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Abuse PEL refusal upheld

Kawicki v Trustees of the Marist Brothers t/as Marist Brothers Sydney Province [2026] NSWCA 220. 23.10.2026.

Headnote:

The appellant, Mr Tadeusz Kawicki, alleged that he was the victim of both sexual abuse and physical abuse while he was a student at the Marist Brothers College, Maitland between 1960 and 1967 when he was between 10 and 17 years old. The primary judge found that Mr Kawicki's teacher at the College, Brother Florentine, had sexually abused him while he was a student but rejected Mr Kawicki's case insofar as it was based upon physical abuse. His Honour entered judgment for Mr Kawicki against Marist Brothers in the sum of $186,000, comprising $185,000 for non-economic loss and $1,000 for medical expenses. No damages were awarded for diminution in earning capacity.

On appeal, Mr Kawicki contended that the primary judge erred in finding that Mr Kawicki had not suffered any diminution in earning capacity productive of financial loss as a consequence of the sexual abuse (ground 1). Mr Kawicki also contended that the primary judge failed to give adequate consideration to the effect of Mr Kawicki's inability to form and maintain stable personal relationships on his earning capacity and failed to take into account the effect of that impairment on his working life and economic prospects (ground 3). Ground 2 was not pressed.

The Court (Griffiths AJA, Leeming JA agreeing, Adamson JA dissenting) held, dismissing the appeal with costs:

Ground 1: no diminution in earning capacity from sexual abuse

(1) Per Griffiths AJA (Leeming JA agreeing): The limited nature of the expert evidence and the inconsistencies in Mr Kawicki's own oral evidence justified the primary judge not being satisfied, on the balance of probabilities, that Mr Kawicki's incapacity during the period up until normal retirement age and the resulting financial loss was caused or materially contributed to by the mental harm resulting from the child sexual abuse. Further, the primary judge's attribution of Mr Kawicki's unfitness for work after his cessation of full time work in 2000 to injuries other than that occasioned by the sexual abuse was consistent with the appellant's evidence in chief: [1] (Leeming JA), [139], [141] (Griffiths AJA).

(2) Per Adamson JA (dissenting): The effects of alcohol use disorder, which were consequential on the sexual abuse, diminished Mr Kawicki's economic capacity by causing him to be unable to work consistently for five days a week. The compelling inference is that he suffered economic loss as a consequence of the sexual abuse by the reduction in the days on which he could work. His diminution in earning capacity has resulted in economic loss for which he is entitled to be compensated in the sum of $247,500, including interest: [65], [79].

Ground 3: no adequate consideration of effect of Mr Kawicki's inability to form and maintain relationships on his earning capacity

(3) Mr Kawicki's relationship impairment was but one manifestation of his depressive disorder and alcohol use disorder. Those conditions were expressly considered by the primary judge when assessing whether Mr Kawicki had suffered economic loss. In any

event, as acknowledged by Mr Kawicki, there was no evidence that specifically connected his relationship impairment to any loss of employment or earnings: [1] (Leeming JA), [10] (Adamson JA), [149] (Griffiths AJA).

Further, Leeming JA: “First, the “Trustees of the Marist Brothers” is a body corporate, established by s 4 of the *Roman Catholic Church Communities’ Lands Act 1942* (NSW), which was appointed as the proper defendant for the purposes of Mr Kawicki’s claim under s 6L of the *Civil Liability Act 2002* (NSW). In this Court, there was no issue that it was vicariously liable for the tortious conduct found at trial to have been committed by a brother who was a member of the order when Mr Kawicki was in late primary school in the early 1960s, approximately 65 years ago. Nor was there any issue in this Court that Mr Kawicki was entitled to the judgment in the amount of $186,000 in his favour, representing non-economic loss of $185,000 plus an allowance for out-of-pocket medical expenses of $1,000. The only issue in this Court is Mr Kawicki’s challenge to the rejection at trial of his claim for past economic loss,” [2].

