HIGH COURT OF AUSTRALIA

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Details of Filing

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Important Information

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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

RESPONDENT'S SUBMISSIONS

Part I: Certification

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

Part II: Concise statement of the issues

2. The Respondent disagrees with the phrasing, order and completeness of the Appellant's statement of issues at AS [2]-[4]. The respondent re-states the issues on the Appeal (and provides the Respondent's answers to them) as follows:

   (1) On the findings of fact as they stand after the unanimous decision of the Court of Appeal (**COA**) on the duty question, did the specific Diocese represented by the Respondent, in the provision of religious instruction or pastoral care at the relevant dates in the 1960s, owe a duty to the Appellant to take reasonable care to avoid the Appellant suffering personal injury in the form of sexual assault? **No.**

   (2) If yes to (1), should *New South Wales v Lepore* (2003) 211 CLR 512 (***Lepore***) be reopened and if so, overruled? **No, to each.**

   (3) If yes to (2), was the scope of the duty of care "non-delegable" in the sense of extending to a duty to ensure reasonable care was taken to avoid the Appellant suffering personal injury in the form of sexual assault? **No.**

3. If the Appellant succeeds on some or all of issues (1)-(3), additional issues will arise on

the Notice of Contention (**NOC**) as explained at [62] to [74] below.

Part III: Section 78B of the *Judiciary Act 1903* (Cth)

4. The Respondent agrees that no notice is required to be given in compliance with s 78B of the *Judiciary Act 1903* (Cth).

Part IV: Material facts

5. A number of the facts asserted by the Appellant are in error or at least incomplete. These can be broadly grouped into the following categories.

6. **Role of Fr Pickin.** AS [9] omits the COA's finding that, at the relevant time, Fr Pickin was not the parish priest, but an assistant priest only (CAB 140 [56]). The parish priest was Fr O'Dwyer (CAB 132-133 [34]). He would have shared the presbytery accommodation with Fr Pickin (CAB 139 [53], 146-147 [79]).[1] While Fr Pickin would still have been subject to the Bishop's powers of direction, his immediate supervisor would have been Fr O'Dwyer (CAB 139-140 [54]). There was no evidence led as to the role and responsibilities of an assistant priest, and the issue was not explored by the primary judge (CAB 145 [75]-[76]).

7. **Relationship between the Appellant and the Diocese.** While the Appellant is described as a practicing Catholic (CAB 56 [213]), his family did not go to mass every Sunday (ABFM-1 at 314 [6]). The "religious instruction" received by the Appellant from Fr Pickin was exclusively provided during the scripture classes at the School. Those classes were attended by students who were not practicing Catholics (such as Mr Perry) (CAB 38 [137], 56 [213]). The decision to permit Fr Pickin to conduct those classes was made by the head of that school and the State government (CAB 191-192 [205]). There is no evidence that the Appellant had any contact with Fr Pickin outside of the scripture classes and the presbytery gatherings (for example, at mass, or at other church events).

8. **Fr Pickin's "interest in teenage boys".** The findings concerning Fr Pickin's sexual interest in teenage boys arose from two tendency witnesses (Mr McClung and BB). The

[1] This was not contended for by either party, however it is also not the subject of the Appellant's NOA. It was put to the parties by Leeming JA during the hearing that the evidence in the case suggested that there was another adult living in the presbytery, being the parish priest (RBFM at 157 ll 32-34, 175 ll 25-26). The parties agreed that there was no direct evidence that the parish priest was living in the presbytery, however this did not preclude the COA from inferring this was a potentially correct finding on the evidence: CAB 140-144 [56]-[69], 146 [77], 146-147 [79]. At trial, the Appellant did not seek to demonstrate that Fr Pickin lived alone at the presbytery.

tendency evidence was found not to be especially probative, because of the difference in severity of the complaints (CAB 165 [130]). Contrary to AS [10], there was no finding of Fr Pickin consorting with or being present when Fr Denham was abusing children (see CAB 46 [170]). Further, the Appellant does not mention that Mr Perry observed no inappropriate behaviour on the part of Fr Pickin when on holiday with him: ABFM-1 at 360 [18]).

