HIGH COURT OF AUSTRALIA

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IN THE HIGH COURT OF AUSTRALIA
SYDNEY REGISTRY

BETWEEN:

AA
Appellant

and

THE TRUSTEES OF THE ROMAN CATHOLIC CHURCH FOR THE DIOCESE OF MAITLAND-NEWCASTLE
ABN 79469343054
Respondent

APPELLANT'S REPLY

PART I – CERTIFICATION

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

PART II – REPLY

Material facts

2. RS[6] highlights a critical difficulty for the Diocese. Its pleaded case;[1] the agreed issues at trial;[2] the manner it put its case to the relevant witnesses; its submissions at trial,[3] and in the Court of Appeal,[4] are all inconsistent with the propositions apparently now put about Fr Pickin's role. That is unsustainable.[5] An attempt to conduct a case in this Court contrary to the way the case was conducted at trial, and the evidence at trial, is a repeated feature of the Diocese's submissions. In any event, the Diocese led *no* evidence about the role of Fr Picken or of priests generally (whether assistant or otherwise) (CAB 17; SC[39]). That centrally engaged the principle in *Blatch v Archer*.[6] However, contrary to the assertion in RS[6], Fr Dillon *did* give evidence not only about

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1 Defence at [9]–[11] (ABFM vol 1 at 72).

2 List of Matters and Facts in Issue at [20] (ABFM vol 1 at 80).

3 Defendant's Outline of Opening Submissions at [12] (RBFM at 23); Defendant's Closing Submissions at [11] (RBFM at 50).

4 'We're stuck with the admission [that Fr Pickin was the parish priest]. … There was no evidence of anyone else living at the presbytery. Whether that's because of the passing of time or what have you. That wasn't established, but we're stuck with the admission we made': T57.25–34 (Mr Sheller) (RBFM at 190).

5 *University of Wollongong v Metwally (No 2)* (1985) 59 ALJR 481 at 483; *Coulton v Holcombe* (1986) 162 CLR 1 at 8.

6 *Blatch v Archer* (1774) 1 Cowp 63 at 65; 98 ER 969 at 970.

parish priests but about the role of priests generally.[7] The claim in RS[6] that there was 'no evidence' on the topic is wrong.

3. RS[7] initiates an unseemly contention developed in RS[56]. The finding at trial was that the appellant was a practising Catholic, raised in a Catholic family, and taught to trust and obey priests (CAB 40, 55–6; SC[141], [209], [213]).[8] It should not be accepted that the obligations of the Diocese towards children who were its communicant members depend on how frequently they attended Mass or other church events: see further paragraph 17 below.

4. The submission in RS[9] that it was 'problematic' to find that Fr Pickin had the opportunity to abuse the appellant out of the sight of Mr Perry is inapt. It was squarely put to Mr Perry that the appellant could have been in another part of the presbytery when he was abused.[9] There was no re-examination of Mr Perry about, and no other evidence to suggest, the likelihood he would have noticed anything amiss.[10] See further paragraphs 22–23 below.

Duty of care

5. The evidence of the appellant being entrusted to the care of one of the Diocese's priests was emphatic, and was rightly accepted by the primary judge (CAB 55, 57–9, 65; SC[210], [218], [224], [227], [257]).[11] In view of its admissions on the pleadings;[12] the matters agreed at trial;[13] the evidence from Fr Dillon, the appellant and other similarly-situated young people (set out in AS[27]–[29]); and the absence of any countervailing evidence from the Diocese, the ignorance professed in RS[15] is feigned. This case did not involve a coincidental interaction between a diocesan priest and a (hypothetical) non-communicant, non-parishioner, non-student young person who had no connection to any pastoral ministry delegated by the Diocese to its clergy. Given the obligation of

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7 First report of Fr Kevin Dillon (ABFM vol 1 at 438); Second report of Fr Kevin Dillon (ABFM vol 1 at 445); oral evidence of Fr Dillon (T41.6–46.10) (ABFM vol 2 at 558–63).

