IN THE SUPREME COURT OF VICTORIA
AT MELBOURNE
COMMON LAW DIVISION
GROUP PROCEEDINGS LIST

Not Restricted

S ECI 2023 04435

BETWEEN:

JANE JONES (A PSEUDONYM) Plaintiff

- and -

WALLER LEGAL PTY LTD (ACN 167 030 757) Defendant

JUDGE:	Gorton J
WHERE HELD:	Melbourne
DATE OF HEARING:	18 December 2024
DATE OF RULING:	17 February 2025
CASE MAY BE CITED AS:	Jane Jones (a pseudonym) v Waller Legal Pty Ltd (First Revision 17 March 2025)
MEDIUM NEUTRAL CITATION:	[2025] VSC 42

PRACTICE AND PROCEDURE – Group proceedings – Application by defendant that proceeding no longer continue as a group proceeding – Whether group proceeding not an efficient and effective means of dealing with group members' claims – Where the content and scope of the duties owed are not controversial – Where each group member's case is factually discrete – Where the plaintiff seeks to prove the defendant had an invariable practice of providing certain advice with respect to how economic loss claims are determined under a mistaken understanding of the law – Where difficulties with respect to client privilege can be overcome through case management – Where findings of common questions would not lead to appreciable savings in determination of group member's claims – Where in interests of justice that proceeding no longer continue as a group proceeding – *Supreme Court Act 1986* (Vic) s 33N(1) – *Bright v Femcare Ltd* (2002) 195 ALR 574 – *Beecham Motors Pty Ltd v General Motors Holden Australia NSC Pty Ltd* [2021] VSC 855 – *Pearce v Waller Legal Pty Ltd (Ruling)* [2024] VSC 779 – *AS v Minister for Immigration and Border Protection* [2017] VSC 137.

APPEARANCES:	Counsel	Solicitors
For the Plaintiff	Dr M Rush KC with Mr A James-Martin	Rightside Legal
For the Defendant	Mr P Solomon KC with Ms G Berlic	Lander & Rogers

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HIS HONOUR:

A Background

1 Rightside Legal, acting for Jane Jones (a pseudonym), the plaintiff, has commenced this proceeding against Waller Legal Pty Ltd, the defendant. Waller Legal is a law firm that specialises in acting for people who seek compensation from institutions for childhood sexual abuse. Ms Jones was a client of Waller Legal. The proceeding has been commenced as a 'group proceeding' under Part 4A of the *Supreme Court Act 1986* (Vic). The 'group members' are defined to be all persons who claim to have been abused, as minors, by a person or persons associated with an institution, were clients of Waller Legal between 1 July 2015 and 21 September 2023, retained Waller Legal to advise them and to represent them in a claim for compensation for that abuse, and resolved their claims without proceedings being commenced or, at any rate, prior to judgment.[1] It seems there are some 700 group members, of which 61 or so are clients of Rightside Legal and, presumably, aware of the existence of this proceeding.

2 The essence of the claim is that Waller Legal did not adequately advise the group members in respect of, or adequately pursue, claims for damages for loss of earning capacity.[2] The claim is brought in contract and in tort and under the *Australian Consumer Law*.[3] The claims in contract and tort are for breach of contractual and tortious duties to take reasonable care. The claim under the *Australian Consumer Law* is that Waller Legal misrepresented that it would apply specialist skill and expertise in the provision of legal services. Damages are sought for the difference between the amounts received in settlements and the amounts that the group members 'would have obtained' had Waller Legal provided adequate advice and adequately pursued damages for loss of earning capacity, or the value of the lost

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1 There is the usual exclusion of the persons referred to in s 33E(2)(b), (d) and (e) of the *Supreme Court Act 1986*.

2 The pleadings use the phrase 'economic loss', but defines that term to include only loss of earning capacity.

3 Being schedule 2 to the *Competition and Consumer Law Act 2010* (Cth) as applied in Victoria by s 7 of the *Australian Consumer Law and Fair Trading Act 2012* (Vic).

chance to compromise their claims for the 'true value', and the difference between the legal costs paid and the 'true value' of the legal services provided.

3 Waller Legal has applied for an order that the claim no longer proceed as a group proceeding. These reasons concern that application.

B The issues in this proceeding in more detail.

4 Waller Legal has admitted that it owed a duty of care to its clients and, for the purpose of a claim brought under the Australian Consumer Law, that it represented that it would apply specialist skill and expertise in the provision of legal services. The issues in dispute are:

(a) whether Waller Legal breached its duty or did not apply the skill and expertise it represented it would apply (which is likely to amount to the same thing); and

(b) if so, whether that caused any loss; and

(c) if so, what is the appropriate measure of that loss.

5 In order to establish breach or misleading or deceptive conduct, the plaintiff will seek to prove, according to the second further amended statement of claim, that during the relevant period Waller Legal:[4]

(a) was obliged to, but did not, advise its group member clients that 'steps should be taken to investigate and assess the economic loss component' of the client's claim including by obtaining a full history, obtaining records, obtaining medical opinions, and 'calculating past and future lost earnings' or obtaining an actuarial report;

(b) 'had a practice of advising' its group members clients that:

(i) they should attempt to resolve their claims at an informal settlement conference rather than by first commencing proceedings; and

[4] This is for the most part not verbatim, but is my summary of the substance of the allegations made.

