IMPLICATIONS OF THE *COMENSOLI V O'CONNOR* DECISION ON THE ASSESSMENT OF DAMAGES IN HISTORICAL INSTITUTIONAL ABUSE CLAIMS

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THE SUPREME COURT DECISION

In late 2022, Justice Keogh awarded Stephen O'Connor (the Respondent) the sum of AU$1,908,647 plus interest by the Archbishop of Melbourne, Peter Comensoli (the Applicant).

The case related to grave sexual assaults committed by a Catholic priest, Desmond Gannon, upon the Respondent on three occasions between 1968 and 1970. The Supreme Court held that the Applicant was both directly and vicariously liable for Gannon's sexual assaults. Although this finding of direct and vicarious liability was raised as a ground of appeal in the Applicant's application, it was not ultimately pursued before the Court of Appeal.

The damages awarded comprised general damages (AU$525,000) and economic loss damages (AU$1,500,000), with a small award for medical expenses. The general damages figure represented a significant increase in awards previously made by courts in comparable cases. At the time of the abuse, the Respondent was living with his mother, grandparents and siblings, following his parents' separation at age nine. The amounts awarded reflect Justice Keogh's decision that the Respondent had been a happy child until age 12, when his life was derailed by Gannon's abuse. Supportive evidence from his sister was key to this finding, as well as evidence that his other siblings were stable, productive, and successful.

The full decision can be read here.

THE COURT OF APPEAL'S DECISION

The Applicant sought leave to appeal on three aspects of Justice Keogh's decision, arguing:

1. That the general damages award was manifestly excessive;
2. That the economic loss damages award was erroneous; and
3. That disability support payments received by the Respondent ought to have been deducted from the damages awarded (ultimately this ground of appeal was not considered as it has not been pursued before Justice Keogh).

As to the general damages amount, the claim of manifest excess was based on:

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4. Disconformity with awards in other cases that generally sat between AU$250,000 and AU$300,000;
5. Failure to take into account other causes of misfortune, including family dysfunction and antisocial peers;
6. Overstating the effects of alcohol addiction by ignoring the circumstances in which the Respondent functioned shortly after he left school; and
7. The absence of recent medical evidence relating to alcohol addiction.

The Applicant was particularly aggrieved by Justice Keogh's decision, as the Respondent had submitted at trial that a lower award of between AU$400,000 and AU$450,000 was appropriate.

The Court of Appeal distilled two key principles from the authorities regarding whether a general damages award is manifestly excessive.

- First, damages must be proportionate, but the ground that an award is manifestly excessive must reach the point of being "grossly disproportionate." An appellate court should not lightly interfere with the judgment of the trial court when it comes to assessment of damages.
- Second, other cases do not provide set points of reference.

The Court of Appeal rejected all of the Applicant's arguments. In particular, in relation to the significance of other general damages awards, they stated: "[T]he number of so called comparator cases is small, and the destructive impact of child sexual abuse is becoming better understood."

As to the economic loss amount, the Court of Appeal rejected the claim that there were erroneous calculations, rejected the argument that the economic loss figures should not have been rounded up by AU$5000, and rejected the Applicant's objections to a discount figure of 15% to reflect vicissitudes in respect of past loss.

IMPLICATIONS OF THE DECISION

With the number of historical sexual abuse claims continuing to grow, this decision is of great interest to those working in the area.

Some key takeaways are as follows:

- The award for general damages was unexpectedly high, exceeding the amounts awarded in "comparable cases" identified by the Applicant and exceeding even the figure claimed by the Respondent. It remains to be seen whether this reflects a shift in judicial and community sentiment or whether the outcome for the Respondent was due to the specific features of his case, including the convincing and corroborated evidence of the abuse triggering a sudden and immediate shift in behavior, where the Respondent had previously been a happy child.
- Evidence of a sibling's success or happiness in his or her personal and professional life can be found as an inference that a plaintiff would otherwise also have been similarly happy or successful.

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