A: A Ionita ins Moody Law. R: L Gyles SC with G Napier, ins Carroll & O'Dea Lawyers.

Long stop extension

Morgan v Mid North Coast Local Health District and Gayed [2026] NSWDC 386 28.10.2026 Waugh SC DCJ

After injurious gynaecological surgery in 2009, resolved v first defendant, plaintiff's application *Limitation Act 1969* (NSW) ss 50C, 50D, extension per ss 62A and 62B.

His Honour: "According to her statement of particulars (filed 4 November 2024), Mrs Morgan alleges that she suffered the following injuries: an unnecessary ablation on 4 April 2007; an unnecessary operation on 16 September 2007; significant per vagina bleeding; emergency hysterectomy; hypovolemic shock; renal failure; acute kidney injury; abdominal adhesions; pelvic adhesions; and mental harm. She alleges that she continues to suffer from the following disabilities: cognitive loss with episodes of memory loss; poor concentration; impaired short and long-term memory; abdominal pain; pelvic pain; lower back pain; abdominal cramping; abdominal bloating; hypertension; dizziness; nausea; sweating; tremors; diarrhoea; chronic post traumatic stress disorder; flashbacks; nightmares; chronic fatigue; reduced libido; reduced trust of healthcare professionals and healthcare settings; insomnia; hyperarousal; poor emotional regulation; and social avoidance," [11].

At [22] Waugh SC DCJ, "As Cavanagh J explained in *Vonhoff v Hillier* [2024] NSWSC 1285 (at [31]-[35]), under those provisions an action is not maintainable if brought after the first to expire of the 3-year post discoverability limitation period or the 12 year long-stop limitation period. The date on which the cause of action is discoverable is determined with reference to section 50D. The 12 year long-stop limitation period commences on the date of the act or omission of the defendant. The person may apply for an extension of the 12 year long-stop limitation period in accordance with section 62A. The court may order an extension of the 12 year period if it is just and reasonable to do so, but not to extend the period beyond the period of 3 years after the date on which the cause of action accrues having regard to Part 2 Division 6. Section 62B specifies the matters to be considered in determining an application for an extension of the 12 year long-stop limitation period."

"Twelve years running from the time of that surgery expired on 15 September 2021. These proceedings were commenced after that date, on 23 July 2024. It follows that regardless of when the cause of action was discoverable by the plaintiff, the 12 year long-stop limitation period had expired before the proceedings were commenced. Hence the plaintiff's application to extend that 12 year long-stop period under s.62A," his Honour said [25].

"In her affidavit (paragraph 29), Mrs Morgan said that she first heard about Dr Gayed's misconduct on the news, on "A Current Affair". She said she could not remember exactly when she saw that program, but her best recollection was that it was in late 2018 or early 2019. She said that she remembered on that program women coming forward saying that Dr Gayed had performed unnecessary procedures on them which had left them with significant injuries. She said that before seeing that program, she had no knowledge of any women alleging misconduct against Dr Gayed. She said she was appalled with what she saw in the program, that it was very confronting for her and she felt very violated," [35].

"In her affidavit (paragraphs 30 and 31) Mrs Morgan said that she remembered that she contacted Slater and Gordon (her present solicitors) shortly after seeing that

program. She said she first contacted Slater and Gordon in February 2019 regarding a potential class action they were investigating against Dr Gayed. She said that she spoke to someone in the class actions team who asked her a number of questions about the treatment she received from Dr Gayed," [36].

Detailed Slater & Gordon correspondence [45].

Expert medical opinion from Dr Anthony Lawrence supported claim against the second defendant seen by the plaintiff in July 2024.

Excerpted transcript [78]+, and thereafter canvassed plaintiff's solicitor's affidavit evidence, and the second defendant's solicitor's evidence [117]+ and cross examination.