(ii) they should seek a 'nominal sum' for loss of earning capacity, or an amount 'for loss of opportunity', rather than make a 'formal claim' for loss of earning capacity supported by medical and actuarial evidence; and

(c) was obliged to advise, but didn't advise, its group members clients that:

(i) commencing a proceeding did not preclude a settlement prior to trial and that, with mediation, a 'high proportion of litigated claims' settled before trial; and

(ii) negotiating after having commenced proceedings put more pressure on the defendants and might allow a settlement in a higher amount than any amount agreed in an informal settlement conference; and

(d) 'had a practice' of allowing, or failing to advise against, settlements that did not adequately take into account a 'properly assessed claim for economic loss … specific to the individual Group Member'.

6 These allegations are denied. Waller Legal alleges, in summary, that it provided advice as to the options available and considered, on a case by case basis, how best to present its clients' claims in light of each particular client's circumstances and instructions. In its particulars, Waller Legal indicates that it will seek to prove, or at least to argue, that the advice it gave to any individual client in relation to a claim for loss of earning capacity depended on, among other things: whether the client could prove the abuse took place; whether the abuse had caused economic loss; the client's 'willingness to participate in the litigation process, given the attendant stresses of that process'; whether there was a juridical entity against which to claim that could be proved to be vicariously liable and that had assets to meet any claim; the risk that a defendant could obtain a stay of the proceeding; and, for interstate claims, whether a limitations period applied.

7 Waller Legal also alleges that:

(a) for 'many' of its clients, or 'on many occasions', it 'pursued claims for economic loss … including through the commencement of proceedings'; and

(b) some of their clients:

(i) did not wish to seek damages for economic loss because of the possible need to repay Centrelink benefits or to disclose earnings to the Australian Taxation Office or to disclose the allegations of abuse to their employers;

(ii) gave instructions that their abuse had not reduced their earning capacity;

(iii) had not engaged in the workforce, or limited their working endeavours, due to unrelated events such as unrelated accidents, caring responsibilities or periods of incarceration; or

(iv) otherwise did not have 'a viable cause of action against any defendant'.

8 Causation and loss, too, are in dispute. According to the second further statement of claim, the plaintiff will seek to prove that, had the defendant acted in accordance with its obligations:

(a) its group member clients would have instructed it to pursue claims for loss of earning capacity and it would have done so, including by obtaining proper supporting material, and it would have 'demanded' more compensation;

(b) its group member clients would have been able to 'make an informed decision' about any offers made and would have instructed it to 'refuse to compromise' for the amounts offered; and

(c) its group member clients would have 'been compensated … for an amount greater than what they received' in their settlements including, if necessary, by the commencement of legal proceedings.

9 Waller Legal does not admit these matters. It further alleges that any settlement entered into before 1 July 2018 could be set aside and, unless this has been sought, some group members will not have mitigated any loss that they have suffered.

10 In terms of the lead plaintiff herself, Waller Legal specifically pleads that:

(a) it advised her that she could litigate and that if she did so she could obtain greater compensation including for loss of earning capacity, but the plaintiff instructed them to pursue 'out-of-court' negotiations instead;

(b) it advised the plaintiff that she would 'do better if she issued proceedings' and that she had 'reasonable prospects' but she instructed it that 'she was not sure she could bear a trial' and to accept the most recent offer made.

C Is it in the interests of justice that the proceeding no longer continue as a group proceeding?

C.1 What Waller Legal must establish on the application

11 The application is brought under s 33N(1) of the *Supreme Court Act 1986*, which provides that:

> (1) The Court may, on application by the defendant, order that a proceeding no longer continue under this Part if it is satisfied that it is in the interests of justice to do so because—
>
> (a) the costs that would be incurred if the proceeding were to continue as a group proceeding are likely to exceed the costs that would be incurred if each group member conducted a separate proceeding; or
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> (b) all the relief sought can be obtained by means of a proceeding other than a group proceeding; or
>
> (c) the group proceeding will not provide an efficient and effective means of dealing with the claims of group members; or
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> (d) it is otherwise inappropriate that the claims be pursued by means of a group proceeding.

12 As the language of the statute makes clear, there is an obligation on Waller Legal to satisfy me that it is in the interests of justice that the proceeding no longer continue as a group proceeding because of the existence of one or more of the matters set out in paragraphs (a) to (d).[5] Determining whether it is in the interest of justice to order that the proceeding no longer continue as a group proceeding 'invites a comparison between the pursuit of the group members' claims in the subject representative

[5] Cf *Bright v Femcare Ltd* (2002) 195 ALR 574, 601 [128] (Kiefel J); *Beecham Motors Pty Ltd v General Motors Holden Australia NSC Pty Ltd* [2021] VSC 855, 5 [13] (Nichols J).

proceeding, and their pursuit in hypothetical, non-representative proceedings'.[6] Paragraph (d), of course, allows requires the Court to consider whether it is for any reason 'inappropriate' that the claims be pursued by means of a group proceeding and this calls for a 'broad evaluative judgment'.[7]

C.2 The duties owed are not controversial

13 One feature of this proceeding is that the legal framework is clear. The existence and nature of the legal duty owed by a solicitor to a client is well established. As noted above, and entirely unsurprisingly, Waller Legal has admitted that it owed to each group member a duty to exercise reasonable care and skill in the performance of its retainer, and that the standard of care and skill required was that of a person professing to have specialised skill and experience in claims for compensation against institutional defendants arising from sexual abuse or physical abuse. Waller Legal has also, again unsurprisingly, admitted (in response to the claim under the *Australian Consumer Law*) that it represented to each group member that it applies specialist skills and expertise in the provision of legal services and that that representation was made in trade or commerce.