9. **The gatherings at the presbytery.** The problems with the factual findings relating to the presbytery gatherings are detailed below in Part VI-B. It is sufficient to note here that the Appellant fails to refer to the primary judge's acceptance that there were other boys present at the presbytery during the gatherings organised by Fr Pickin: CAB 59 [229], 162 [121], 209-210 [262]-[266]. Further, the reference at AS [11] to Fr Pickin having the opportunity to abuse the Appellant out of the sight of Mr Perry is problematic: CAB 45 [167]. This was never put to Mr Perry as part of the Appellant's case, because the Appellant's case was that Mr Perry was not at the presbytery at all. Findings of this nature formed part of Ground 2 of the NOA: CAB 106. This Ground was upheld at least by Leeming JA: CAB 174 [152].

Part V: Statement of argument

A. Context

10. AS [16]-[22] raises a false issue. Leeming JA's criticism of the Appellant's pleading and use of "the Diocese" was not a result of any misunderstanding as to the operation of Part 1B of the *Civil Liability Act 2002* (NSW) (**CLA**). There was "*no reason to doubt*" that the Diocese was eligible as a proper defendant for an organisation (CAB 184 [183]), and the case proceeded on the basis that s 6O was engaged (CAB 184-185 [184]). While Leeming JA indicated that it would have been "*highly desirable*" for the Appellant to identify the particular organisation for which the Respondent was the proper defendant (CAB 185 [187], 186 [190]), his Honour proceeded, beneficially to the Appellant, on the basis that the organisation was "*that part of the Catholic Church within the geographical Diocese which was subject to the power and control of the Bishop of Maitland*" (CAB 185 [187]), and that s 6O could apply – although it is not beyond argument – to agglomerate in the Respondent the powers, property rights and procedures of the Bishop and the Respondent trustees (CAB 187-188 [193]), as was required by the Appellant's allegations of duty and breach by "the Diocese" (CAB 185 [186]).

11. As to AS [23], the result of the COA's decision is not to resurrect the *Ellis* defence. The effect of the COA's decision is simply that this particular unincorporated association did not owe a duty of care to this particular Appellant.

B. Order of issues

12. Consistently with the order of issues in the NOA (CAB 257), the Appellant defers until the end of its submissions (AS [48]-[55]) its attack on the COA's unanimous finding that no (ordinary) duty of care arose. However, unless a duty of care under ordinary principles is established, no question can arise of the duty being "non-delegable".[2] An argument about the "non-delegability" of a duty of care goes only to the scope of that duty which otherwise exists in relation to a foreseeable risk of harm: is the defendant obliged merely to take reasonable care to protect against a foreseeable risk of harm (which duty in the usual case can be discharged by delegating the task or function to a person apparently competent to carry it out), or is the scope of the duty elevated to one under which the defendant must ensure that reasonable care is taken?[3] Even if the scope of the duty falls into the enhanced category, it is still not a duty to ensure that no harm occurs. The care which the person owing the duty must ensure is exercised by the delegate cannot be greater in scope than would have been required of the person if it had been fulfilling the duty of care directly.[4]

13. Accordingly, the starting point must be Ground 2 of the NOA and whether the COA erred in overturning the primary judge's finding of a duty of care. If it did not err, the appeal must be dismissed. If it did err, the next question is whether *Lepore* should be re-opened and overturned. Only if both of those questions are answered favourably to the Appellant, will the need arise to determine if the postulated duty was non-delegable.

C. No error in COA finding no duty of care was owed

14. The duty of care as pleaded at ASC [33] (ABFM-1 at 15) was as follows: "*At all material times, the Diocese owed the plaintiff, as a child in the care of one of its priests, a duty to*

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2 *Hollis v Vabu Pty Ltd* (2001) 207 CLR 21 at [27] (Gleeson CJ, Gaudron, Gummow, Kirby and Hayne JJ); ***Northern Sandblasting*** *Pty Ltd v Harris* (1997) 188 CLR 313 at 330-331 (Brennan CJ); ***Burnie Port Authority*** *v General Jones Pty Ltd* (1994) 179 CLR 520 at 550 (Mason CJ, Deane, Dawson, Toohey and Gaudron JJ); ***Kondis*** *v State Transport Authority* (1984) 154 CLR 672 at 681 (Mason J). See also ***Voli*** *v Inglewood Shore Council* (1963) 110 CLR 74 at 95 (Windeyer J).