To ss 50C and 50D, "The research of counsel for the second defendant revealed that the Court of Appeal has considered the construction or interpretation of the 2 sections in at least 7 decisions commencing with *Baker-Morrison v State of New South Wales* [2009] NSWCA 35; (2009) 74 NSWLR 454 and ending with *Agrigrain Pty Ltd v Rindfleish* [2024] NSWCA 295," in [136].

" For the purposes of section 50D(1)(b), the plaintiff must have known or ought to have known the key factors necessary to give rise to liability: *Baker-Morrison* at [39] per Basten JA (Ipp & Macfarlan JJA agreeing), *State of New South Wales v Gillett* [2012] NSWCA 83 at [94] per Beazley JA (the other members of the court agreeing), *Synergy Scaffolding Services Pty Ltd v Alelaimat* [2023] NSWCA 213; (2023) 326 IR 289 at [69] per Simpson AJA (Meagher & Kirk JJA agreeing), *Agrigrain* at [83] per Kirk JA (Ward P & Stern JA agreeing)," [138](1), then quoting Campbell JA in *Gillett* [131], and Simpson JA in *Synergy Scaffolding* at [69]-[71].

Later, "I accept the plaintiff's contention and the submissions made in support of it that the date of discoverability of the cause of action for her claim was no earlier than 11 July 2024 when she was provided with Dr Lawrence's supplementary report dated 30 January 2024 by her solicitors," Waugh SC DCJ said [156].

To ss 62A and 62B [160], relied on Cavanagh J in *Vonhoff v Hillier* [2024] NSWSC 1285 at [86] - [94].

"The reasons for the *delay* are relatively straightforward. I have already found that what both Mr Morgan and his wife took from the conversation with Dr Wicks was that to them it was as good as Dr Wicks saying "No, it wasn't negligent". After they spoke to Dr Wicks that was it, Mr and Mrs Morgan put what had happened behind them. They got on with their lives. After the conversation with Dr Wicks, from Mrs Morgan's point of view, and her husband's, there was nothing to investigate. That changed when they saw the A Current Affair program in late June 2018. It was seeing that program that led Mr Morgan to speak to one of his work colleagues who was an ex-lawyer which in turn led Mr and Mrs Morgan to contact her current, and only ever, solicitors in early 2019. Since contacting Slater and Gordon, Mrs Morgan has taken their advice and acted upon it without delay," Waugh SC DCJ said [164].

At [174] "I accept the second defendant's submission, the effect of which is that the court should not seek to determine contested questions of causation, injury and loss on an application such as this. I accept that they are matters for a final hearing. However I do not accept the submission that the nature and extent of the plaintiff's injury or loss is neutral in the present case. In my view it is appropriate to take into

account that it is a claim for significant injury and ongoing disability and loss. The plaintiff's claim as far from a trivial one."

Then, "Having regard to all those matters, all of the factors in section 62B and the evidence in more detail I referred to earlier in these reasons, I am satisfied that in all the circumstances it is just and reasonable to extend the operation of the 12 year long-stop limitation period to the day after these proceedings were commenced being 24 July 2024."

Listed for directions, and costs indicated in the cause but for the parties' submissions otherwise.

P: Mr S. Grey ins Mr Timothy Cummings, Slater and Gordon 1D: Ms K.E Holcombe ins Ms Eun Sil Choi, Hicksons 2D: Mr N. Bentley ins Ms Leonie Byers, HWLE Ebsworth

Leapt from car

Hoblos v Insurance Australia Limited t/as NRMA Insurance [2026] NSWPIC 650. 04.11.2026. Ms Susan McTegg, Senior Member.

Incident 3.02.2024 Liverpool.

“This is an application for determination of a miscellaneous claims assessment matter under Schedule 2, cl 3(b) of the *Motor Accident Injuries Act 2017* (MAI Act) as to whether the injury allegedly sustained by the claimant resulted from a motor accident as defined in the MAI Act,” [2].

