

Compounding the Abuse: Lawyers for the Catholic Church in the Ellis Case

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The actions and ethics of lawyers for the Catholic Church have come under close scrutiny during hearings before the Australian Royal Commission into Institutional Responses to Child Sexual Abuse. Established in January 2013, the Commission's brief is to investigate how institutions such as schools, churches and government organisations have responded to allegations and instances of child sexual abuse and to make recommendations on how to ensure better protection of children.¹ The Commission is holding formal public hearings around Australia, each hearing examining a different case study. The actions of lawyers for the Catholic Church have been interrogated in one of these case studies in particular: the Ellis case. While the Commission has yet to report its findings from this case study, the material already in the public domain tells a story of a church ill-served by its legal advisors.

As a teenager, John Ellis was sexually abused by Father Duggan, a Catholic priest. As an adult, Ellis lodged a formal complaint about this abuse through the Church's Towards Healing process, a process designed to be conducted 'with justice and compassion'.² Michael Eccleston, an experienced, independent assessor, was appointed by the Church to investigate Ellis's complaint as part of the Towards Healing process.³ Eccleston found that, on the balance of probabilities, the abuse had more likely than not occurred and had more likely than not adversely affected Ellis's mental, emotional and physical health.⁴ When Ellis asked for \$100,000 in compensation, he was offered \$30,000 and told he would need to sign a deed of release. As required by the process, Ellis contacted a lawyer who advised him against signing, because he may have a substantial claim. Ellis's lawyer wrote without prejudice to the Church authorities proposing a settlement. With no settlement in sight, and running up against a limitation period, in 2004 Ellis commenced legal proceedings against Cardinal Pell, Father Duggan and the Church Trustees. Duggan died shortly afterwards.

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¹ Commonwealth of Australia, Royal Commission into Institutional Responses to Child Sexual Abuse ('Commission'). See generally the Commission's website: www.childabuseroyalcommission.gov.au. Terms of Reference: www.childabuseroyalcommission.gov.au/about-us/terms-of-reference.

² Commission's Second Public Hearing into Towards Healing Complaint by John Ellis. Case Study 8. Opening Address by Senior Counsel Assisting, Gail Furness SC (10 March 2014) 9.

³ Commission, Public Hearing—Case Study 8. Transcript 20/03/14 (58) 6015 J Dalzell.

⁴ Opening Address by Senior Counsel Assisting, Gail Furness SC (10 March 2014) 10.

Once proceedings were on foot, Cardinal Pell instructed Corrs Chambers Westgarth ('Corrs') to act in the matter.⁵ Contrary to the advice the Cardinal would have received from his former lawyers, Monahan & Rowell, who would have 'unhesitatingly and strongly recommended'⁶ that the Archdiocese engage in mediation as proposed by Ellis, Corrs advised that mediation was no longer a viable option. Several months later, Corrs advised against the recommendations of the Church's Interim National Review Panel which had criticised the handling of Ellis's complaint and had called for the Church to both apologise to Ellis and to attempt to re-engage him in the Towards Healing process. The Archdiocese accepted Corrs' advice not to apologise or engage with Ellis. The gloves were off: Ellis's claim was to be hard fought.

And hard fought it was. Ellis's application for an extension of time in which to sue was resisted, the Archdiocese relying on the argument that neither the Cardinal nor the Trustees were the proper defendant. Further, despite Eccleston's findings that the abuse had occurred and had seriously affected Ellis, the Archdiocese disputed the abuse and called into question Ellis's character and credit. Corrs subpoenaed Ellis's former employer, approached his former colleagues and former wife for statements, and subpoenaed documents relating to his divorce and custody dispute.⁷ Ellis was cross-examined by Senior Counsel for four days about intimate details of his life. In particular, he was challenged on whether the abuse had actually occurred, a challenge that was extremely distressing to him: 'I had understood until then that those instructing the lawyers for the trustees and Cardinal Pell believed without a doubt that the abuse had occurred.'⁸

The Court at first instance extended the limitation period against the Trustees, while dismissing Ellis's claim against Cardinal Pell on the basis that he was not the proper defendant. Ellis offered to negotiate, but the Archdiocese appealed and the Court of Appeal accepted the Archdiocese's argument that the Trustees were not liable for the claim. Ellis sought special leave to appeal to the High Court. This was refused, leaving him in a state of 'severe psychological decline'.⁹ He became severely depressed, believing that he had made it more difficult for victims of abuse to get redress.¹⁰

The Archdiocese through Corrs pursued Ellis for payment of its costs (exceeding \$500,000) with the same 'vigour' with which it had defended the litigation. The pursuit of the claim for costs had a severe negative impact on Ellis and his psychological condition worsened to the point that his solicitor was concerned he might self-harm. Finally

⁵ Corrs had acted for the Archdiocese in Melbourne and had impressed the Cardinal with 'their efficiency'. *Ibid*, 16.