14 Arguably, Waller Legal has not admitted that it was an implied term of the retainer with each group member that it would exercise reasonable care and skill but has only admitted that such a duty exists in tort and that it is subject to the terms of the particular retainer. Even if this be so, I see this as being of no significance. Counsel for the plaintiff did not identify any relevant distinction between the claims in negligence and in contract and, as counsel for the plaintiff also accepted, the existence of an implied term that a solicitor will take reasonable care in the conduct of the retainer is clear beyond any sensible argument.

15 For these reasons, I am satisfied that the lead plaintiff's case will proceed on the basis that Waller Legal owed to her a duty to take reasonable care in the performance of its retainer and that the care required was that of a solicitor professing to have specialised skill and experience in the relevant area. Accordingly, the only substantive questions that arise are whether the duties owed

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6 *Beecham* [14], [15] (Nichols J).

7 *Multiplex Funds Management Ltd v P Dawson Nominees Pty Ltd* (2007) 164 FCR 275, 277 [1] (French J).

to the plaintiff were breached and if so what damage was suffered as a result. These are essentially questions of fact, although legal issues may arise when determining whether advice given was reasonable or not.

16 Further, I am prepared to assume for the purpose considering the 'hypothetical, non-representative proceedings',[8] if the proceeding does not continue as a group proceeding, that Waller Legal would make the same admissions or that, if it did not, the Court would have little difficulty concluding that duties of the types alleged were owed in any claim brought by individual group members. Accordingly, if an order is made that this proceeding no longer proceed as a group proceeding, the only substantive questions that would arise in any separate proceedings brought by group members would be whether the duties owed to that plaintiff were breached and if so what damage was suffered as a result.

C.3 To what extent are there common questions of fact or law to be determined?

17 The fact that this proceeding will turn essentially on questions of fact rather than questions of law does not, of course, mean that it should not proceed as a group proceeding. If there are common questions of fact, in the sense that there are questions of fact that arise in this proceeding and that would arise also in any claim brought by each or many of the other group members, a group proceeding may be an efficient and effective means of dealing with the claims of the group members. Obvious examples of this include the group proceedings brought in this Court where the causes of the 'Black Saturday' bushfires were in dispute,[9] the group proceeding brought in this Court where there was a factual dispute as to whether a medical device was defective,[10] and the group proceeding brought in the Federal Court of Australia where there was a factual dispute as to whether 'Round Up' caused Non-Hodgkins Lymphoma.[11] In cases such as those, the single determination of questions of fact that are common across the group members' claims that binds all group members will often be an efficient and effective means of dealing with those claims, as it will avoid each group member having separately

8 *Beecham* [14], [15] (Nichols J).
9 *Matthews v Ausnet Electricity Services Pty Ltd; Rowe v Ausnet Electricity Services Pty Ltd (Final Ruling)* [2023] VSC 313.
10 *Turner v Bayer Australia Ltd* [2024] VSC 760.
11 *McNickle v Huntsman Chemical Company Australia Pty Ltd* [2024] FCA 807.

to establish the same facts, or will avoid a defendant from having separately to defend the same allegation of fact of multiple occasions. It also has the benefit of precluding a situation from arising where different courts make different findings on the same factual issue, which, where it occurs, can bring the administration of justice into disrepute.

18 In order to determine whether there are questions of fact that arise in this proceeding that are common to the claims of group members other than the lead plaintiff herself, the resolution of which may therefore usefully bind all group members, it is necessary to consider at the actual issues that will arise and how they may be determined.

C.3.1 Each group member's case is factually discrete

19 In this proceeding, each group member gave Waller Legal instructions separately and at different times and was given advice by Waller Legal separately and at different times. As noted above, in order to obtain an award of damages, each group member will have to establish:

(a) first, what was the actual advice that they were given in relation to a possible claim for loss of earning capacity, and that the advice was unreasonable having regard to that client's particular circumstances and the legal context at the time that the advice was given. As part of this process, the group member will have to establish what advice they should instead have been given having regard to their particular circumstances;

(b) next, what instructions that group member would have given if this other, non-negligent advice had been given in relation to a possible claim for loss of earning capacity; and

(c) finally, the outcome, or likely outcome, had that proper advice been given and the subsequent instructions followed. Whether the analysis proceed by way of damages for a lost chance[12] or some sort of weighted evaluation of past hypothetical scenarios,[13] this will require consideration, again, of the

12 *Sellars v Adelaide Petroleum NL* (1994) 179 CLR 332. Cf *Tabet v Gett* (2010) 240 CLR 537.
13 *Malec v JC Hutton Pty Ltd* (1990) 169 CLR 638.

strength of that particular group member's claim, the particular group member's desire to litigate rather than to compromise and their appetite for risk, and the likely behaviour of the various institutional defendants in defending or offering to compromise the claim.

