HIGH COURT OF AUSTRALIA

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IN THE HIGH COURT OF AUSTRALIA
MELBOURNE REGISTRY

BETWEEN:

BISHOP PAUL BERNARD BIRD
Appellant

and

DP (A PSEUDONYM)
Respondent

APPELLANT'S REPLY

Part I: Certification

1. These submissions are in a form suitable for publication on the internet.

Part II: Reply

Ground (1)

2. The Diocese does not contend that "'employment' is the exclusive category of vicarious liability" (cf. RS [10]). The authority of this Court makes clear that "true agency" is an established category to which vicarious liability may attach, a point clearly acknowledged at [21]-[22] of the appellant's submissions. But that authority makes equally clear that the ambit of that principle does not encompass the present facts. The liability of partners for one another – which, of course, does not arise here – is best understood as joint and several responsibility arising by virtue of the basis of their legal relationship.

3. While *CML* can doubtless be described as an "orthodox" strand of authority, its application to the present facts is inconsistent with the authoritative statement of its confined operation in *Sweeney* (cf. RS [12]).

4. It is accepted that the *Legal Identity of Defendants (Organisational Child Abuse) Act 2018* (Vic) (**Legal Identity Act**) makes it possible for an NGO, through a proper defendant, to be vicariously liable for the wrongs of its employees and agents. But, while the Act deals with the issue of legal personality, it does not go further to alter the substantive law of vicarious liability. A relationship which would otherwise enliven vicarious liability is still required.

5. If there were doubt about that, it is resolved by the extrinsic materials to Bill which enacted the Legal Identity Act. The Explanatory Memorandum noted that the "Bill responds to the problem identified in finding 26.3 and recommendation 26.1 [of the Parliamentary Committee Report[1]] and adopts an approach to the same problem recommended by recommendation 94 of the 2015 Redress and Civil Litigation Report of the Commonwealth Royal Commission into Institutional Responses to Child Sexual Abuse".[2]

6. Chapter 26 of the Parliamentary Committee Report is divided into five sections. Finding 26.3 and Recommendation 26.1 deal with the use of trusts as an aspect of legal identity of non-governmental organisations.[3] Section 26.5 deals separately with issues of vicarious liability and non-delegable duty.[4] Similarly, recommendation 94 of the Redress Report, to which the Explanatory Memorandum refers, forms an aspect of chapter 16 of the report.[5] Issues of vicarious liability are, however, addressed in recommendations 89-93, found within chapter 15. Those recommendations were directed to the establishment of a duty to protect with a reverse onus and a statutory non-delegable duty. In particular, recommendation 93 was

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1 Betrayal of Trust: Inquiry Into the Handling of Child Abuse by Religious and Other Non-Government Organisations.

2 Explanatory Memorandum, Legal Identity of Defendants (Organisational Child Abuse) Bill 2018 (Vic), 1.

3 Parliamentary Committee Report, 536.

4 Parliamentary Committee Report, 545-552.

5 Redress Report, 504-511.

that "State and territory governments should ensure that the non-delegable duty and the imposition of liability with a reverse onus of proof apply prospectively and not retrospectively".[6]

7. The Victorian Parliament gave effect to that recommendation in March 2017, with the suggested prospective effect, in the separate amendments under the *Wrongs Amendment (Organisational Child Abuse) Act 2017* (Vic), inserting Part XIII of the *Wrongs Act*: (AS [37]).

8. In any event, the issue of legal identity was not the only deficit in the evidence which led the primary judge to conclude that there was no relationship of employment. His Honour also observed that there was a "lack of immediate control or supervision by the Diocese over
10 Coffey's activities" {PJ [211]: (CAB 56)}, a consideration which had assumed prominence in *Hollis* (AS [49]).

Ground (2)

9. The appellant's position in relation to Ground (2) does not imply "that the relevant 'special role' must be one that is in addition to, or more particular than, the role of assistant priest having pastoral responsibility in a given parish" (cf. RS [37]). Whether or not the role actually assigned ought to satisfy the test will depend upon what tasks the Diocese specifically assigned to the priest and how the harm eventuated. It is apparent how such analysis is fulfilled on the facts of *Prince Alfred College*, but not on those as found in the present case.

Notice of contention

20 10. Both authority and policy are set against the imposition of a non-delegable duty on the present facts. In addition to the majority's conclusion in *Lepore* that a duty to protect does not extend to protection from intentional, criminal conduct (AS [64]), for the reasons at AS [66] and paragraphs 16 to 22 below, there was no assumption or undertaking of a kind which would justify imputing such a duty of protection here.

11. **Section 61 of the *Wrongs Act* does not assist:** DP contends that s 61 of the *Wrongs Act* has since undone any "supposition that breach of a non-delegable duty could only arise from negligence (and not from intentional wrongdoing)": RS [44]. That provision provides no such support for the proposition advanced.