Excerpted the claimant’s statement: “Then I told him that I wanted to go home at which point he got angry, and he began screaming at me and was driving fast and dangerously pounding the dashboard and the steering wheel of the car and then prodding me in the chest twice as he was driving. … As he began to slow down, I noticed that there were no cars around us about fifty metres before the intersection and at that point I made the decision to exit the vehicle, so I unbuckled my seatbelt, grabbed his and my mobile phones that were on the floor, and stepped out of the moving car whilst holding the door. I cannot recall how fast the car was travelling at the time but hung onto the door of the car and then let go falling onto the road grazing my left knee and twisting my left ankle”.

At [49] “The insurer submits the causative “use or operation” requirement was considered by Cavanagh J in *QBE Insurance (Australia) Limited v Abberton* [2021] NSWSC 588, where his Honour stated at [68]:

> “Motor accident” is defined to mean an incident or accident involving the use or operation of a motor vehicle that caused the death or injury to a person in the circumstances as set out in the definition in s1.4 of the MAI Act. The definition of motor accident thus necessarily requires that there be the use or operation of a motor vehicle that causes the injury. If there is no accident involving the use or operation of a motor vehicle that causes the injury, then there is no motor accident as that term is defined.

Then [51] “The insurer also relies on *Allianz Australia Insurance Limited v GSF Australia Proprietary Limited* [2005] HCA 26 where Justices Gummow, Hayne and Heydon held that the statutory test requires both: (a) a causal connection between the injury and one of the prescribed circumstances (the causal requirement), and (b) that the injury occur during the driving or operation of the vehicle (the temporal requirement).

Also, from *GSF* at [94],

> “One criterion is that the injury be sustained during certain events, including the driving of the vehicle or a collision with the vehicle or its running out of control. The other criterion is that the injury be sustained as a consequence of those events. The phrase "a result of" is linked to the first or temporal criterion; the phrase "is caused" is linked to the second criterion. For sub-par (iv), the temporal criterion is that the injury be the result of the use or operation of the vehicle because it was sustained during that activity. The other criterion is that the injury be caused by a defect in the vehicle.”

Sifting facts, at [69] “In *Campbell v Campbell* [2015] NSWSC 784 at [74] Sackar J stated greater weight should be accorded to contemporaneous accounts than the flawed attempts at recollection of facts by persons with an interest in the outcome of the litigation. It seems to me that the latter version of events is a flawed attempt at recollection of the facts by the claimant and is aimed at improving her chances of success in this litigation,” the Senior Member said.

Noted other authorities and PIC determinations [71]+.

Then [95] “Given the insured driver has corroborated the evidence of the claimant as to his conduct while driving the vehicle I find the insured driver was screaming, pounding the dashboard and the steering wheel and hit the rear vision mirror with such force that it broke and fell, hitting the claimant on the nose. I find as a result of the conduct of the insured driver the claimant became fearful for her safety and decided to jump from the moving vehicle.

“I am satisfied there was fault in the use or operation of the vehicle given the insured driver was pounding the dashboard and the steering wheel whilst driving. I find the violent behaviour of the insured driver was part of and incidental to the driving of the vehicle and was the predominant cause of the injury sustained by the claimant when she jumped from the moving vehicle. The violent conduct of the insured driver was not consistent with the actions of a prudent and safe driver, and I am satisfied it was both the proximate and immediate cause of the injury sustained by the claimant,” [96].

“I find that that the proximate cause of injury was the driving which caused the claimant to exit the vehicle in circumstances where she felt unsafe whilst she was a passenger in the vehicle. As in *Collins* it may be the concept of danger involved a risk of harm which may not have materialised, but it was a risk which created a dangerous situation where it led the claimant to jump from a moving vehicle,” [99].

“I find that the claimant sustained injury resulting from the use or operation of a motor vehicle caused as a result of and during the driving of the vehicle and in the alternative caused as a result of and during a dangerous situation caused by the driving of the vehicle,” [100].

“I find that the incident on 3 February 2024 was a motor accident within the gateway provisions of s 1.9 of the MAI Act and does constitute a motor accident as defined by s 1.4 of the MAI Act,” [101].