⁶ Patrick Monahan, Senior Partner at Monahan & Rowell, noted in a letter to the Church dated 14 September 2004 (the day the firm's retainer in the Ellis case was terminated) that 'I would in ordinary circumstances unhesitatingly and strongly recommend that we should proceed down [the mediation/settlement] track ... before we get too far down the litigation path' in the Ellis case. Monahan was 'however ... very conscious of the fact that Cardinal Pell has his own views about the matter, and that he might wish Corrs to be involved'. Letter Monahan & Rowell to Catholic Church Insurances Ltd, 17 March 2006, Commission Exhibit CCI.0030.00003.0087 for Case Study 8.

⁷ Opening Address by Senior Counsel Assisting, Gail Furness SC (10 March 2014), 18.

⁸ Commission, Public Hearing—Case Study 8. Transcript 11/03/14 (53) 5416 JA Ellis.

⁹ *Ibid*, 5418.

¹⁰ *Ibid*.

recognising the harm done to Ellis and the significant negative publicity that would result if Ellis went bankrupt or his psychiatric condition worsened,¹¹ the Archdiocese eventually dropped its claim for costs and made some ex gratia payments to Ellis, including for counselling.¹²

This litigation saga came under the Royal Commission's spotlight in its March 2014 public hearing. Cardinal Pell and two Corrs lawyers, Paul McCann and John Dalzell, were questioned extensively about the tactics used in the Ellis case. All three initially hid behind the 'advice/instructions' rationalisation: Pell contended that he had acted on advice from his lawyers, McCann and Dalzell both insisted that they had acted on instructions. These explanations were interrogated by Commissioner McClellan, such that Pell at various points in his testimony seemed to accept moral responsibility for the 'abusive' strategy adopted in the case.¹³ With respect to the lawyers, the Commissioner was particularly concerned about the extensive cross-examination of Ellis as to whether the abuse had occurred. Given that the Church had previously accepted Eccleston's report validating Ellis's claims, the Commissioner put it to the lawyers that, instructions or not, they had an independent duty not to mislead the court into thinking that the fact of the abuse was in serious dispute. Nor could they hide behind the excuse that senior counsel was running the hearing.¹⁴

In hindsight, the Archdiocese's win in the Court of Appeal seems a pyrrhic victory; its litigation tactics have cost the Church dearly—in pastoral, reputational and even financial terms. It spent in the vicinity of \$1.5 million in defending Ellis's claim and in the ex gratia payments it ultimately made to him.¹⁵ Cardinal Pell offered a form of apology¹⁶ to Ellis for the hurt caused to him by the litigation and has told the Commission that the Church 'should be able to be sued in cases of this kind'.¹⁷

The Commission's findings in this case study will make interesting reading and provoke much commentary from ethics writers. In the meantime, Robert Vishner's comments about lawyers who acted for the US Catholic Church in defending sexual abuse claims seem particularly apt in relation to Corrs:

As the Catholic Church's lawyers imported 'Rambo-style' tactics into their litigation strategy, they were also importing an alternative set of moral claims regarding the dignity of the victim, the

¹¹ Commission, Public Hearing—Case Study 8. Exhibit DUG.080.063.0138. Email from John Dalzell to Marita Wright, 7 May 2008, www.childabuseroyalcommission.gov.au/exhibits/6c8c5e48-5c11-4902-a5e3-7f5988493fcf/case-study-8,-march-2014,-sydney.

¹² Opening Address by Senior Counsel Assisting, 21.

¹³ Commission, Public Hearing—Case Study 8. Transcript 27/03/2014 (63B) 6676, 6705 G Pell.

¹⁴ Commission, Public Hearing—Case Study 8. Transcript 18/03/2014 (57) 5990-5991 PR McCann: McCann conceded that the fundamental challenge to Ellis's claim (that the abuse had occurred) should probably not have happened. Transcript 20/03/2014 (58) 6012-6016 J Dalzell: Dalzell denied misleading the court.

¹⁵ Opening Address by Senior Counsel Assisting, 21.

¹⁶ Commission, Public Hearing—Case Study 8. Transcript 27/03/2014 (63B) 6705 G Pell. Some considered Pell's apology lacking in sincerity; Pell referred to Ellis in the third person and did not make eye contact with him. See Frank Brennan, 'Cardinal Pell at the Royal Commission' (2014) 24(5) *Eureka Street* (27 March 2014), and comments, for views in support of Pell and *contra* Pell, www.eurekastreet.com.au/article.aspx?aeid=39184#.VDNs27EviLk.

¹⁷ Cardinal George Pell, Statement to the Commission, quoted in Opening Address by Senior Counsel Assisting, 19.

relationship of trust with parishioners, and the pre-eminence of concerns over financial liability. The lawyers certainly did not erase the moral perspective, they just substituted the profession's for their client's ... Whether or not the bishops who hired the lawyers would have embraced the profession's adversarial mindset, they should have been engaged by their attorneys in an ongoing dialogue that explored the mindset not just as a set of legal tactics, but as the moral perspective that it is.¹⁸

¹⁸ Robert K Vischer, 'Legal Advice as Moral Perspective' (2006) 19 *Georgetown Journal of Legal Ethics* 225, 254.