



HIGH COURT OF AUSTRALIA

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Details of Filing

File Number: M82/2023
File Title: Bird v. DP (A Pseudonym)
Registry: Melbourne
Document filed: Form 27F - Respondent's Outline of oral argument
Filing party: Respondent
Date filed: 14 Mar 2024

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IN THE HIGH COURT OF AUSTRALIA
MELBOURNE REGISTRY

BETWEEN:

BISHOP PAUL BERNARD BIRD
Appellant

and

DP (A PSEUDONYM)
Respondent

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RESPONDENT'S OUTLINE OF ORAL SUBMISSIONS

PART I: PUBLICATION

1. This outline is in a form suitable for publication on the internet.

PART II: OUTLINE OF ORAL SUBMISSIONS

(1) Factual findings – The Diocese's power to control its servants, and the distinct pastoral role of assistant parish priest

- 20 2. Because the Diocese was not a legal person, it could not have been Coffey's employer; nor could it have engaged him as an independent contractor (RS[7]).
3. Nonetheless, the Diocese exercised control over Coffey in a fashion consistent with that of an employer; Coffey was its servant and representative. Coffey's work was undertaken within the Diocese in Port Fairy. He was in a role akin to employment (RS[6], [8]).
4. Coffey's role placed him in a position of trust, intimacy and authority vis-à-vis the respondent, a vulnerable child of tender years. Pastoral visits to parishioners' homes were an integral part of his role (RS[6], [7], [8]).

(2) Ground 1 – 'Employment' and 'true agency' are not the exclusive categories of vicarious liability. The Diocese is vicariously liable for its servant, Coffey

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5. Each of the usual indicia of an (informal or unwritten) employment relationship giving rise to vicarious liability were met (RS[9]).

Hollis v Vabu Pty Ltd (2001) 207 CLR 21 at [48]–[57] (**JBA vol 3 pt C tab 8 p 235**)

6. Vicarious liability does not arise *only* from the acts of an employee. No decision of this Court stands in the way of recognising the Diocese's vicarious liability for a diocesan priest who was its servant (RS[10]–[13]).

Colonial Mutual Life Assurance (1931) 46 CLR 41 at 48–50 (**JBA vol 3 pt C tab 7 p 203**)

Sweeney v Boylan Nominees Pty Ltd (2006) 226 CLR 161 at [12], [20] (**JBA vol 4 pt C tab 14 p 639**)

CCIG Investments Pty Ltd v Schokman (2023) 97 ALJR 551 at [12], [13], [16], [49]–[54], [81] (**JBA vol 5 pt D tab 19 p 835**)

7. The modern relationship of contractual employment has not displaced the law’s historical recognition of master–servant relationships (**RS[12]**).

10 8. The *Legal Identity Act* provides a statutory context for facilitating a finding of vicarious liability. The Act does not *deem* the Diocese to be vicariously liable, but it removes any impediment based on a lack of a corporate defendant capable of being an employer (**RS[14]–[22]**).

Legal Identity of Defendants (Organisational Child Abuse) Act 2018 (Vic) (**JBA vol 1 pt A tab 4 p 38**)

9. Further, and consistently with the law of other jurisdictions, this Court should recognise relationships ‘akin to employment’ as giving rise to vicarious liability (**RS[23]–[33]**).

Various Claimants v Catholic Child Welfare Society [2013] 2 AC 1 at [47], [56]–[60] (**JBA vol 5 pt D tab 26 p 1005**)

20 *BXB v Trustees of the Barry Congregation of Jehovah’s Witnesses* [2023] 2 WLR 953 at [58], [68]–[69], [73]–[82] (**JBA vol 5 pt D tab 18 p 778**)

Bazley v Curry [1999] 2 SCR 534 at [22], [57] (**JBA vol 5 pt D tab 17 p 742**)

Doe v Bennett [2004] 1 SCR 436 at [24], [27], [28] (**JBA vol 5 pt D tab 2 p 860**)

(3) Ground 2 – Coffey’s role was the ‘occasion’ and not merely the ‘opportunity’ for the abuse

10. The lower courts made a detailed examination of the specific role in which the Diocese placed Coffey as assistant priest. The Diocese put forward no evidence of its own to contradict any of those matters (**RS[34]–[35]**).

30 11. It is not necessary that the ‘special role’ giving rise to vicarious liability be one that is in addition to, or more particular than, the role of assistant priest having pastoral responsibility in a given parish. *That* was the role specifically assigned to Coffey (**RS[36]–[37]**).

12. Coffey’s role was the quintessence of one having authority, power, trust, control and the ability to achieve intimacy with the victim. When Coffey abused the trust inherent

in that role, the Diocese became vicariously liable (**RS[38]–[41]**).

Prince Alfred College (2016) 258 CLR 134 at [81], [131] (**JBA vol 3 pt C tab 8 p 235**)

(4) Notice of Contention – The Diocese owed a non-delegable duty of care

13. The Diocese is liable for breach of a non-delegable duty owed to the respondent to protect him from the risk of sexual abuse by its priests, including Coffey, in the course of their functions and duties as a priest and as a representative of the Diocese (**RS[42]–[50]**).

10 14. The risk of sexual assault by clergy is, sadly, a known class of risk, to which the respondent was vulnerable; and which arose because he was entrusted to the Diocese’s pastoral care, in which priests were clothed with an aura of charisma and authority (cf **Reply [17]–[19]**).

Kondis v State Transport Authority (1984) 154 CLR 672 at 687 (**JBA vol 3 pt C tab 10 p 323**)

CCIG Investments Pty Ltd v Schokman (2023) 97 ALJR 551 at [81] (**JBA vol 5 pt D tab 19 p 835**)

Woodland v Swimming Teachers Association [2014] AC 537 at [23] (**JBA vol 5 pt D tab 27 p 1032**)

20 15. The factual relationship between Diocese, assistant priest and child parishioner was squarely in issue at trial. The respondent does not contend for any different factual findings than those already made, concurrently, by the lower courts (cf **Reply [20]–[21]**).

Dated: 14 March 2024



David Robert Campbell SC

Senior Counsel for the Respondent

30 Phone: (02) 8815 9320

Email: campbell@chambers.net.au