12. Section 61(2) does not expand the scope of non-delegable duties which apply at common law
30 to include intentional torts. Nor does it seek to reverse the majority conclusion in *Lepore*. Rather, it ensures that the liability-limiting principle in s 61(1) also applies to any liability for similar such conduct established by non-delegable duty despite the fact that such liability does not fall within the specific definition of "negligence" in Part X of the *Wrongs Act*.[7]

13. Part X of the *Wrongs Act* was inserted by the *Wrongs and Other Acts (Law of Negligence) Act 2003* (Vic) (the **2003 Act**), which implemented reforms recommended by the Ipp Report.[8]

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6 Redress Report, 495.

7 *Wrongs Act 1958* (Vic), s 43.

8 Victoria, *Parliamentary Debates*, House of Assembly, 30 October 2003, (John Brumby, Treasurer), 1421.

Section 61 resulted from recommendation 43 of the Ipp Report.[9] That recommendation was concerned to avoid plaintiffs side-stepping the proposals (in Victoria, ultimately embodied in Part X) which were "intended to limit liability and damages for negligence"[10] by alleging that liability arose from a non-delegable duty rather than vicariously for negligence.[11] Section 61(1) provides that the extent of liability in tort for a non-delegable duty is to be determined as if the defendant were vicariously liable for the negligence of the person in connection with the performance of the work or task. Significantly, "negligence" within Part X is defined exhaustively to mean "failure to exercise reasonable care": s 43. It is "not a reference to the tort, but to a category of conduct, which may be an element of a cause of action in tort, in contract, under statute or otherwise".[12]

14. Section 61(2) then provides that the liability limiting requirement in s 61(1) (to apply vicarious liability principles) applies to a claim for damages in tort whether or not that claim results from negligence, despite anything to the contrary in s 44. The reason that the provision is expressed not to be confined to negligence (as defined) is that a non-delegable duty was understood not to involve any failure to take reasonable care, meaning that the assertion of a non-delegable duty would fall outside the concept of negligence for the purpose of Part X generally and s 61(1) specifically.[13] That the Ipp Report's intention was effected by the Victorian Parliament is evidenced by the Explanatory Memorandum to the Bill for the 2003 Act.[14] As has been observed of the NSW cognate provision (s 5Q of the *Civil Liability Act 2002* (NSW)), the provision does not determine or define what duties are or are not non-delegable.[15]

15. So, while the liability-limiting principle in s 61(1) applies to torts whether or not they involve a failure to take reasonable care, s 61(2) does not purport to expand the fields of non-delegable duty which exist.

16. **The factual findings do not support a duty of the scope asserted:** DP relies on Lord Sumption's decision in ***Woodland*** *v Swimming Teachers Association.*[16] The principles there stated, however, indicate why the present case is an inappropriate vehicle from which to fashion a novel non-delegable duty.

17. ***First***, as his Lordship there noted, the duty is a "positive or affirmative duty to protect a particular class of persons against a particular class of risks".[17] Noting that the assumption is to be imputed, for such imputation to be warranted, it would be expected that the class of risks in question is one which is known (or at least capable of being ascertained) at the time when the duty arises. The ability to apprehend a class of risk is undoubtedly a feature of cases in

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9 David Ipp, Review of the Law of Negligence (September 2002) (**Ipp Report**).

10 Ipp Report [11.14].

11 Ipp Report [11.14].

12 *Paul v Cooke* (2013) 85 NSWLR 167, 177 [40] (Leeming JA with whom Basten and Ward JJA agreed).

13 Ipp Report [11.10].

14 Explanatory Memorandum, Wrongs and Other Acts (Law of Negligence) Bill 2003 (Vic), 8.

15 *Cohen v Double Bay Bowling Club (No 4)* [2021] NSWSC 872, [33] (Stevenson J).

16 [2014] 1 AC 537.

17 *Woodland* [2014] 1 AC 537, 573 [7].

the established categories of employer-employee, hospital-patient and school-student. It is precisely the relationship between the ability to foresee a class of risk and the scope of the duty assumed which exercised Gleeson CJ in *Lepore* when his Honour noted the artificiality of a hospital being under a non-delegable duty to protect patients from "a member of the hospital's staff with homicidal propensities" who attacked and injured a patient.[18] Such class of harm, having nothing to do with the care services agreed to be provided, could not be foreseen and therefore was not within the scope of any assumed duty to protect.