20 Evaluating the strength or value of each group member's claim against Waller Legal will require consideration of the strength of the underlying claim against the relevant institution and therefore whether the abuse would have been admitted by the institution and if not the prospects of proving that the abuse happened, and consideration of the prospects of establishing that the institutional defendant was liable for that abuse either under principles of vicarious or direct liability. This would require consideration of the particular circumstances in which the alleged abuse took place and relationship between the particular alleged abuser and the particular institution and any knowledge the institution had at the relevant time that the abuser did or might abuse minors, and the legal framework as it existed at the time the allegedly negligent advice was given.

21 The changes to the legal landscape through the period sought to be covered by this proceeding should not be overlooked. The relevant period commences on 1 July 2014, which is the date from which amendments made to the *Limitations of Actions Act 1958* removed any defence that a claim for childhood sexual abuse was statute barred.[14] Even so, after that time and the legal landscape varied during the relevant period. In particular:

(a) Prospect of a stay. The Court retained a power permanently to stay a proceeding that was, by reason of the effluxion of time and its effect on the availability of evidence or for other reasons, an abuse of process. Assessing whether the institutional defendant could obtain a permanent stay, or the appropriate discount for that risk, would require consideration of the particular circumstances of the individual group member and their reasons

[14] Section 4 *Limitation of Actions Amendment (Child Abuse) Act 2015* (Vic) introduced into the *Limitation of Actions Act 1958* Div 5 of Part IIA.

for any periods of delay and the extent to which the effluxion of time had prejudiced the institutional defendant's ability to defend the claim;[15]

(b) Availability of the National Redress Scheme. From 2018, persons had the ability to make a claim for compensation under the scheme established by the *National Redress Scheme for Institutional Child Sexual Abuse Act 2018* (Cth). This was a comparatively straightforward process, but was limited to a payment of $150,000 and provision of counselling and an apology or other like communication.[16] If a claim were made and accepted, the claimant was precluded from seeking also to recover damages at common law.[17]

(c) Need for a solvent defendant. Where the alleged abuser was a priest, there could be problems identifying an entity to sue with assets sufficient to meet any claim. This was because of the peculiar status of priests and their relationships with churches or church bodies with which they were connected. This allowed a church institution to rely on the so-called 'Ellis defence' to avoid responsibility for abuse by an individual priest.[18] This problem was ameliorated from 1 July 2018 by the enactment of the *Legal Identity of Defendants (Organisational Child Abuse) Act 2018* (Vic) which required 'non-government organisations' to nominate a person to act as defendant and to incur liability on behalf of that organisation;

(d) Vicarious liability. Where an institution or body was identified who was potentially responsible for the assault, but it could not be shown that the institution or body was on notice of the fact that the alleged abuser posed a risk to children and was in breach of a direct duty owed by it to a child, there could be problems establishing that the body was vicariously liable for any

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15 See, eg, although not an institutional case, *Connellan v Murphy* [2017] VSCA 116, [57]-[60] (Priest, Beach and Kaye JJA).

16 *National Redress Scheme for Institutional Child Sexual Abuse Act 2018* (Cth), s 16, s 54.

17 Accepting an offer under the scheme operates as a release: *National Redress Scheme for Institutional Child Sexual Abuse Act 2018* (Cth) s 43.

18 *Trustees of the Roman Catholic Church for the Archdioceses of Sydney v Ellis* (2007) 70 NSWLR 565.

sexual assaults that took place.[19] Where there was an employment relationship, the courts (and advising lawyers) were 'left in an uncertain position' at least until *Prince Alfred College v ADC,* which clarified in 2016 the test to be applied and emphasised its variable and fact-specific nature.[20] There was also uncertainty as to whether vicarious liability could exist outside an employment relationship. In August 2021, this court held that it could,[21] but in November this year the High Court held that it could not.[22]

(e) Past settlements. Under conventional legal principles, a person who had settled a claim was unable to claim again. This was changed from 18 September 2019 by the *Children Legislation Amendment Act 2019*. That Act introduced s 27QA into the *Limitation of Actions Act 1958*, which allows an action to be brought 'on a previously settled cause of action', and the court to set aside a previous judgment made, if the claimant can establish that it is 'just and reasonable to do so'.[23] When first introduced, this applied only in respect to settlements made before 1 July 2015. On 26 April 2021, this was extended to settlements made before 1 July 2018.[24]

22 For these reasons, it is difficult to see how there are common questions of fact or law that may be determined in the lead plaintiff's proceeding that would or could apply across the claims of the group members, or a sufficient number of them, for the group proceeding to be an efficient and effective means of dealing with the

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19 *Prince Alfred College v ADC* (2016) 335 ALR 1. French CJ, Kiefel, Bell, Keane and Nettle JJA said at 8 [38]: 'The judgments of the courts below in this case reflect the divergent views about the approach to be taken to the question of vicarious liability both generally and in cases of the kind here in question. Differing views were also expressed in *Lepore. Lepore* itself was decided against the background of developments in Canada and the United Kingdom, the catalyst for which it appears to have been cases of this kind — concerning the sexual abuse of children in educational, residential or care facilities by persons were placed in special positions with respect to the children. Since *Lepore* there have been further developments in each of these jurisdictions. It is therefore understandable that trial courts and intermediate appellate courts in Australia are left in an uncertain position about the approach which should be taken'.