8 Appellant's second statement at [5]–[15] (ABFM vol 1 at 314–15).

9 T134.6–24 (ABFM vol 2 at 651).

10 T145.46 (ABFM vol 2 at 662).

11 See, e.g. the appellant's second statement at [7]–[10] (ABFM vol 1 at 313–14); [the appellant's brother's] statement at [16]–[20] (ABFM vol 1 at 336); Fr Dillon's first report (ABFM vol 1 at 439–43).

12 Defence at [13], [17], [18] (ABFM vol 1 at 74).

13 List of Matters and Facts in Issue at [21]–[23] (ABFM vol 1 at 80).

diocesan clergy to engage with Catholic young people,[14] and the educational ministry in fact exercised by Fr Pickin,[15] the sufficiency of the relationship between the Diocese, Fr Pickin and the appellant was clear.

6. Tellingly, RS[16] (like RS[17](a)) does not seek to justify the erroneous framing by the Court of Appeal of the question of reasonable foreseeability. The proper inquiry does *not* depend on positive advance knowledge of an actual risk of harm from Fr Pickin personally (cf CAB 192–194; CA[207]–[211]).

7. In RS[17], the Diocese is driven to the remarkable proposition that a class of risk — sexual abuse of young people by clergy — was not merely unknown but unforeseeable. That is not sustainable. Quite aside from Fr Dillon's evidence,[16] the existence of the risk was brought to the Bishop's attention (AS[51](a));[17] and was known to his parish priest, Fr Doran (AS[51](b)).[18] The test of attribution indeed depends upon context (cf RS[17](f)). Here, the relevant context arises straightforwardly from the terms of the *Civil Liability Act*, which require an unincorporated organisation to be treated *as if* it were incorporated and had legal personality: s 6O(d). The uncontradicted evidence was that parish priests were the highest local authority in the Diocese for members of the Catholic Church (CAB 52; SC[204]).[19] There was no other higher officer — save the bishop himself — to whom parishioners could complain. That is why the knowledge of Fr Doran was attributable to the Diocese.[20]

8. As to the contention in RS[19] that it was ultimately for 'the head of the School and the State government to permit Fr Picken to conduct scripture classes', the management of the state education system was not in issue at trial. It was agreed, and the evidence established, that it was in his role as an incardinated priest of the Diocese that Fr Pickin attended the school to give instruction in the Catholic faith.[21]

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14 Fr Dillon's first report, question (d), (j) (ABFM vol 1 at 440, 442).

15 List of Matters and Facts in Issue at [21] (ABFM vol 1 at 80); Fr Dillon's first report, question (g), (h) (ABFM vol 1 at 441).

16 First report of Fr Dillon, question (l) (ABFM vol 1 at 443).

17 Letter dated 5 November 1987 from Dr Derek Johns to Bishop Clark (ABFM vol 1 at 296, cf 189).

18 Evidentiary statement of Stephen McClung at [15] and [16] (ABFM vol 1 at 356) and T98.45–99.5 (ABFM vol 2 at 615–16).

19 Fr Dillon's first report, question (c) (ABFM vol 1 at 439).

20 *O'Connor v Comensoli* [2022] VSC 313 at [289]–[295].

21 List of Matters and Facts in Issue at [21] (ABFM vol 1 at 80); Fr Dillon's first report, question (g), (h) (ABFM vol 1 at 441).

Non-delegable duty

9. The elaborate gloss in RS[21]–[36] on *Lepore* and its subsequent consideration by this Court, serves to emphasise the confusion and uncertainty to which that decision has given rise (cf RS[28]). The essence of a non-delegable duty is that it is *not* concerned with the fault (or absence of fault) on the part of the delegator. Rather, the relevant fault is that of the delegate (cf the attempted explanation of *Lepore* at RS[23], [24]). That is why RS[30] raises a false issue. This case has never been about strict or no-fault liability. Relevantly, the fault here is that of Fr Pickin: the question is whether *the Diocese* is liable for *that* fault.

10. RS[32] misunderstands the point made in AS[44]. Faced with a risk controlled by the defendant, or for which the defendant has assumed responsibility, a vulnerable plaintiff who cannot control the risk is just as much — if not more — vulnerable to intentional wrongdoing as to negligent wrongdoing. In that sense, the intentionality of the wrongdoing is 'neutral': the plaintiff remains just as vulnerable, and the defendant retains just as much control, as in the case of negligent wrongdoing.