$150,000 to cyclist

Coulson-Knight v Allianz Australia Insurance Limited [2026] NSWPIC 647. 05.11.2026. Ms Elyse White, Member.

Liability admitted in late 2022 collision at Nowra between insured and claimant cyclist, a now 57yo science teacher. Dr Home certified less than 10% WPI.

“The claimant sustained a sacral fracture on the left-hand side, left sided ribcage injuries, spinal injury and injuries to both shoulders, referred pain into both hands, neck pain and psychological sequelae,” [22].

“He was admitted to hospital where CT scans were performed of the brain, and cervical spine, abdomen and pelvis. No fractures in the skull, neck or spine were found beyond a linear fracture of the sacrum. Pelvis X-rays were also performed.

“He was discharged into the care of his wife. He attended his general practitioner (GP) at Worrigee Medical Centre who arranged an MRI scan of both shoulders. The right shoulder demonstrated no pathology with the left shoulder demonstrating a labral tear. He mentioned to his GP, that as other symptoms settled, he noticed thoracic pain.

“Pathology of the thoracic spine performed in August 2023 demonstrated wedging of the T6 to T9 vertebrae.”

At [38] “The claimant is seeking a past economic loss in the amount of $112,895 based on the initial time he was absent from work, plus a top up of income replacement benefits paid at 85%, a loss of career progression and past loss of superannuation.”

“The claimant says, because of the injuries he sustained in the accident, he has not been able to apply for promotions such as a pastoral care co-ordinator or assistant principal. He submits that both these positions pay a higher salary than his current earnings and as such, he has suffered a loss of impairment to his work capacity,” the Member said [39].

Later, “As such this loss can only be assessed as a buffer. Assessment by way of a buffer is relevant in circumstances where earning capacity has unquestionably been reduced but its extent is difficult to assess, see *Allianz Australia Insurance Ltd v Kerr* [2012] NSWCA 13,” [67].

“Considering the claimant has demonstrated an excellent work ethic as described by Mr Eirth, he has returned to full-time work paying the same level of remuneration as his pre-accident position paid. Considering the loss of opportunity caused by the injuries sustained in the accident, the appropriate buffer for past economic loss, superannuation, top up of replacement benefits and loss of career progression is $70,000,” [68], with credit for statutory payments.

To *future economic loss*, [70]+, “The claimant is claiming a future loss of impairment to his weekly earning capacity of between $350 net per week to $900 net per week. This claim is made on the assumption that but for the accident the claimant’s most likely career trajectory would have progressed until he reached the role of principal.” …

“The insurer relies on the authority in *Randwick City Council v Wunderwald* [2026] NSWCA 116 when the Court of Appeal set aside a buffer award for future economic loss where the evidentiary foundation did not establish that the plaintiff’s most likely future circumstance included any economic disadvantage arising from the injury,” [72].

"The circumstances involving that case are very different to the facts in this case. The plaintiff in that case was an infant child. The buffer was based on the assumption of the most likely probability rather than, the assumptions relied upon, represent the most likely future circumstances," [73].

"He says he intended to work to age 70 years. There is no supporting evidence to assist me in accepting positions within the educational industry are offered to age 70 years. Likewise, there is no supporting evidence that the claimant cannot work to age 70 years," [77].

"As such, considering the accepted age of retirement is 67 years, and in light of medical support which suggests he may have to modify his work arrangements to continue to work, the appropriate amount for future economic loss and superannuation is $80,000," [78].

Award, costs agreed.

Exemption allowed

Boney-Leuthwaite v Insurance Australia Limited t/as NRMA Insurance [2026] NSWPIC 658. 05.11.2026. Mr Brett Williams, Senior Member.

Exemption pursuant to MAI s 7.34(1)(b) allowed, on documents, with consent. PIC Rules r 99 noted.