3 See ***Elliott*** *v Bickerstaff* (1999) 48 NSWLR 214 at [82] (Giles JA, Handley and Stein JJA agreeing).

4 See *Elliott* (1999) 48 NSWLR 214 at [82] (Giles JA, Handley and Stein JJA agreeing). See also *Lepore* (2003) 212 CLR 511 at [105] (Gaudron J), [159] (McHugh J), [291]-[292] (Kirby J); *Kondis* (1984) 154 CLR 672 at 688 (Mason J), 694 (Deane J); *Voli* (1963) 110 CLR 74 at 95 (Windeyer J).

take reasonable care to avoid the plaintiff suffering foreseeable and not insignificant harm". Three features of the alleged duty stand out.

15. *First*, it depends upon it being proved on the facts that the child was "*in the care*" of one of the Diocese's priests. This grounding fact is expressed at a level of imprecise generality. In the Appellant's submissions, it is re-expressed with various shades of meaning: AS [15] and [48] assert an "*entrustment*" of the Appellant to the "*pastoral and educational care*" of the Diocese. Somewhat differently, AS [54] asserts that "*a vulnerable class of persons including the Appellant were exposed*" to the Diocese's pastoral and educational activities. One of the many problems with the Appellant's case, at a factual level, is that there was no evidence, or findings, to support an "*entrustment*" or "*exposure*" case. What precisely was it that the Diocese did that led the Appellant to be in the presbytery? This is discussed in more detail at [51] to [57] below.

16. *Second*, the harm which the duty is to protect against is also expressed at a level of imprecise generality. The Appellant repeats this error at AS [48]. However, the relevant enquiry is whether injury of the kind or class that has been suffered was reasonably foreseeable, not merely whether damage of "*some kind*" (AS [49]) was reasonably foreseeable.[5] Accordingly, and as the primary judge attempted to grapple with in the formulation of the duty at CAB 58 [224], no duty could be contemplated without, in some acceptable way, building in as the foreseeable risk which the duty was to protect against, injury from sexual assault upon a child while in some relevant sense "*in the care*" of the Diocese.

17. This second point leads to the fundamental, and fatal, error in the Appellant's submissions regarding duty. The primary judge had found, in the highly compressed findings at CAB 59-60 [227]-[233] that the Respondent was fitted with sufficient knowledge at the relevant time of the "*risks…its priests could pose to children*". Ground 5 of the appeal below (CAB 106) put this finding in issue. Conversely, Ground 5 of the NOC (CAB 112) sought to support it with a further intermediate finding that the Diocese in fact had knowledge that Fr Pickin was an offender. The COA, in its most careful and detailed reasons between CAB 192 [207] and CAB 202 [241], expose why the primary judge was

[5] *Sutherland Shire Council v Heyman* (1985) 157 CLR 424 at 487 (Brennan J); *Sullivan v Moody* (2001) 207 CLR 562 at [42] (Gleeson CJ, Gaudron, McHugh, Hayne and Callinan J); *Tame v New South Wales* (2002) 211 CLR 317 at [12] (Gleeson CJ), [45] (Gaudron J), [200], [203] (Gummow and Kirby JJ), [249] (Hayne J); *Mallonland Pty Ltd v Advanta Seeds Pty Ltd* (2024) 98 ALJR 956 at [29] (Gageler CJ, Gordon, Steward, Gleeson, Jagot and Beech-Jones JJ). See also [45] below.

in error on her critical finding and why the finding sought in the NOC should not be made. The Appellant's scattergun attempts at AS [50]-[54] to criticise parts, but never engage with the whole, of the COA's critical reasoning on this point misfire:

(a) As to AS [50], it is unfair to take one paragraph, at the end of 30 plus paragraphs of reasons and distil from it a preclusionary proposition that no duty of care could ever arise unless the Bishop or senior priests in the Diocese knew that Fr Pickin in particular posed a risk to children. CAB 202 [241] is the conclusion to the analysis of NOC Ground 5 which commenced at CAB 196 [219], which sought a finding specific to knowledge of Pickin's offending. But earlier at CAB 192 [207] to CAB 195 [218], especially the final two paragraphs, the COA was addressing more broadly Ground 5 of the NOA. The Court accepted that in principle a duty might be established if a Diocese had knowledge of a sufficient risk of priests, in general, offending. It was just that the evidence here did not support such a finding.