11. For the reasons explained in AS[47], RS[34] misses the mark. Part 1B of the *Civil Liability Act* expressly preserves common law claims, and does not create a uniquely statutory regime. The circumstances in which the statutory duty will apply to organisations will be broader than those attracting a non-delegable duty of care. Similarly, as to RS[35], non-delegable duties may also coexist with common law vicarious liability. They may arise from the same set of facts, but the non-existence of vicarious liability does not create any negative implication that prevents other doctrines from applying to the facts.[22] Conversely, not all situations potentially involving vicarious liability will attract non-delegable duties. The extension of non-delegable duties for which the appellant contends would not 'swallow up' vicarious liability.

12. The particular complaints in RS[37]–[38] are without foundation. Non-delegable duty was squarely in issue (CAB 12; SC[11.8]).[23] The evidence and factual findings of the primary judge (CAB 17, 52–60; SC[39], [204], [218]–[219], [228]–[229]) each spoke to that issue. Again, the submission in RS[39] ignores reality. The nature of the task

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22 See, e.g. the situations in *Commonwealth v Introvigne* (1982) 150 CLR 258; *Nationwide News Pty Ltd v Naidu* (2007) 71 NSWLR 471.

23 List of Matters and Facts in Issue at [8] (ABFM vol 1 at 79).

delegated to Fr Pickin was clear: it was the same task delegated to all incardinated clergy in the exercise of their priestly ministry. The Diocese cannot profit from the fact that it did not put on any evidence to contradict this aspect of the appellant's claim.

13. As RS[41] rightly acknowledges, non-delegable duties exist for the protection of vulnerable parties. RS[50] rightly accepts that the appellant — a young schoolchild — was vulnerable. The relationship of power, control, intimacy, trust and vulnerability between the Diocese, its clergy and young people under its pastoral care, is entirely different from the abstract and impersonal relationship between highway authorities and road users considered in *Montgomery* (cf [42]).

10 14. The evidence is that, consistently with the Catholic teaching of the Diocese, the appellant was *obliged* to maintain communion with the Church, and Fr Pickin — like all clergy — was *obliged* to engage with him as part of pastoral ministry towards Catholic young people, including those educated in state schools. Those circumstances were uniquely within the Diocese's control. The 'antecedent relationship' (RS[44]) was precisely that brought about by the Church's teaching about maintaining 'communion'; manifested in the appellant indeed being brought up as a churchgoing Catholic (CAB 40, 55–6; SC[141], [209], [213]).[24] The implication in RS[44] that some person or organisation *other* than the Diocese might have been responsible for the Church's pastoral relationship with Catholic young people in Maitland-Newcastle is fanciful.

20 15. RS[51]–[53] ignore both the primary judge's findings, and the underlying evidence, about the central connection between the Diocese, Fr Pickin's priestly ministry, and the abuse of the appellant (CAB 17, 52–60; SC[39], [204], [218]–[219], [228]–[229]). In particular, RS[51] overlooks the finding — supported by the evidence — that the appellant was a Catholic churchgoer, brought up in a Catholic family, informed by Catholic teaching about the relationship between priests and the faithful (CAB 40, 55–6; SC[141], [209], [213]). To say there was 'no evidence' (RS[51]) of those topics is wrong; and underscores the unfairness of the Diocese now trying to rely on its own prior unwillingness to put forward evidence on those topics at trial.

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24 Fr Dillon's first report, question (b) (ABFM vol 1 at 439); appellant's second statement at [7]–[10] (ABFM vol 1 at 313–14); [the appellant's brother's] statement at [16]–[20] (ABFM vol 1 at 336).