20 Ibid at 18 [84]: 'The relevant approach requires a careful examination of the role that the [employer] actually assigned to housemasters and the position in which [the alleged abuser] was thereby placed vis-à-vis the respondent and the other children'.

21 *DP (a pseudonym) v Bird* [2021] VSC 540 (J Forrest J), upheld in *Bird v DP (a pseudonym)* [2023] VSCA 66 (Beach, Niall and Kaye JJA).

22 *Bird v DP (a pseudonym)* [2024] HCA 41.

23 *Wrongs Act 1958*, s 27QE(1). These provisions were introduced by s 32 of the *Children Legislation Amendment Act 2019.*

24 The amendment was effected by s 44 of the *Justice Legislation Amendment (Drug Court and Other Matters Act) Act* 2020.

claims of the group members. It is to be recalled that the group is not limited to those persons who had claims in respect of one particular abuser, or those persons who had claims against one particular institution, but includes all the clients of the defendant who settled their claims, regardless of the identity of the abuser or the identity of the institution or the nature or amount of the settlement.

23 The plaintiff accepted that 'claims regarding damage, and most likely causation, will involve facts relevant to the individual group member and to that extent will not be finally determined at the initial trial'. As noted above, the fact that each claim will require individualised attention to be given to the particular circumstances of each group member is, of itself, no reason to order that the proceeding not continue as a group proceeding if there are otherwise common issues the resolution of which would aid in the resolution of claims generally.[25] The plaintiff submitted that was the case here and that this group proceeding remained an efficient and effective means of dealing with the claims of the group members (or at least the contrary has not been established) because the defendant had a 'practice' of providing advice of a particular type or a 'strategy' for settling claims that was generally applicable including a 'practice' of advising its clients 'in lieu of making a "formal claim" of compensation for economic loss Group Members should seek a nominal sum, or an amount for loss of opportunity'.[26] In counsel's words, an 'invariable feature' of Waller Legal's approach was 'a misunderstanding of the law with respect to how economic loss claims are to be determined and therefore, how they should be advanced on behalf of claimants'. I was taken to letters in which Waller Legal:

(a) advised clients that they should try to settle the case using alternative dispute resolution processes rather than going to court;

(b) advised clients that:

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25 See, eg, *Nguyen v Rickhuss* [2023] NSWCA 249, where the group consisted of patients who had undergone breast enhancement surgery that, it was contended, was performed in accordance with what they contended was a negligent approach 'universally and indiscriminately' applied to all group members.

26 Second Further Amended Statement of Claim filed 12 April 2024, para 17.5.

(i) a 'formal loss of earnings component' may only, or should only, be included in a claim if the client, while a child, had a 'genuine career' or a 'particular realistic career' in mind and can substantiate that, but for the abuse, they could have 'achieved that career path'; and

(ii) otherwise a 'loss of opportunity' type claim may be put, which, instead of a calculated figure, is a nominal claim for the impact of the abuse generally on education and employment;[27] and

(c) informed the solicitors for institutions against which the claim was made that their client was not making a 'formal claim for loss of earnings' but was instead pursuing a 'claim for loss of opportunity', and sought a sum for that 'loss of opportunity', rather than formulating a claim by reference to matters such as the average weekly earnings of a person over the relevant period supported by specific psychiatric or actuarial evidence.

24 The plaintiff submitted that the existence or not of certain practices or strategies and their reasonableness or not, and indeed Dr Waller's 'understanding of the law' (and the understanding of those who worked under her at Waller Legal), were common questions of fact that could usefully be determined by the group proceeding procedure and could then be relied upon by each group member when prosecuting their own individual claim to damages. The plaintiff submitted that this would be particularly useful if, say, a particular client could not recall the advice given: if in the course of the group proceeding a finding was made binding on the parties that Waller Legal had a practice of providing certain advice, or had a certain understanding of the law, an inference may be drawn that that advice was given in accordance with that practice or understanding. On that basis, counsel for the plaintiff identified the common questions as including questions such as:

(a) What was Waller Legal's understanding of the legal principles application to an assessment of damages for economic loss?

(b) Was that understanding consistent across the relevant timeframe?

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27 Not nominal in the sense of trivial, but more in the sense considered in *Victorian Stevedoring Pty Ltd v Farlow* [1963] VR 594.

(c) Did Waller Legal have a practice of advising clients that a 'formal loss of earnings component' may only, or should only, be included in a claim if the client, while a child, had a 'genuine career' or a 'particular realistic career' in mind and can substantiate that, but for the abuse, they could have 'achieved that career path'?

(d) Is a claimant able to prosecute a claim for loss of earning capacity by reference to some method such as average weekly earnings without that claimant having to have had in mind, as a child, a particular career path denied to them, and is advice to the contrary wrong?

25 The first three of these are questions of fact, and the fourth is a question of law.

C.3.2 The legal question as to whether a claimant must have had an identified career path while a child in order to formulate a claim for damages for loss of earning capacity

26 The question as to whether a claimant is, at law, able to prosecute a claim for loss of earning capacity by reference to some method such as average weekly earnings without that claimant first having to have had a particular career path in mind as a child and denied to them by the abuse, is a question that will arise in the lead plaintiff's proceeding and, I am prepared to assume for the purpose of this application, will arise in a considerable number of claims brought by other group members. It is not, however, a difficult question. It is clear that a claimant is, at law, in the right circumstances, able to prosecute a claim for earning capacity by reference to some method such as average weekly earnings without that claimant having to have had in mind, as a child, a particular career path denied to them. I do not anticipate that there would be any real dispute on this point.

