defendant, parties to bear their own costs.

I so advise.

Steven Woods
13 Wentworth Selborne Chambers
16 May 2012