16. RS[55] is inapt and misstates the law. Non-delegable duties do not arise merely because of a *legal compulsion* to deal with the principal or delegate.[25] But even if that were true, here canon law *did* oblige the appellant — as a Catholic — to engage with the clergy of the Diocese.[26] This is not a case of false imprisonment: the existence of a duty does not turn on whether the appellant was or was not free to leave the Presbytery; in any event, the insinuation that the appellant should have left the Presbytery earlier is unreal, given the evidence of the exalted position of power and authority occupied by adult clergy vis a vis young people.[27] The primary judge did not reject the appellant's evidence about what he *believed* to be the purpose of Fr Pickin's invitation. The very essence of Fr Pickin's abuse was that he exploited, pretextually, the opportunity his role gave him to achieve intimacy with young people. So much is emphasised when the finding in CAB 59; SC[229] is read with the anterior finding at CAB 59; SC[228] about the opportunity created by Pickin's role.

17. The suggestion in RS[56] appears to be that the existence of a duty of care turns on how frequently the appellant (or Mr Perry) attended church, or some other measure of their devotion. That is unsustainable. The unchallenged findings are that the appellant was a practising Catholic (CAB 56; SC[213]); that he received religious instruction from Fr Pickin (CAB 11; SC[10.6]); and that he had been raised to have a high regard for priests, who could be trusted, respected and obeyed without question (CAB 40; SC[141].[28] This is not a case where the connection between the appellant, Fr Pickin and the Diocese was somehow adventitious. Equally remarkable is the suggestion in RS[57], which involves a literalistic understanding of physical 'placement' or 'custody' that is both inapt and contrary to the evidence.[29] The relevant duty is owed to the

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25 There is no 'requirement', for example, to be someone's neighbour, yet recognised non-delegable duties arise in such circumstances: *Dalton v Angus* (1881) 6 App Cas 740; *Burnie Port Authority v General Jones Pty Ltd* (1994) 179 CLR 520.

26 Fr Dillon's first report, question (b) (ABFM vol 1 at 439).

27 Set out in AS[27]–[29].

28 Appellant's second statement at [5]–[15] (ABFM vol 1 at 314–15). It seems the Diocese wishes to transmogrify the appellant's statement that 'we did not go to Mass every Sunday' (Appellant's second statement at [6]; ABFM vol 1 at 314) into a proposition that he was not a 'regular parishioner' (RS[56]).

29 The appellant's evidence included that his parents would be angry if he did not continue to go to church: Appellant's second statement at [15] (ABFM vol 1 at 315); T39.25–32 (ABFM vol 2 at 505). His parents knew of Fr Pickin's proposition that the appellant go on holiday with him, and withheld their consent (T28.11–27; ABFM vol 2 at 494). Mr Perry gave evidence of at least one occasion he returned with the appellant from the Presbytery to the appellant's family home, and was noticed by the appellant's father to have been drinking (T134.39–135.10; ABFM vol 2 at 651–2) and one occasion when he had dinner with Fr Pickin with the nuns across the street from the Presbytery (T136.28–46; ABFM vol 2 at 653).

appellant, not to his parents or some other third party; but the evidence was indeed that it was at his parents' direction that the he was brought up in and took part in the sacraments of the church; and that they would be angry if he did not go to church.[30]

18. RS[58] highlights the gravity of Fr Pickin's exploitation of his role and emphasises, rather than diminishes, the relationship of trust, power and ascendancy — giving rise to a duty of care — that enabled Fr Pickin to behave as he did. Again, RS[59] overlooks the obvious: the antecedent relationship was precisely that between the Diocese and a young Catholic layperson — a student of religious education — who was obliged to remain in communion with it and be engaged by, and receive ministry from, its clergy.

10 19. The constrained description of the 'Respondent's enterprise' in RS[61] is inapt, and does not accord with the primary judge's findings, or the evidence, about the nature and extent of diocesan clergy's engagement with young people (CAB 17, 52–60; SC[39], [204], [218]–[219], [228]–[229]). It is especially artificial to limit the Diocese's — or Fr Pickin's — responsibility to the appellant (a practising and churchgoing Catholic) to the hours of formal classroom instruction.

Notice of contention

20. ***The abuse.*** The heart of the Notice of Contention is the Diocese's challenge to the primary judge's credit-based finding that the appellant was abused by Fr Pickin. That challenge did *not* lead to any dispositive reasoning in the Court of Appeal: both Bell CJ
20 (CAB 126; CA[13]) and Leeming JA (CAB 174; CA[154]) were explicit on the point. This Court should determine for itself that there is no proper basis on which to overturn the primary judge's finding; essentially for the reasons given by Ball JA (CAB 206–12; CA[254]–[271]).