27 More significantly, I do not consider that, if an order is made that the proceeding not proceed as a group proceeding, the failure to have a finding of the type discussed binding on the parties will significantly, if at all, add to any expense or delay in any claims brought separately by the current group members. Indeed, I am satisfied that any savings in having that issue determined would be minimal. As noted above, each group member will still have to establish, as part of establishing their entitlement to damages, what advice they say they should have

been given in light of their own particular circumstances and what they would have sought if that advice had been given. I am satisfied that resolving what the plaintiff says is this common question of fact would not appreciably lighten the burden placed on each group member. Any additional cost of having to prove that such advice was negligent would likely be immaterial (if not subsumed) in a context where each group member would still be required to establish the actual advice that they say they should have been given. Put simply, if evidence of the type referred to above is ever required, it may easily and conveniently be obtained as part of the process of obtaining evidence as to what advice the claimant says they should have been given.

C.3.3 The factual questions as to whether Waller Legal had a practice of giving certain advice, or a particular legal understanding.

28 The plaintiff's notions of establishing in this group proceeding a 'practice' or a legal misunderstanding are more complicated.

29 What ultimately matters when assessing liability and damage is what advice was in fact given and so any practice or understanding is only relevant to the extent that it may justify or make more likely a finding as to what advice was in fact given. In that sense, a practice or understanding does not form part of the cause of action reflected in the pleadings and so does not emerge from the pleadings as a 'question of fact'. That, however, does not mean that it may not be a 'common question of fact'. A factual dispute that forms a 'substratum'[28] used in a permissible process of reasoning towards other findings of fact may be a 'common question of fact' for the purposes of the group proceeding procedure set out in Part 4A of the *Supreme Court Act 1986*.

C.3.3.1 An invariable practice

30 That said, I have difficulty seeing how the allegation that Waller Legal had the 'practice' of providing certain advice would be proved or, if proved, would be used by the finder of fact. Counsel for the plaintiff clarified that the allegation to be proved was that the practice was 'invariable', and that the practice would be sought

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[28] Being language used by the plaintiff's counsel.

to be proved by leading evidence of that advice having been given on a number of occasions and then asking for an inference to be drawn from those occasions that such a 'practice' existed and was implemented across the entire group. The plaintiff submitted that each group member would then have the advantage of such a finding, and that this would result in savings in time and cost.

31 The process by which an invariable practice would be established, or sought to be established, is intriguing. A forensic decision would have to be made as to how many occasions would have to be proved before an inference could be drawn that the practice was invariable. It would be awkward if the Court were to make a finding of an invariable practice based on evidence led in the lead plaintiff's proceeding and it was later to emerge, in determining the damages of a particular group member, that different advice was in fact given to that client. Further, for reasons set out in part D.1 below, Waller Legal may face difficulties in leading evidence to the contrary if it were precluded from leaving evidence as to advice given to some group members because they had not waived privilege. Those problems may, perhaps, be overcome by narrowing the group so that the only persons caught by the finding are persons who have waived privilege.

32 It seems unlikely that a court would infer that certain advice was invariably given, in the sense of given to all group members, without hearing evidence of the advice in fact given to all, or nearly all, group members. If evidence were led from only a selection of group members, then the Court would likely not be in a position to infer an invariable practice, in which case the time and cost of leading that evidence would be wasted. If evidence were led from all or nearly all of the group members, any savings in time and cost associated with the group proceeding process on this point would be substantially lost. In my view, endeavouring to prove, in the lead plaintiff's proceeding, by a process of inference, that advice of a certain type was invariably given, in the sense that it was given to each group member, would probably add to the cost of the group proceeding without resulting in any material benefit.

33 The plaintiff, as I understood it, disavowed any intention to prove in answer to a common question instead that there was a *tendency* to give advice of that type

(rather than an invariable practice). That, in my view and with respect, was sensible. It is difficult to see what benefit would follow from such a finding, because if the finding allowed for cases where that advice was not given, it would save little time or expense in determining each group member's claim because evidence would still have to be led as to what advice was in fact given or probably given to that group member. Further, there are real potential problems in attempting to rely on what is in truth tendency, or propensity reasoning, and I note that J Forrest J has recently ruled that evidence of that type was not admissible in a case before him.[29]

C.3.3.2 The subjective beliefs and understandings

34 The plaintiff also seeks to have determined as a common question of fact the subjective beliefs or understandings of the individual solicitors who were handling the group member's claims, or perhaps Waller Legal in some corporate sense. Again, because all that is relevant in any particular claim is the reasonableness of the advice that was in fact given, any beliefs held or not held by certain solicitors are only relevant if they are probative of that issue. I accept, at least for the purpose of this application, that if there is a dispute as to whether wrong advice had been given in a particular case, evidence could be led in that particular case that the advising solicitor had a wrong belief about the law, because the existence of that mistaken belief would make it more probable that the mistaken advice was given.

