

# Case Alert

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## Supreme Court of Victoria's historical child sexual abuse decision confirms damages in one case are not binding on another

### *Waks v Cyprys & Ors* [2020] VSC 44

3 MARCH 2020

#### AT A GLANCE

- The Supreme Court of Victoria has handed down its judgment in the matter of *Waks v Cyprys & Ors* [2020] VSC 44, which involved an assessment of common law damages regarding a claim for historical child sexual abuse.
- The *Waks* decision highlights that awards for general damages in Victorian matters continue to turn on the facts of the case and are not bound by damages decisions in other cases.
- The *Waks* decision also shows the Court will make appropriate reductions to account for the impact of other unrelated factors, even in cases where there is unchallenged evidence.

#### BACKGROUND

The plaintiff was a 13-year-old student at Yeshivah College (College) in 1988. At this time, the plaintiff was sexually abused on multiple occasions by David Cyprys, a caretaker, security guard, karate teacher and locksmith at the College.

Cyprys was criminally convicted and sentenced. There were further allegations of earlier abuse by another adult member of the Yeshivah community, who was initially named as a defendant in the proceeding. However, the earlier abuse allegations were not pursued in the case and remain the subject of a police investigation. The plaintiff subsequently made a civil claim for common law damages regarding psychiatric injury resulting from the sexual abuse by Cyprys.

Cyprys was named as the second defendant to the proceedings, together with 11 other defendants associated with the College and Yeshivah Centre (Yeshivah defendants). The Yeshivah defendants settled with the plaintiff for an unknown sum. As Cyprys did not file a defence or actively participate in the litigation, judgment was entered in favour of the plaintiff against him in default of a defence.

In the circumstances, liability was not in issue and the Court was only required to assess damages against Cyprys.

## THE ISSUES CONSIDERED IN ASSESSING DAMAGES

The assessment of damages proceeded before Justice Forbes. Her Honour considered there were three key issues:

1. assessing the damages of a tortfeasor (Cyprys), when other tortfeasors (the Yeshivah defendants) had paid damages in settlement of the same injury,
2. disentangling the effect and impact of the earlier abuse from the abuse by Cyprys, and
3. determining whether the plaintiff was entitled to aggravated and/or exemplary damages as against Cyprys.

The first issue dealt with the earlier settlement with the Yeshivah defendants. The plaintiff argued that Cyprys and the Yeshivah defendants were “joint tortfeasors”, and therefore could recover the damages awarded from either Cyprys or the Yeshivah defendants.

Her Honour pointed out that the pleaded case made a clear distinction between Cyprys being liable for the intentional tort of battery and the Yeshivah defendants being liable for breach of a duty of care. She also noted there was no claim that the Yeshivah defendants were vicariously liable for Cyprys. Accordingly, Justice Forbes determined Cyprys and the Yeshivah defendants were jointly and severally liable for the same injury, loss and damage, but not the same tort. This meant they were not joint tortfeasors.



**There is no doubt that awards of general damages in historical child abuse cases have been on an upward trend in recent years.**

The second issue involved disentangling the earlier abuse, which was not at issue in this proceeding and therefore not compensatory, from the abuse perpetrated by Cyprys. Accordingly, Her Honour considered the issue of causation and separated the contribution of the earlier abuse to the plaintiff’s injury from the contribution of the abuse perpetrated by Cyprys to the plaintiff’s injury.

The medical evidence tendered by the plaintiff acknowledged the impact of the earlier abuse but found that the abuse by Cyprys was the predominate cause of the plaintiff’s psychiatric injury.

Her Honour was satisfied that this gave rise to a liability to pay damages for the entirety of the psychological conditions, but noted:

*...in assessing those damages, the possibility of impact from earlier unrelated events on enjoyment of life or earning capacity is not ignored. If, as here, there is evidence of earlier sexual abuse which itself was a cause of some psychiatric injury, the effects of which are not established on the balance of probabilities, then the possibility of ongoing consequences cannot be disregarded in arriving at proper compensation.*

The plaintiff made a claim against Cyprys for aggravated and/or exemplary damages on the grounds that Cyprys’s “breach of trust and exploitation of the plaintiff was a disgrace which demands condign punishment.” Her Honour (in line with the High Court decision in *Gray v Motor Accident Commission* (1998) 196 CLR 1) emphasised that exemplary damages are awarded to punish the defendant, and should not be awarded against Cyprys as he had been punished through the criminal justice system.

Her Honour also declined to make an award for aggravated damages, stating that in the circumstances, the plaintiff’s suffering had not increased to a level where additional compensatory damages should be awarded. The plaintiff’s suffering had been a factor in the award of general damages for his psychiatric injuries.

## ASSESSMENT OF DAMAGES

The plaintiff submitted that the Court should be guided by the decisions of:

- *Elich v Leifer & Adass Israel School Inc* [2015] VSC 499, in which the plaintiff was diagnosed with PTSD and awarded \$300,000 for general damages regarding sexual abuse perpetrated against her by the school principal between 2003 and 2006,
- *P2 v D2* [2019] NSWDC 84, in which the plaintiff was awarded \$300,000 in general damages regarding sexual assaults committed by her criminally convicted foster father between 1973 and 1977, and
- *Walker & Anor v Hamm & Ors (No 2)* [2009] VSC 290, in which the first plaintiff was awarded \$300,000 for general damages after being diagnosed with PTSD as a result of a police assault and battery in 1993.

When quantifying appropriate general damages, Her Honour assessed the plaintiff's entitlement to general damages at \$200,000. In assessing general damages, Her Honour was satisfied that the effect of the assaults by Cyprys on the plaintiff had been profound. However, Her Honour also acknowledged the resilience of the plaintiff. Of note, Her Honour stated:

*Whilst cases with similar facts may be of assistance, the pain and suffering caused to each individual by virtue of the abuse, turns on its own facts and therefore a finding as to an assessment of damages in one case is not binding on another. Other cases such as Hand v Morris (being a general damages award of \$260,000) also illustrate the individuality of any damages assessment.*

In addition to the assessment on general damages, Her Honour assessed a sum of \$541,822 regarding past and future economic loss. This assessment was based on evidence of the plaintiff's treating doctors, medical experts and a forensic accountant that was unchallenged.

In arriving at the assessment, Her Honour did consider the possibility that the earlier abuse might itself have led to symptoms that impacted the plaintiff's capacity notwithstanding the later abuse by Cyprys, and made a higher reduction for vicissitudes to account for the impact of other unrelated stressors later in the plaintiff's life.

### THE SIGNIFICANCE OF THIS DECISION FOR INSURERS

There is no doubt that awards of general damages in historical child abuse cases have been on an upward trend in recent years. However, the *Waks* decision confirms that each assessment of damages turns on its own facts and the evidence put before the court.

It also illustrates that even in cases where there is unchallenged evidence, the Court will still make appropriate reductions in cases of psychiatric injury to account for the impact of other unrelated factors, such as other incidents of sexual abuse or other traumatic events in the person's life.

### NEED TO KNOW MORE?

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