21. Far from being glaringly improbable or contrary to compelling inferences,[31] the primary judge's finding was correct, and was consistent with the undisputed facts that: (1) the appellant and Mr Perry went to the Presbytery on 10 to 12 occasions on Friday evenings after dinner (CAB 39; SC[139]; CAB 206; CA[255]); (2) Fr Pickin met the boys while teaching religious education at school (CAB 12; SC[10.6]; CAB 206; CA[255]); (3) while at the Presbytery, Fr Pickin plied the boys with cigarettes and alcohol

30 Appellant's second statement at [6], [15] (ABFM vol 1 at 314, 315; T39.25–32 (ABFM vol 2 at 505).

31 *Fox v Percy* (2003) 214 CLR 118 at 126–7 [25]; *Lee v Lee* (2019) 266 CLR 129 at 148 [55].

(CAB 12; SC[10.9]; CAB 206; CA[255]); (4) Fr Pickin had a poker machine in his dressing area (CAB 12; SC[10.10]; CAB 206; CA[255]); (5) the tendency evidence of Mr McClung and BB established that Fr Pickin had a sexual interest in boys, sought out opportunities to establish intimacy with boys, used church premises for that purpose, and had a tendency to sexually abuse boys who were in his care when he was able (CAB 26–8; SC[72]–[86]; CAB 206–7; CA[256]; cf RS[8]); (6) Fr Picken sought to create an opportunity to sexually abuse boys by inviting the appellant and Mr Perry to the Presbytery, and it was difficult to see another plausible explanation for his providing the boys with alcohol (CAB 207; CA[257]); and (7) the appellant's subsequent conduct was, in the joint opinion of the psychiatrists who gave evidence, consistent with the abuse he said he suffered (CAB 67–8; SC[266]; CAB 207; CA[257]).[32] As Ball JA said (CAB 207; CA[257]): 'the uncontested facts provide strong corroborative evidence of that given by the plaintiff'.

22. Given it was undisputed that the appellant and Mr Perry did attend the Presbytery with Fr Picken, who did supply them with cigarettes and alcohol — and that Fr Picken did begin to teach them religious education in 1969 — any imprecision in the precise timing of those visits cannot be seen as telling against acceptance that the abuse occurred as the appellant alleged (CAB 48; SC[182]; CAB 208; CA[260]–[261]; cf RS[68]–[69]). Equally, there was nothing in the primary judge's acceptance of Mr Perry's evidence that other boys were present, that told against acceptance of the appellant's account of the abuse (cf RS[70]). So much was consistent with Fr Picken's acknowledged tendencies, and the other undisputed circumstances that were consistent with the appellant's account (CAB 209; CA[263]–[266]). Ball JA correctly described the presence of other boys as 'not inconsistent with the central tenet of the plaintiff's evidence' (CAB 209; CA[265]).

23. The assertion that Mr Perry was 'by the appellant's side' — necessarily meaning not merely that he was present at the Presbytery, but that he remained in sight of the appellant for the *entirety* of *every* occasion the appellant was at the Presbytery — cannot be sustained (cf RS[69]), and was rightly rejected by the primary judge (CAB 42; SC[151]). Mr Perry's evidence was that he could not remember the layout of the Presbytery, how many occasions there were on which he was there with the appellant,

[32] Joint expert conclave of Dr Robertson and Dr Apler at question 12(b) (ABFM vol 1 at 433).

or whether he ever saw that the appellant was ever in the bedroom or playing the poker machine.[33] He accepted he could not say definitively whether the appellant might have gone to a different part of the Presbytery where he (Mr Perry) was not present.[34]

24. No case was ever put by the Diocese that the appellant had a 'sincerely held but unreliable belief' of what had happened to him (cf CAB 167; CA[136]). The evidence was contrary to any suggestion that the appellant had any defect of memory or mental functioning.[35] Nor did Leeming JA view the entirety of the appellant's relevant evidence. Contrary to his Honour's statement at CAB 168; CA[137], the appellant *was* cross-examined when he was recalled on the occurrence of the assaults.[36] Critically, that cross-examination was premised on a frank assertion that the appellant was lying (and not mistaken) about the occurrence of abuse. An assertion about the 'malleability of memory' (CAB 171–2; CA[145]) formed no part of the Diocese's case, and was unsupported by any expert evidence — Ball JA's reasons on this point are compelling (CAB 210–11; CA[267]–[268]).