35 That said, in my opinion a process whereby it is sought to prove in the lead plaintiff's proceeding the beliefs of those persons over time who advised each group member, with a view to having findings made that are binding in each group member's claim, would likely be wasteful. The time period under consideration is significant and I am prepared to assume that different operators handled at least some of the group member's files over that time and their beliefs and understandings may have changed, at least to some extent, over time. Making findings on these proposed common questions would not be straightforward and would require, in my view, the calling of considerable evidence. At the same time, it is probable that, for at least a substantial number of group members, the issue of

[29] *Pearce v Waller Legal Pty Ltd (Ruling)* [2024] VSC 779, [32]-[33].

the subjective beliefs of the persons advising would not arise or would not need to be relied upon. This would be the case where the advice in fact given was in writing or could be inferred from written documents or behaviour, or the group member could give evidence about the advice given and that evidence was not the subject of dispute.

36 There is another difficulty. Dr Waller swore in her affidavit, and I accept, that during the relevant period she engaged 29 different counsel. I infer that counsel were also involved in the giving of advice. That would make more tenuous any reasoning process by which an inference that particular advice was given or not given was drawn from the subjective beliefs of the instructing solicitors.

37 For these reasons, I am satisfied that the process of seeking to establish in the context of a group proceeding the subjective beliefs from time to time of those who advised group members (currently some 700) over an 8 year period, in case findings of their beliefs needed to be relied upon in order to establish by a process of inference what advice was in fact given on any particular occasion, would likely result in the incurrence of often unnecessary, and significant, costs.

C.4 These reasons do not conclude that negligent advice was given.

38 Finally, I should emphasise, lest these reasons be read by someone unfamiliar with the approach taken to interlocutory applications such as this where findings of fact are not ultimately made, that Dr Waller does not accept that she or her firm provided negligent advice, and I have not made a finding that she did. Further, she filed an affidavit in which she deposed, in broad terms, that:

(a) there were, on her estimation, something like 700 group members;

(b) she treated each client separately;

(c) her clients tended to wish, for a variety of reasons, to engage in alternative dispute resolution rather than litigation;

(d) she did turn her mind to and obtain instructions directed at whether a client had a claim for economic loss or wanted to pursue such a claim. Some clients did not wish to pursue a claim for economic loss for reasons including that

it would require the disclosure of undeclared and untaxed income and potentially expose the client to claims for unpaid tax or return of social security payments or criminal sanctions; and

(e) each retainer was guided by what it was that the client sought from her and, in her words:

> …the approach, and steps, Waller Legal took to investigating and assessing a group member's claim, and the advice given to a group member about the steps taken and to be taken to assess the economic loss component of their claims (if any), differed significantly depending on various factors, including, but not limited to each group member's personal circumstances and instructions; and the time period in question, including the legal landscape relevant to Abuse Claim at that time.

D Other issues of potential concern.

D.1 Problems associated with privilege and confidentiality

39 Waller Legal pointed out that the advice given to each client was confidential and subject to privilege held by that client. If that client brought a proceeding for damages, the commencement of that proceeding would result in an implied waiver of that privilege and so Waller Legal could rely on the communications between Waller Legal and that client in defence of that claim. However, the commencement of the group proceeding did not result in a waiver of privilege by all group members. Accordingly, it submitted, this meant that the group proceeding process, in which it was sought to establish a general practice outside the particular circumstances of Ms Jones the lead plaintiff, acted unfairly: Rightside Legal could lead evidence selectively from those clients who had a complaint and to whom the 'generic' and 'wrong' advice had been given and invite a conclusion that Waller Legal had a general practice of giving that advice, but Waller Legal could not lead evidence in response of occasions on which it had given other advice to other clients in respect of which privilege had not been waived. As its counsel put it, if the proceeding as constituted continues, then Waller Legal 'has to answer a claim on common practices whilst preserving confidence to her clients, almost all of whom are not clients of Rightside [Legal]'.

40 Counsel for the plaintiff submitted that it was premature to consider this issue, because it was a problem that could be ameliorated by case management rather than ordering that the proceeding not proceed as a class action. He suggested, as a possible solution (to be considered at a later time) that an 'opt in' process be adopted to narrow and to close the class and to require as a condition of any person opting in that they agree to a waiver of privilege.

41 As counsel for the plaintiff submitted, it is important not to make an order that a proceeding that would otherwise be appropriate to proceed as a group proceeding not do so because of difficulties that may be ameliorated by control of the court process. I do not rely on Waller Legal's concerns in this regard when deciding whether to make the order sought, on the grounds that, if the matter does proceed as a group proceeding, appropriate safeguards may be made to alleviate any such difficulties.

D.2 Sensitivity of the issues that arise

42 Waller Legal expressed concern through counsel (but this is my phrasing, not his) that there are over 600 group members who are not presently clients of Rightside Legal many of whom are vulnerable or unwell and probably not wishing to consider again their childhood abuse or to make a complaint about Waller Legal and who are presumably entirely unaware that they are group members in the present legal proceeding. It is an unavoidable aspect of the group proceeding process that persons became group members without their knowledge. The problem may be ameliorated, at least to a considerable extent, by formulating notices that are as sensitive to these issues as possible, and adopting, for example, an 'opt in', rather than an 'opt out' process and closing the group.