(b) As to AS [51] generally, it is an unfair criticism that the COA limited the knowledge of the Diocese to that of the Bishop alone; the Court contemplated that knowledge of "*senior clergy*" of priests posing a risk to children could be enough (CAB 192 [208]). It was just that such knowledge was not proven.

(c) As to the sub-points of AS [51]: **(1)** The primary judge's reliance on the Cunneen Report was misplaced as that report was not in evidence: CAB 194 [211]. The related submission, knowledge of any offending involving Fr McAlinden, could not be established on the evidence: CAB 194-195 [213]-[218]. **(2)** Mr McClung's report of Fr Pickin's conduct to Fr Doran did not amount to the imputation of any form of knowledge to "*the Diocese*" and it was not established (nor was any evidence led on the point) that Fr Doran was under any obligation to report what Mr McClung told him, at the time (1966): CAB 198 [228]. Fr Doran was not the Bishop or a senior member of the Diocese (who were not identified by the Appellant) (CAB 192 [206]; CAB 198 [230]). **(3)** Further, Fr Dillon could not give evidence concerning the Bishop of Maitland (or any other senior clergy in New South Wales) in 1969: CAB 192-193 [208]-[210].

(d) As to AS [52], the assertion that "*what mattered was that it was foreseeable that any priests having private unsupervised contact with a child could potentially abuse a child*" is referenced to an allegation in the pleading, not to any finding. The assertion

ignores the COA's findings to the contrary (CAB 192 [207], [208]). It also ignores the direct evidence of Fr Dillon.[6]

(e) As to AS [53], neither court dealt with whether s 6O(b) of the CLA imputes the knowledge of each and every priest in a diocese to the proper defendant because no such contention was made. The Court should be slow to allow such a topic to be opened up for the first time on appeal because of its far-reaching implications and the limited time available at the hearing for the issues that have been properly ventilated below.

(f) In any event there is strong reason to doubt the contention. There is nothing in the text of s 6O(b), or any cited extrinsic materials, to support a view that the section was intended to create novel principles of attribution of knowledge, inconsistent with the general law. The test for attribution depends upon context, and the purpose for which that attribution is sought.[7] If Fr Doran was an employee, it would not follow that his knowledge would be imputed to his employer.[8] The Roman Catholic Church was and is hierarchical, as is apparent from Fr Dillon's evidence (see ABFM-1 at 443). Appropriately, the knowledge of each and every priest within a Diocese is not taken to be the knowledge of the Diocese as a whole.[9]

18. *Third,* the COA observed that the duty was not said to fall into any recognised category (CAB 180 [169]).[10] The Appellant does not suggest that it does. The Appellant does however complain (AS [54]) of a failing by the COA to "*step back*" and "*consider the factors relevant to the existence of the duty overall*", as would be required with a novel category of duty. That complaint is again unfair. The task of the COA was to focus on the issues joined before it; particularly Ground 5 of the NOA and Ground 5 of the NOC. Once

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6 See, eg, ABFM-1 at 443 where Fr Dillon says, "*there was generally minimal if any suspicion that a trusted religious leader could or would ever pose any kind of threat to a young parishioner.*"

7 *Productivity Partners Pty Ltd v Australian Competition and Consumer Commission* (2024) 98 ALJR 1021 at [236] (Edelman J); *Meridian Global Funds Management Asia Ltd v Securities Commission* [1995] 2 AC 500 at 506 (Lord Hoffmann); *Director General, Department of Education and Training v MT* (2006) 67 NSWLR 237 at [17]-[19] (Spigelman CJ, with whom Ipp JA and Hunt AJA agreed).

8 See, eg, *Smits v Roach* (2006) 227 CLR 423 at [47] (Gleeson CJ, Heydon and Crennan JJ); *Nationwide News Pty Ltd v* ***Naidu*** (2007) 71 NSWLR 471 at [40]-[41] (Spigelman CJ). See also *Sargent v ASL Developments Ltd* (1974) 131 CLR 634 at 658 (Mason J).

9 CAB 198 [229], 199-202 [233]-[241]. See also CAB 199 [232] where Leeming JA observes that such a conclusion would be unrealistic noting that there were in the order of 55 parishes and some 200 priests and nuns in the Diocese of Maitland.