25. ***Breach.*** As for RS[72]–[74], no ground of appeal in the court below alleged any error in respect of the primary judge's findings on breach. Ground 5 of the relevant Notice of Appeal expressly concerned duty, not breach (CAB 106). The Diocese should not be permitted to raise a new ground of appeal for the first time in this Court.[37] Particularly so, since the Diocese now wishes to contend for a new finding of fact — contrary to the agreed position at trial,[38] and which could have been met with evidence — about Fr Pickin *not* being alone in the Presbytery at the relevant time (RS[6] fn 1, [19]; cf CAB 203; CA[243], [245]).[39]

26. In any case: (1) if the Court upholds the existence of a non-delegable duty, the issue of breach will fall away; and (2) in the case of a general duty of care, the primary judge's findings about breach were correct, and justified in the context of the actual forensic

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33 T121.7–122.44 (ABFM vol 2 at 638–9).

34 T134.6–24 (ABFM vol 2 at 651).

35 Report of A/Prof Robertson at [23] (ABFM vol 1 at 44); Report of Dr Apler at 13 (ABFM vol 1 at 374).

36 T82.21–46 (ABFM vol 2 at 599).

37 *University of Wollongong v Metwally (No 2)* (1985) 59 ALJR 481 at 483; *Port Jackson Stevedoring Pty Ltd v Salmond & Spraggon (Aust) Pty Ltd* (1978) 139 CLR 231 at 241, 271, 283–4.

38 CAB 9, 25, 38, 59; SC[3], [68], [137], [228]; CAB 139; CA[53]; CA T 42.23–33, 57.27–34 (RBFM at 175, 190). See also ABFM vol 2 at 481–2 (AA); ABFM vol 2 at 632.32-49 (Perry); ABFM vol 2 at 694, T177.38–43 (Sheller).

39 *Suttor v Gundowda Pty Ltd* (1950) 81 CLR 418 at 438; *Coulton v Holcombe* (1986) 162 CLR 1 at 8.

contest at trial (namely, in which no other adult was shown to be at the Presbytery at the relevant times) (CAB 65–7; SC[260]–[264]).

27. For the reasons already developed, the risk of harm was foreseeable. Despite that risk, as the primary judge accurately recorded (CAB 66; SC[262]), this was not a case in which there was any evidential contest about the adequacy or practicality of any particular precautions against it. It was a case about the total absence of precautions, in which the Diocese led no evidence to suggest that any of the precautions identified by the appellant were unreasonable or unavailing. In that context, it was not appropriate for Leeming JA to hypothesise that an emergency exception in cases of grave necessity (such as a child fleeing domestic abuse) would somehow negate the efficacy of a broader policy of preventing priests being alone and unsupervised with vulnerable young people (CAB 203; CA[243]).

28. ***Causation.*** As to RS[75], so far as causation is concerned, the primary judge was correct for the reasons she gave (CAB 67–9; SC[266]–[272]). Given the plenitude of the Dioceses' control over the relevant people and premises, if a proper policy against unsupervised contact by priest with minors was in place, and if parents and children had been warned about the relevant risks posed by unsupervised contact with minors, it is difficult to see how the opportunity for Fr Picken's abuse could have arisen (CAB 68; SC[270]). Further, each psychiatric expert agreed that the abuse committed by Fr Pickin was consistent with causing or contributing to the psychiatric sequelae experienced by the appellant (CAB 69; SC[272]).[40]

Dated 23 July 2025

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[40] Joint expert conclave of Dr Robertson and Dr Apler at question 12(b) (ABFM vol 1 at 433).