43 Although there is validity to this concern, I put it to one side.

D.3 The engaging of counsel

44 As noted above, Dr Waller swore in her affidavit, and I accept, that during the relevant period she engaged 29 different counsel. If Waller Legal is liable to a client, and if, as seems likely often to have been the case, counsel were involved in the negotiation and settlement of that claim, then Waller Legal may have a claim

against that counsel. How this would work in a group proceeding is not clear. Adding each counsel to the proceeding would be unwieldly and expensive, but unless the counsel are added as parties, they will not be bound by any findings of fact made.

45 This echoes the concern referred to by Kiefel J, as her Honour was then, in *Bright v Femcare Ltd*[30] where a group proceeding was brought by women against the manufacturer of a prophylactic device that had not prevented pregnancies, but the surgeons who had applied that device, and who might also have been negligent in the application of that device, were not parties to the proceeding. Her Honour said the mere risk of hospitals or surgeons seeking to re-litigate the issues between themselves and the respondent in that matter 'does not deny some utility' to a group proceeding, and the weight to be afforded this consideration in making a determination under s 33N(1) would involve an assessment of the likelihood of a cross-claim by the defendant against a third party followed by re-litigation of factual issues occurring. As was the case before Kiefel J, I am not in a position to comment on the likelihood of this eventuating, the risk only having been ventilated by the defendant as to its existence and not by either party as to its likelihood.

D.4 The 700 group members

46 In reality, if this proceeding does not proceed as a group proceeding, at least some of the group members will not bring their own proceeding either because they never had a good claim for loss of earning capacity against the institution from whom they claimed damages, or, for one reason or another, they do not wish to sue Waller Legal or turn their mind to so doing. It is somewhat artificial, in those circumstances, to compare the maintenance of this group proceeding with the commencement of 700 separate proceedings. Section 33N(1)(a) of the *Supreme Court Act 1986* requires for the purpose of that subsection that consideration be given to the costs that would be incurred if 'each group member conducted a separate hearing', but that requirement is not found in ss 33N(1)(c) or (d) of the *Supreme Court Act 1986*. The language of ss 33N(1)(c) and (d) has no such requirement but, particularly when read with the opening words in s 33N(1), allows a court to have

30 (2002) 195 ALR 574, 598 [116], 605 [148].

regard to the realities. It would be odd if, for example, the Court were obliged to assume that persons with no valid claims, or no wish to bring claims, would bring claims if the group proceeding did not continue when assessing whether it was in the interests of justice to terminate a group proceeding.

47 In most circumstances, the difficulties that arise in this regard may be avoided by taking management steps directed at focusing the class such as by requiring some form of opt in procedure, and it may be, in some cases, that that process should be performed before the application under s 33N(1) is made. It is not necessary for me to give further consideration to this issue in this application because I am prepared to assume for the purpose of my analysis that all the group members who would wish to prosecute their claims to damages in the conduct of the group proceeding would otherwise wish to commence separate proceedings.

E Conclusion – an order that the proceeding not proceed as a group proceeding will be made

48 Having regard to the relevant matters set out above, I have decided to order that this proceeding no longer proceed as a group proceeding. In summary, the common questions of law are either not in dispute or not likely to be the subject of dispute. The claim of each group member for damages from Waller Legal is distinct and will depend on a detailed assessment of the actual advice that each group member was given assessed in the legal context in existence at that time, the merits of that group member's underlying claim to damages against the relevant institutional defendant including an assessment of that group member's prospects of proving the abuse and establishing liability for that abuse on the part of an institution (not the abuser), and, importantly, on what that particular group member would have done in response to what is said to be the correct advice, and what, in those circumstances, that group member's claim (if properly prosecuted) was worth. The hearing and determination of the proposed common questions would involve significant time and expense but would not, in my judgment, appreciably shorten the process of evaluating each group member's claim or lead to savings of any real significance in that process. Accordingly, this group proceeding will not provide an efficient and effective means of dealing with the claims of group members and it is in the interests of justice that it no longer continue

as a group proceeding.[31] As was J Forrest J in *AS v Minister for Immigration and Border Protection*[32], and in substance also Drummond J in *Connell v Nevada Financial Group Pty Ltd*[33] I am ultimately of the view that the 'imbalance between common and individual issues'[34] leads to the conclusion that termination under s 33N is appropriate.

49 In reaching this conclusion, I have not overlooked that making such an order may result in some persons who are presently group members having their claims against Waller Legal statute barred, and that some may receive less in penalty interest than they would otherwise receive. Those are consequences of the decision to commence a proceeding as a group proceeding that, I have concluded, should not proceed in that way and are not a matters that, in my view, should result in my not making the order that I otherwise consider appropriate.

50 I will hear the parties on the form of order and on the question of costs.

CERTIFICATE

I certify that this and the preceding 22 pages are a true copy of the reasons for judgment of the Honourable Justice Gorton of the Supreme Court of Victoria delivered on 17 March 2025.

DATED this 17th day of March 2025.

Associate

31 *Supreme Court Act 1986*, s 33N(1)(c).
32 [2017] VSC 137.
33 (1996) 139 ALR 723, 733.
34 *AS v Minister for Immigration and Border Protection* [2017] VSC 137, 30 [79].