18. It may be accepted that there need not be foresight of the precise harm which might eventuate. But there must be some aspect of the relationship which points up a particular class of risk and thereby justifies the imposition of the exceptional and onerous duty to protect from harm. Justice Mason noted when imposing a duty in respect of pupils attending school during school hours that the immaturity and inexperience of the pupils and their propensity for mischief was what warranted the imposition of the extraordinary duty.[19] But, in what similar way, did the Diocese's undertaking to provide pastoral care to its parishioners involve an assumption to protect those parishioners (or, more particularly minors amongst them) from intentional assaults?

19. Similarly, while the Diocese had agreed to provide DP with mass and religious education at school, it does not follow that that undertaking to child parishioners could have given rise to an obligation to protect from intentional assault, in circumstances which were both temporally and geographically separate from the undertakings. DP's proposed answer involves an elision between what the Diocese undertook and/or conferred and how the delegate abused that position. The distinction is not pedantic. It is important for two reasons: ***first***, because of the real boundaries it places around the unusual obligation; and, ***second***, because reliance on the conferral of authority as a basis for perceiving the class of risk presupposes a form of understanding beyond that which was appreciated at the time.

20. ***Second***, and relatedly, Lord Sumption referred to, and DP relies on (RS [50]), a notion that the Diocese's pastoral function involved custody or control over DP. Lord Sumption's precise words were that the antecedent relationship "places the claimant in the actual custody, charge or care of the defendant…".[20] A literal form of custody, charge or care which the duty-holder has assumed, which has obvious and known limitations, is consistent with the established categories for such duty. To fulfil that aspect of a non-delegable duty this Court has only the abstract characterisation by the Courts below of the pastoral role as being neither temporally nor geographically constrained {J [232]-[233]: [CAB 61]} and including visits after hours and outside places of posting. But the breadth of that characterisation is in tension with identifying a sufficiently confined form of control which supports an assumption of the exceptional duty to protect from harm.

21. ***Third***, that tension highlights the prejudice which the Diocese now faces in dealing with the issue on appeal. DP relies heavily on *Blatch v Archer* as supporting generalised findings. But,

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18 *Lepore* (2003) 212 CLR 511, 532 [31] (Gleeson CJ).

19 *Commonwealth v Introvigne* (1982) 150 CLR 258, 271.

20 *Woodland* [2014] 1 AC 537, 583 [23] (emphasis added).

quite apart from the limited support which that principle can provide in circumstances occurring 40 years before trial, the Diocese is now left refuting arguments about the scope of the role it is said to have assumed which was never squarely put before the tribunal of fact. At trial, the focus was on whether Coffey's conduct was in the course of his employment in that it had provided the opportunity and occasion for the offending. That question directed attention to how Coffey approached his role. But the impermissibility of using findings based on general practices from other locations is greatly enhanced where they are used to infer from Coffey's conduct, what the Diocese itself had assumed to parishioners.

22. ***Fourth***, the Court should be slow to impose a form of liability which, in its extension to intentional torts, would deprive the Diocese (and similar such organisations) of the benefit of a carefully balanced statutory scheme which Parliament enacted through Part XIII of the *Wrongs Act*. Consistent with the Redress Report recommendations, s 91 of the *Wrongs Act* establishes a positive statutory duty to prevent the abuse of a child. Under s 91(3), where it is proved that the abuse has occurred and that the abuse was committed by an individual associated with a relevant organisation, the organisation is presumed to have breached the duty of care unless it proves on the balance of probabilities that it took reasonable precautions to prevent that abuse.

23. So, not only is the duty confined by its prospective operation,[21] but also by the reasonableness of the precautions taken. In addition to their prospective operation, the provisions indicate a general parliamentary acknowledgement that fault should have some (albeit reduced) role to play in assessing liability of organisations for wrongs involving child abuse. By contrast, a common law non-delegable duty cannot be discharged by the reasonableness of any of the institution's processes. Conventionally, that liability is not absolute because there remains a question of whether the delegate was indeed negligent. In contrast to s 91, however, if extended to intentional torts, that liability would attach regardless of the extensiveness of the steps an organisation had taken. That result would undermine the scheme of s 91(3) not only retrospectively, but prospectively.

Dated: 23 February 2024.

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[21] *Wrongs Act 1958* (Vic), s 93.

ANNEXURE

Pursuant to para of the Practice Direction No 1 of 2019, the particular constitutional provisions and statutes referred to in these reply submissions are as follows:

#	**Title**	**Version**	**Provisions**
1.	*Legal Identity of Defendants (Organisational Child Abuse) Act 2018* (Vic)	Current	Nil
2.	*Wrongs Amendment (Organisational Child Abuse) Act 2017* (Vic)	Repealed	Nil
3.	*Wrongs Act 1958* (Vic)	Current	ss 61, 91 & 93
4.	*Wrongs and Other Acts (Law of Negligence) Act 2003* (Vic)	Repealed	Nil
5.	*Civil Liability Act 2002* (NSW)		s 5Q