



Précis Paper

Waks v Cyprys & Ors [2020] VSC 44

Abstract – A multilayered discussion about the complexities of *Waks v Cyprys & Ors*; criminal punishment, evidence, damages, self-representation, pain/suffering, judicial discretion and calculations.

Discussion Includes:

- Background
- Deconstructing the judgement
- Criminal punishment
- Evidence
- Damages
- Self-represented litigants
- Tips for legal practitioners

Waks v Cyprys & Ors [2020] VSC 44

1. In this edition of BenchTV, Samuel Burt (Barrister at Dawson Chambers) and Thomas McCredie (Partner at Mazzeo Lawyers) engage in a captivating discussion about the lessons learnt from *Waks v Cyprys & Ors*, especially in relation to criminal punishment, evidence, damages, self-representation, pain/suffering, judicial discretion and calculations.

Background

2. This case was initially brought against thirteen different defendants. David Cyprys is the defendant.
3. The plaintiff discontinued action against the first alleged abuser and ultimately settled with all of the other parties except for Cyprys.
4. The judgment in default was obtained against Cyprys, and it pertains to the assessment of damages.
5. The proceeding itself involves allegations by the plaintiff of historical sexual abuse against the defendant.
6. The first issue came down to the representation of high-profile litigants. In almost every way, the role of legal practitioners is the same, regardless of whether the client is high profile or not.
7. When a case attracts media attention, a sense of abnormal pressure will automatically follow. Lawyers need to be prepared to take on these externalities.
8. Generally, lawyers desire to control the client's evidence as much as possible. For example, it is standard practice for a lawyer to advise clients to turn off social media when proceedings are launched. Lawyers even advise clients about who they should and who they should not be talking to.
9. This prevents the Court from having to deal with threads of evidence in public forums like Facebook or LinkedIn.
10. When you have a client that has spoken in the media and has written a book, these become aspects that the representing counsel must be aware of.
11. Clients who are victims of sexual abuse usually have a story to tell. Lawyers must deal with this cautiously because there is a health perspective to it.
12. Many victims of sexual abuse decide to speak up to shed light on the issue and to act as voice for it.
13. The assessment of exemplary damages was an interesting aspect of this case.

Deconstructing the judgement

14. At Paragraph 147 of Her Honour's judgement, the judgement of *Gray v Motor Accident Commission*, was used as a base for judicial reasoning. In that case, the High Court dealt with the appeal of a refusal from a judge to award exemplary damages against the defendant.
15. The case arose in a claim for injuries received by Gray in a motor vehicle accident. The driver of the vehicle had deliberately driven at and struck the plaintiff. Consequently, the driver was convicted of grievous bodily harm and was sentenced to a period of imprisonment.
16. At trial, the judge decided not to award exemplary damages as the driver had already been punished by the Criminal Court.
17. The majority judgement communicated that when the criminal has been served with a substantial punishment, the need for exemplary damages is sometimes undermined. The notion of conduct is assessed through a civil and criminal angle.
18. The decision is not one that is depends on judicial discretion.
19. The majority gave two reasons for this principle. First, the purpose for awarding the exemplary damages has been achieved when a substantial punishment is imposed. Secondly, considerations of double punishment would otherwise arise.
20. In the focus case, the presenters made an application to the Court that it was inappropriate for the defendant to cross-examine the plaintiff. Fundamentally, the Court had to weigh up the obligations before making a determination.
21. Ultimately, the defendant did not end up cross examining the plaintiff.
22. Although the defendant did not seek to cross examine the plaintiff, he did provide lengthy submissions to the Court after the close of proceedings. This introduced new evidence, but the Court did not admit it. Her Honour referred to that in the judgement.
23. Another issue is that in proceedings, the victim will have to face his/her abuser. This demands the client to be emotionally prepared; a daunting prospect. It is a type of preparedness that goes beyond legal parameters.
24. It was a fairly unique situation, because a private settlement with one individual was acknowledged. This acknowledgment was used to assess damages as a whole.
25. From a procedural perspective, it is slightly confusing to consider how one might do that but the judgment conveyed that a confidential settlement did exist.
26. Another interesting aspect (after the judgment was given) concerns the potential to pursue Cyprys for damages and the credit that was supplied by the Court for the full amount.
27. Essentially, you need to beat the settlement amount and whatever the gap is between the settlement amount and the award by the Court.