10 See, for example, the recognised categories identified by McHugh J in *Vairy v Wyong Shire Council* (2005) 223 CLR 422 at [27].

it had correctly upheld the argument on the former, and rejected the argument on the latter, no duty of care could arise. Any analysis of factors which might be relevant in another case could never change that outcome.

19. In any event, in addition to the above, dispositive reasoning, the COA provided the following reasoning. *First*, Part 1B of the CLA only applies prospectively when addressing an institution's obligations or liabilities: CAB 189 [197].[11] *Second*, the primary judge had in her reasoning relied on the erroneous fact that "*the Diocese empowered [Fr Pickin] alone to determine who he invited there*", for which there was no evidence: CAB 191 [203]. *Third*, it was ultimately a decision of the head of the School and the State government to permit Fr Pickin to conduct scripture classes: CAB 191-192 [205].

20. The following submissions are made in the alternative.

D. *Lepore* is a complete answer to the Appellant's case on non-delegable duty

D.1 What exactly does *Lepore* stand for?

21. The Appellant submits that *Lepore* held that a non-delegable duty cannot be owed to ensure that a delegate does not commit an intentional criminal act (AS [2]); that intentional wrongdoing can *never* constitute a breach of non-delegable duty of care (AS [43]); and that *Lepore*, so understood, is inconsistent with certain safe working cases (AS [43]). These submissions are based upon an over-reading of what was in issue in *Lepore* and what was actually decided by the majority.

22. *Lepore* concerned whether a school authority could be liable in negligence in respect of sexual assaults committed by an employed teacher on pupils. It was accepted that the relationship between school authority and student gave rise to a duty of care, and that the duty was non-delegable. The particular issue was whether, in the absence of any allegation of fault against the school authority in respect to its selection, supervision etc of the teacher, the non-delegable aspect of the duty nevertheless rendered the school authority liable in negligence for the criminal assaults by the teachers.[12]

23. At least four of the majority justices – Gleeson CJ, Gummow and Hayne JJ, and Callinan J – held that the non-delegable aspect of a duty of care is not a vehicle to extend

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[11] Leeming JA said that this was relevant to "*salient features*" (o) and (p) of *Caltex Refineries (Qld) Pty Limited v Stavar* (2009) 75 NSWLR 649: CAB 189 [197].

[12] See *Lepore* (2003) 212 CLR 511 at [2], [3], [18] (Gleeson CJ).

responsibility in negligence to a duty-ower for the intentional criminal wrongdoing by a third party in circumstances of no fault by the duty-ower itself.[13] Gaudron J set up the question (at [97]) and analysed the nature of a non-delegable duty (at [99]-[105]) in a similar fashion. Her Honour returned to the question (at [123]-[126]) and indicated that the non-delegable aspect of a duty could be used to extend responsibility for the intentional wrongdoing of another only where such wrongdoing was a material and foreseeable (inherent) risk in the system adopted by the relevant enterprise, and there was fault on the part of the duty-ower in adopting such a system to exist.

D.2 The authority of *Lepore* has not been subsequently eroded

10 24. The safe working cases referred to at AS [38] and [43] do not derogate from the decision in *Lepore*. In those cases, the employer was itself at fault in failing to exercise reasonable care to protect an employee from the criminal wrongdoing of a stranger,[14] such that the alleged breach was antecedent to, rather than coterminous with, that wrongdoing.

25. Further, contrary to AS [43], *Bird v DP*,[15] and *Willmot*,[16] do not undermine the security of the holding in *Lepore. First*, the joint judgment in *Willmot* (Gageler CJ, Gordon, Jagot and Beech-Jones JJ) does not presuppose that intentional criminal wrongdoing *could* constitute breach of a non-delegable duty. Their Honours at [49]-[50] are simply delineating between the confined issue before the Court and the issues for determination at trial. The majority should not be taken to have impliedly cast doubt on *Lepore* where
20 the correctness of that case was not in issue, and there was no argument on that point. *Second,* although the majority in *Bird v DP* identified *Morris v C W Martin & Sons Ltd*[17] as involving a breach of a non-delegable duty, this should be taken in context as merely a suggestion that some cases should be re-conceptualised to differentiate appropriately between agency, vicarious liability and non-delegable duty. To the extent that *obiter* comment is taken to mean anything more, it is inconsistent with the majority in *Morris*,[18]

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[13] *Lepore* (2003) 212 CLR 511 at [3], [18], [31]-[34], [77], [79] (Gleeson CJ), [264]-[270] (Gummow and Hayne JJ), [340] (Callinan J).