"Peter Boney-Leuthwaite (claimant) alleges that he suffered injury as a result of a motor vehicle accident at Glendenning on 8 October 2023 (accident). He subsequently made a claim for damages under the *Motor Accident Injuries Act 2017* (MAI Act) on Insurance Australia Limited trading as NRMA (insurer). Liability for the claim was denied on 1 June 2026. The claimant has also made a claim for damages on the Nominal Defendant with respect to the accident," [1].

At [9] "The claimant relies on written submissions dated 6 October 2026. It is recorded that he was a pillion passenger on an unregistered dirt bike that was involved in a collision with a car. Claims for damages have been made on both the insurer of the

car and the Nominal Defendant. He suffered significant injuries and is a participant in the Lifetime Care and Support Scheme. Liability for the claim has been denied.

“The claimant identifies the following matters in support of the application: liability and contributory negligence are in issue as is apportionment between the two drivers; expert accident reconstruction and pharmacological evidence will be required; he suffered a catastrophic brain injury as a result of the accident; assessment of damages will be complex, and subpoenas give evidence are likely to be required,” [10].

“The claimant argues that because an assessment by the Commission of the issue of liability is not binding on any party, any assessment would not finally resolve the issues in dispute, and the matter would be litigated again in court. That sequence, it is submitted, would add delay and cost, “without any corresponding gain”,” [11].

Then, “For the reasons advanced by the claimant, I am satisfied the claim is not suitable for assessment. Liability for the claim is in dispute. The legal and factual issues are complex. There are likely to be multiple lay and expert witnesses required to give evidence. Subpoenas to give evidence are likely to be required. There will be expert evidence in relation to both liability and damages. It is likely the hearing will occupy a number of days. Additionally, and on this background, a determination by the Commission with respect to liability will not bind the parties and will add to the costs associated with a final determination of the claim,” [13].

“I am satisfied the determination of the claim by a court is more likely to result in the just, quick and cost-effective resolution of the real issues in the proceedings,” [14].

C: Ms Thompson. I: Mr Gil.

Nel $300,000

AAI Limited t/as AAMI v Everson [2026] NSWPIC 601. 06.11.2026. Ms Elyse White, Member.

Approved $310,000 settlement non-economic loss and travel for unrepresented 74yo claimant, front seat passenger driven by her husband who on 26.07.2024 lost control after striking pothole and striking a tree. WPI unnoted.

“She was diagnosed with: mildly displaced fracture of the manubrium + sternal body + ant mediastinum hematoma; mildly displaced right 5-6 rib fractures; T12 burst compression fracture with central 30% height loss with minimal retropulsion + Minor T11 compression fracture + T11 spinous process fracture, and superficial submental bruise; and right 4th metatarsal fracture,” [13].

Having noted MAIA s 4.7, “Damages are assessed with the application of Common Law Principles up to the maximum amount. This was explained by Heydon JA in *Hodgson v Crane* [2002] NSWCA 276; (2002) 55 NSWLR 199 when he said it is not possible to construe the concept of proportionality out of the language of the MAI Act. When the threshold of 10% whole person impairment was passed, the court was required to assess non-economic loss without statutory restraint except for the maximum amount that may be awarded,” [27].

“According to the authority in *Dell v Dalton* [1991] NSWCA 76; (1991) 23 NSWLR 528 the court determined that the assessment of non-economic loss involved: “...questions of fact and degree, and matters of opinion, impression, speculation and estimations, calling for the exercise of common sense and judgment,” [28].

Accepted entitlement $300,000 in context of maximum $712,000.

“An additional sum has been allowed in accordance with Regulation 9 of the MAI Act for overseas travel in the sum of $10,000,” [30].

Backyard

“As he began to slow down, I noticed that there were no cars around us about fifty metres before the intersection and at that point I made the decision to exit the vehicle, so I unbuckled my seatbelt, grabbed his and my mobile phones that were on the floor, and stepped out of the moving car whilst holding the door,” claimant in *Hoblos*.