28. The Court is faced with the task of examining a life that has not been lived in a hypothetical realm. It is a mental dynamic, which is quite challenging for a courtroom.
29. Often, that will take place in a world which has disputable facts around a particular event or circumstance.
30. In the judgement, Her Honour explicitly states that a degree of prophesising is required.

Criminal punishment

31. Paragraph 94 and 96 of *Gray v Motor Accident Commission*, emphasise the conceptual problem of an individual being criminally punished, but there is an endeavor to have that person be accountable for exemplary damages. This has continually shocked the Court, over the years.
32. Generally, aggravated damages shock the offender. That is how these two heads of damages are interpreted.
33. Justice Kirby indicated that a plaintiff's entitlement to a component of damages in common law is discretionary and exceptional. Ordinarily, damages are the plaintiff's right. The remedies are devised by the common law.
34. However, the description of exemplary damages is embedded in case law. Similar descriptions can be found in Canadian and other Australian authority but the existence of discretion has been described as a safety valve, permitting the tribunal of fact to decline the award of exemplary damages.
35. This opposes the following strict view - exemplary damages must not be considered when an individual is criminally punished. We must note that being subject to criminal punishment is not always indictable. Therefore, this can lead to awkward situations.
36. The minority (as articulated by Justice Kirby) judgement indicates that there is more to be grappled with here; a safety valve for circumstances where the presiding judge might take the view that judicial discretion has the power to decide whether damages are to be awarded or not.
37. This is a judicial invitation to have more scope and interaction with the facts. That is paramount.
38. This aspect is constantly evolving. At the moment, it is not a crystal clear situation, particularly when a single case involves many types of offences.
39. In the focus case, Her Honour decided against awarding exemplary damages. She held that she could not apply discretion.
40. The concept of substantive punishment is arguably, a subjective standard. One interesting aspect of what constitutes substantive punishment is that Cyprys was criminally convicted of four charges against Waks.
41. Essentially, criminal punishment means that discretion cannot be used. This is in sync with the majority judgement in *Gray v Motor Accident Commission*.

42. The ultimate decision was that the extra heads of damage were blocked, due to the criminal punishment.

Evidence

43. Waks provided evidence about the fact that he was assaulted over one hundred times.
44. There is arguably a distinction between what was decided in *Gray v Motor Accident Commission*, and potentially what could have been decided in the focus case.
45. If an offender is only criminally convicted for three out of one hundred assaults, the following question arises - has he been substantially punished? That is the first question.
46. The second question is what obligation the Court has in terms of considering the other convictions that Cyprys was subject to, in determining whether the current punishment is substantive.
47. The Court will often have to be alive to this question of assessing the following - was the individual criminally punished to a degree that satisfies the exemplary damages question in a civil sense?
48. The examination of that question becomes the sole focus in a civil context but not a criminal one.
49. A Court is a place where admissible evidence is brought and led to determine the existence of facts.
50. One of the more challenging aspects of the focus case concerns the minute examination into the prospect/likelihood of a person achieving or living a life that in many ways, did not occur.
51. It needs to be acknowledged from the outset that the life of a sexual abuse victim is a difficult one to endure.
52. The manner in which the Court approaches how a victim's life would have played out if the sexual abuse never occurred, is dependent on the core characteristics of the victim.
53. The Court is a forum for the open discussion of abuse and its impacts on the victim but the inquiry about his/her life is always at the heart of this.
54. These types of matters can be overwhelmingly heavy in an emotional and financial sense (e.g. future economic loss).
55. When the judicial decision is handed down, the process of a victim dealing with that outcome and moving on with their life will occur regardless of what amount is awarded.

- 56. The role of lawyers is to maximise the outcomes and to assist clients to the best of their ability, but they also play close attention to the process.
- 57. It is critical for plaintiffs to have medical evidence that is attributable (or has the subsequent capacity) to specific losses.
- 58. In these kinds of cases, there are often incidents of sexual abuse before and after the one that is brought before the Court.