[14] *Chomentowski v Red Garter Restaurant Pty Ltd* (1970) 92 WN (NSW) 1070 at 1074-1075 (Sugerman P), 1078 (Asprey JA), 1084-1085 (Mason JA); *Karatjas v Deakin University* (2012) 35 VR 355 at [47]-[50], [53]-[56] (Nettle JA, Hansen JA and Kyrou AJA agreeing). See also *Naidu* (2007) 71 NSWLR 471 at [329]-[330] (Beazley JA, in dissent), [424] (Basten JA).

[15] ***Bird v DP*** *(a pseudonym)* (2024) 98 ALJR 1349.

[16] ***Willmot*** *v Queensland* (2024) 98 ALJR 1407 at [112] (Edelman J).

[17] ***Morris*** *v C W Martin & Sons Ltd* [1966] 1 QB 716.

[18] *Morris* [1966] 1 QB 716 at 730, 736, 737 (Diplock LJ), 738 (Salmon LJ). Cf *Morris* [1966] 1 QB 716 at 726, 728 (Lord Denning MR).

who treated the case as one of vicarious liability.[19]

D.3 *Lepore* should not be re-opened

26. This Court should not lightly depart from its previous decisions.[20] Here, the four *John* factors tell against reopening.[21] *First,* the reasoning of the majority rests on a principle carefully worked out in a succession of cases, all of which involved the plaintiff being injured as a result of negligence, not intentional criminal wrongdoing.[22] These cases establish that a non-delegable duty is not a duty to prevent any kind of harm, which was a key feature of the majority's reasoning (with the exception of Kirby J).[23] Contrary to AS [45], *Lepore* is not "*inconsistent with previous authority*" (which the Appellant has not in fact identified).

27. *Second,* on the reasoning decisive to the conclusion set out above at [23], there was no material difference between the reasons of Gleeson CJ (with whom Callinan J agreed) and Gummow and Hayne JJ. The reasoning of the majority on the separate issue of vicarious liability is immaterial (contra AS [45]).

28. *Third*, *Lepore* has achieved a useful result by providing clarity on whether and when a non-delegable duty can extend to intentional criminal wrongdoing. Contrary to AS [45], *Lepore* is not contrary to the "*overall thrust*" of Part 1B of the CLA. The second reading speech makes it plain that the legislature intentionally did not extend Part 1B to "*impose a non-delegable duty on certain institutions for institutional child abuse despite it being the deliberate criminal act of a person associated with the institution*".[24] Further, the contention that *Lepore* allows organisations to immunise themselves from liability by ensuring their staff are not employees (AS [45]) distorts the reasoning of the Court in *Bird*

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[19] See also *Lister v Hesley Hall Ltd* [2002] 1 AC 215 at [19] (Lord Steyn); *Lepore* (2003) 212 CLR 511 at [41], [48] (Gleeson CJ), [112] (Gaudron J), [241] (Gummow and Hayne JJ); ***Prince Alfred College*** *Inc v ADC* (2016) 258 CLR 134 at [51], [56] (French CJ, Kiefel, Bell, Keane and Nettle JJ); *CCIG Investments v* ***Schokman*** (2023) 278 CLR 165 at [32] (Kiefel CJ, Gageler, Gordon and Jagot JJ).

[20] *Wurridjal v Commonwealth* (2009) 237 CLR 309 at [70] (French CJ); *NZYQ v Minister for Immigration, Citizenship and Multicultural Affairs* (2023) 280 CLR 137 at [17] (the Court).

[21] *John v Federal Commissioner Taxation* (1989) 166 CLR 417.

[22] See, eg, *Dalton v Henry Angus & Co* (1881) 6 App Cas 740; *Wilsons and Clyde Coal Co Ltd v English* [1938] AC 57; *Paine v Colne Valley Electricity Supply Co Ltd* [1938] 4 All ER 803; *Gold v Essex County Council* [1942] KB 293; *Commonwealth v* ***Introvigne*** (1982) 150 CLR 258; *Kondis* (1984) 179 CLR 520; *Burnie Port Authority* (1994) 179 CLR 520.

