

Breach of Fiduciary Duty in cases of sexual abuse

Paramasivam, Roger v. Vincent John Adams Flynn [1998] 1711 FCA (23rd December, 1998)
Geoff Coates, Ballarat

The Full Court of the Federal Court of Australia sounded the death knell for the use of breach of fiduciary duty as an alternative pleading to tort in cases of sexual abuse and assault.

In paragraph 68 they state "In Anglo-Australian law, the interests which the equitable doctrines invoked by the Appellant, and related doctrines, have hitherto protected are economic interests".

In paragraph 79 "All those considerations lead us firmly to the conclusion that a fiduciary claim, such as that made by the Plaintiff in this case, is most unlikely to be upheld by Australian courts. Equity, through the principles it has developed about fiduciary duty, protects particular interests which differ from those protected by the law of contract and tort, and protects those interests from a standpoint which is peculiar to those principles".

This is a significant decision as many cases of sexual abuse plead breach of fiduciary duty in the alternative. Often this is important because the tortfeasor is either dead or has no assets and it is difficult to demonstrate negligence on the part of the organisation under whose umbrella they operated, ie. welfare agencies and churches.

In this case the relevance was a difference in treatment of the alternate causes of action and *Limitation of Actions Act* in the different jurisdictions.

The matter came before the Federal Court of Australia on appeal from orders of the Supreme Court of the Australian Capital Territory dismissing an application by the Appellant for an extension of time in which to sue the Respondent.

At paragraph 24 the court states "The gravamen of the claim is that by virtue of the Plaintiff's age and the Defendant's role as guardian whilst the Plaintiff was under his care in Australia and Fiji, there was a relationship giving rise to fiduciary obligations. This fiduciary relationship was

breached when the Defendant took advantage of his position of power over the Plaintiff and persuaded him at various times to have sexual relations."

The causes of action were well outside the relevant Statute of Limitations and an application for extension of time was made.

One of the factors the judge in the first instance took into account in determining whether an extension should be granted was to take into account the strength or weakness of the Appellant's case. The Federal Court determined that it was appropriate to look at those issues and then went on to consider whether the primary judge was correct in his assessment of the strength of the claim. In doing so, they looked at whether in the circumstances of this case there could be a maintainable claim for breach of fiduciary duty.

The allegations were that Respondent made representation to the mother of the Appellant that he would pay for the education of the Appellant and provide him with accommodation in Australia and pay for air fares there and that while the Appellant was in the Respondent's care in Australia he took advantage of the position to sexually abuse the Appellant.

In determining that such an action was unlikely to succeed the Federal Court concluded that a breach of fiduciary duty did not exist as a separate cause of action in this case and that the proper remedy was in tort.

At paragraph 70 they state "Here, the conduct complained of is within the purview of the law of tort, which has worked out and elaborated principles according to which various kinds of loss and damage, resulting from the intentional or negligent wrongful conduct, is to be compensated. That is not a field on which there is any obvious need for equity to enter and there is no obvious advantage to be gained from equity's entry upon it. And such an extension would, in our view, involve a leap not easily to be justified in

terms of conventional legal reasoning".

In coming to these conclusions the court drew on statements made by the High Court in *Breen v. Williams (1996) 186 CLR 71*.

The Federal Court in this matter also deals with interesting issues about the conflict of law in the different jurisdictions and applications for extension of time generally and is worth reading in full. ■

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