Damages

- 59. Aggravated damages are based on the circumstances of the offence. It looks at aspects like what happened to the plaintiff.
- 60. In the focus case, the shock element clearly existed. The circumstances in such cases are usually abnormal.
- 61. Aggravated damages were not awarded due to the criminal punishment, once again.
- 62. The pleadings raised aggravated damages as a form of compensation, but the actual allegations were not particularised.
- 63. One might argue that the purpose of pleadings is to ensure that the defendant is at the centre of the allegation, thus not every detail needs to be particularised.
- 64. The abuse took place in close proximity to the plaintiff's siblings. It also took place in front of other classmates. These facts were used to argue in favour of aggravated damages, but it never stood in Court.
- 65. The question of defendants being separate, or joint did not matter. Cyprys was responsible for the harm, but in terms of the damages, the responsibility was global in nature.
- 66. Once the global assessment occurs, it could then interact with the content of the confidential settlement when it came to making an adjustment.
- 67. There will be circumstances where not everybody will want to participate in such situations but the focus case provides guidance about how to deal with that.
- 68. The concepts of pain and damage are intensively assessed in child sexual abuse cases.
- 69. Paragraphs 177-182 of the majority judgement covers the guiding principle for the way in which pain and suffering has increased and whether the awarded damages reflect that.
- 70. The case of *Amaca Pty Ltd (Under NSW Administered Winding Up) v Eric King* was heard at the Victorian Court of Appeal.
- 71. Paragraph 177 said that for present purposes, we do find either case to be particularly persuasive. A lot has changed in the period of twenty years. Apart from anything else, the minimum wage, average weekly earnings and average annual earnings have almost tripled.

The remuneration paid to some members of society such as CEOs of publicly listed companies has increased from a couple of hundred thousand dollars per annum to millions of dollars per annum, with added bonuses and incentives.

- 72. An award of damages for pain and suffering is not a form of compensating lost earnings or earning capacity.
- 73. We do not suggest that there is any necessary relationship between earnings and the measure of compensation appropriate for pain and suffering.
- 74. The Court has also made a very clear and strong statement about the higher value that can now be attributed to the quality of life.
- 75. Her Honour acknowledged that the injuries suffered by the plaintiff were from the overall damage, and it was backed up with medical evidence. Essentially, that opened the gate to compensation.
- 76. Subsequently, the Court needs to apply a discount (vicissitudes) to whatever amount is awarded.

Self-represented litigants

- 77. Many challenges arise when one deals with a self-represented litigant.
- 78. Self-represented litigants have organisation issues compared to those who have legal representation.
- 79. The ability of a self-represented litigant to cross-examine the plaintiff is another factor to consider.

Tips for legal practitioners

- 80. Firstly, the lawyer must take detailed notes about the client - education and employment history. This will help them to form an understanding about what the client's life looked like, up until the point of the proceedings.
- 81. Next, the lawyer must ask the client about what he/she would have done. This should be attached to the reality of what has already been done.
- 82. It all comes down to pulling together the maximal amount of evidence to support the hypothetical scenario.
- 83. A part of this involves actuarial evidence in relation to the loss of earnings.
- 84. In the focus case, Her Honour did not accept the exact scenarios that were put forward by the presenters to the actuarial expert but she did refer to the calculations more generally.
- 85. It is not possible to make a completely accurate calculation.
- 86. At Paragraph 88 of the judgement, Her Honour believed that Waks more likely to be a public sector worker at a particular level.

87. The choosing of that sector decreased the underlying level of speculation that might be necessary as to the plaintiff's annulable intentions.

BIOGRAPHY

Samuel Burt

Barrister, Dawson Chambers, Melbourne

Mr Burt has a broad practice in commercial, employment, common law and criminal law. He has appeared in the Supreme Court of Victoria, Federal Court, County Court, VCAT and the Magistrates Court both led and unled in a variety of matters. He accepts briefs to advise and negotiate in employment and business disputes. Mr Burt is mindful of the need for clients to resolve matters prior to litigation and how that can best be achieved, particularly in the current environment.

Thomas McCredie

Partner, Mazzeo Lawyers, Melbourne

Mr McCredie was admitted to practice in 2014 and moved to London two years later. While there, he gained experience at two international firms working across private client and corporate transaction matters. He returned to Mazzeo Lawyers in 2017. Tom volunteers at the HIV/AIDS Legal Centre and is co-founder and an active member of a local book club. He is a member of the Law Institute of Victoria.

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