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COMPENSATION LAWYERS



Child sexual abuse survivor loses appeal to sue for loss of earnings

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After legislative change as a result of the Royal Commission into Institutional Responses to Child Sexual Abuse (**'the Royal Commission'**), many survivors were afforded the opportunity to revisit previously settled abuse compensation claims. However, conditions applied. In this blog, we examine a 2024 Victorian Court of Appeal case where the child sexual abuse survivor was granted permission to revisit a claim for pain and suffering damages but not his further claim for economic loss (loss of earnings).

Compensation available for child sexual abuse

In most cases involving child sexual abuse claims, abuse survivors will seek the following compensation:

General damages

This is to compensate the survivor for their 'pain and suffering';

Out-of-pocket expenses (past and future) - also part of special damages'

The abuse survivor seeks to recover what they've had to spend themselves (usually for medical treatment for their injuries) to date, and into the foreseeable future; and

Economic loss – loss of earnings/earning capacity

> This typically will be the largest ‘head of damage’ (largest compensation component) as it is to compensate the survivor for how the injuries have adversely impacted their ability to earn income. This is especially the case with child abuse cases, as the injuries can often result in the survivor not being able to do much at all in the way of work for their entire adult working life.

In some more severe cases, claimants can recover compensation for ‘care and assistance’ they’ve needed because of how their injuries have impacted their capacity to look after themselves.

Case review - original child sexual abuse compensation claim commenced in 2012

DZY (a pseudonym) is a survivor of child sexual abuse dating back to 1964. He brought a compensation claim against the Trustees of the Christian Brothers (**‘the Christian Brothers’**) due to being sexually abused by two Christian Brothers (Brother Robert Best and Brother Gerald Fitzgerald) between 1964 and 1968.

DZY’s original claim was for pain and suffering damages only.

He decided to instruct his legal team not to pursue a claim for economic loss back when he first sued the Christian Brothers in 2011/12. This may seem counterintuitive not to seek to recover loss of earnings, especially when it relates to your entire adult working life, but that’s what DZY instructed his legal team to do.

His reasons for doing so were included in his Affidavit, which was filed in the original proceedings, and included (paraphrasing):

> He was not in an appropriate mental state at the time to properly consider the legal advice he was being given at the time;
>
> That legal advice was that he could avoid potential issues with ‘Centrelink’ if he didn’t include a claim for loss of earnings; and
>
> He had a general feeling that he had no choice but to do so (relying on the legal advice he was given at the time).

DZY settled his claim for a total of $100,000 (through two separate deeds of settlement) by 2015. In doing so, he also ‘signed away his rights’ to continue with his claim for significantly more damages at any point in the future.

Child Abuse Royal Commission opens up opportunities for abuse survivors to revisit original compensation settlements

The Royal Commission’s findings and recommendations resulted in all state and territory governments enacting laws that removed very significant barriers to survivors being able to sue for damages due to child sexual abuse.

Before these changes, an abuse survivor was subject to the standard ‘limitation period’ (time limit), which applied to all personal injury actions. This limitation period was usually 3 years, but in some jurisdictions, it could extend to 6 years.

That meant that unless a survivor issued legal proceedings within 3 (or 6) years from the date that they turned 18 (that is, when they attained ‘majority’ and were no longer under a ‘legal disability’ of being a ‘minor’), they would need to seek permission of the court to file proceedings out of time (that is, extend their limitation period).

When governments removed limitation periods (generally in about 2015), they also recognised that many abuse survivors who had settled their claims before 2015 (and usually for compromised sums due to the risks of losing the extension of time applications) had been disadvantaged.

Governments acknowledged that survivors should be able to ask the court to set aside their earlier settlement agreements if they can demonstrate that they settled for smaller amounts due to being advised of the significant risk of losing everything if the court didn’t extend the limitation period.

Due to this series of important legislative provisions after the Royal Commission, was able to apply to the court to ‘set aside’ his earlier agreement to settle his original claim for a total of $100,000.

This meant that DZY was able to have his original compensation claim revisited, with a view that he may be eligible for more compensation than was originally offered several years earlier.

Supreme Court of Victoria sets aside DZY’s original settlement

DZY applied to the Supreme Court of Victoria to revisit the original settlement and was successful.

Bear in mind that DZY commenced original proceedings well outside the time limit that applied prior to the legislative changes. At that time, there were always substantial risks in applying for an extension of time. With this in mind, DZY was able to convince the Supreme Court that he settled for a compromised sum due to being advised by his then-legal team that he could well lose if he attempted to extend the limitation period, which applied back in 2012.

The Supreme Court (a single judge) set aside the original settlement from 2015.

With his new court proceedings, DZY was seeking further compensation for:

- pain and suffering damages; and
- loss of earnings/earning capacity (claiming an amount in excess of $1,000,000).

Christian Brothers appeal the Supreme Court decision

The Christian Brothers appealed the decision of the Supreme Court to allow DZY to seek compensation for economic loss.

They did **not**, however, contest DZY's application to revisit pain and suffering damages.

They essentially claimed that because DZY had not sought economic loss as a component of his claim back in 2012 (he had only sought compensation for pain and suffering), he should not be allowed to include loss of earnings/earning capacity in this revisited claim.

Victorian Court of Appeal overturns the Supreme Court decision

On 23 April, 2024, the Victorian Court of Appeal overturned the Supreme Court's earlier decision to permit DZY to seek compensation for loss of earning/earning capacity.

The court did, however, allow DZJ to continue to re-litigate his claim for 'general damages', which represents compensation for 'pain and suffering and loss of amenities of life generally.

If successful, this would likely result in more compensation (greater than the original $100,000 paid in 2015) due to the child sexual abuse.

Why did the Court of Appeal deny the claim to seek compensation for economic loss (loss of earnings)?

The Court of Appeal allowed DZY to re-litigate his claim for pain and suffering, so why not loss of earnings too? The short answer is that he did not seek compensation for economic loss damages in the first place (back in 2012).

There is some complexity around DZY's decision not to include economic loss in his original claim which is primarily related to his understanding of:

- the risks associated with 'out of time' applications prior to the removal of time limits around 2015; and
- how a payment for economic loss could adversely impact his Centrelink entitlements.

Ultimately, DZY's original settlement for $100,000 was for pain and suffering only.

What does this case mean survivors seeking to revisit abuse compensation claims settled prior to 2015?

The short answer is that is generally a positive decision. Both at first instance, and appeal, it confirms that $100,000 for general damages (in Victoria at least), is not enough to compensate a survivor for their 'pain and suffering' caused by the abuse they

suffered as a child. It recognises that abuse compensation claimants, when relieved of the burden of limitation period defences (that is, the removal of time limits for claims), will be allowed to properly consider the true value of the compensation that they are entitled to, for the abhorrent wrong committed against them when they were just children.

Get help from an abuse compensation lawyer

Cameron Hall has been handling personal injury cases since 1991.He has significant expertise and experience in abuse compensation claims. If you settled an abuse compensation claim prior to 2015 (prior to the time limitations) and you'd like to revisit that settlement, or if you are considering your options for abuse compensation generally, call us for advice and assistance.

We offer a free consultation and run cases on a 'no win no fee' basis, so it costs you nothing to find out where you stand and seek the compensation you deserve.

This article is of a general nature and should not be relied upon as legal advice. If you require further information, advice or assistance for your specific circumstances, please contact us.