[23] See *Lepore* (2003) 212 CLR 511 at [31] (Gleeson CJ), [103] (Gaudron J), [261] (Gummow and Hayne JJ), [340] (Callinan J).

[24] New South Wales, Legislative Assembly, *Parliamentary Debates* (Hansard), 26 September 2018, 22.

v DP for rejecting the extension of vicarious liability in those circumstances.

29. *Fourth*, *Lepore* has been independently acted on, on countless occasions.

D.4 If *Lepore* is re-opened, it should not be overruled

30. If the Court re-opens *Lepore,* it should not overrule that decision. *First,* extending responsibility for non-delegable duties to intentional criminal wrongdoing, absent fault, would be too demanding and is doctrinally incoherent. A responsibility to ensure that reasonable care is taken is substantially different from an obligation "*to ensure that a delegate does not commit an intentional criminal act*" (AS [2]).[25] To extend a non-delegable duty of care in the way contemplated by the Appellant at AS [2], "*would remove the duty altogether from any connection with the law of negligence*".[26] Gleeson CJ's example in *Lepore* demonstrates this: it would be highly artificial to treat a hospital as being held liable for the acts of a staff member with homicidal propensities in attacking a patient in circumstances where there was no fault on the part of the hospital but an assertion that the staff member had neglected to take reasonable care of the patient. Something more is needed.

31. Further, while it can be accepted that negligence and intentional criminal wrongdoing are equally capable of causing harm (AS [43]), this does not justify collapsing these two classes of conduct into a single continuum. Against AS [43], the Court has not treated the intentional infliction of harm as a "*manifestation*" of a lack of reasonable care, and has held, contrary to AS [44], that such harm cannot be pleaded as negligence.[27] Indeed, even in the context of establishing an ordinary duty of care to control the conduct of a third person, the Court has expressly stated: "*the fact that the conduct in question is criminal conduct is of great importance in deciding… what, if any, duty is owed*".[28]

32. There is good reason for intentional criminal wrongdoing to be treated differently to negligence in the context of non-delegable duties. To say the features of vulnerability, assumption of responsibility, and lack of control are "*neutral*" as to whether the

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[25] *Lepore* (2003) 212 CLR 511 at [31] (Gleeson CJ), [103] (Gaudron J), [261] (Gummow and Hayne JJ), [340] (Callinan J).

[26] *Lepore* (2003) 212 CLR 511 at [266] (Gummow and Hayne JJ).

[27] *Williams v Milotin* (1957) 97 CLR 465 at 470 (the Court). See also *Lepore* (2003) 212 CLR 511 at [270] (Gummow and Hayne JJ), *contra* at [162] (McHugh J).

[28] *Adeels Palace Pty Ltd v Moubarak* (2009) 239 CLR 420 at [24] (the Court). See also ***Modbury*** *Triangle Shopping Centre Pty Ltd v Anzil* (2000) 205 CLR 254 at [19], [30] (Gleeson CJ), [42] (Gaudron J), [113] (Hayne J), [136] (Callinan J); *Smith v Leurs* (1945) 70 CLR 256 at 262 (Dixon J).

wrongdoing is negligent or intentional (AS [44]), elides two separate concepts: the **existence** of the non-delegable duty, and the **scope** of that duty. The features identified by the Appellant are relevant to determining whether a non-delegable duty is owed at all; they do not set the boundaries of that duty. As set out below, the scope of a non-delegable duty is determined by the foreseeability of the risk, and the connection of that risk to the duty-ower's enterprise – neither of which are "*neutral*" as between criminal offending and negligence.

33. In reality, the real reason for the extension contended for in the present case is because the Respondent cannot be held vicariously liable for the alleged abuse, consistent with the Court's decision in *Bird v DP*. The principles relating to non-delegable duties should not be stretched, untethered to any considered conceptual development of this area of law, merely because of "*frustration at the limits of vicarious liability*".[29] This is particularly so in circumstances involving strict liability.[30] The correction of any perceived injustice occasioned by the interaction of *Lepore* and *Bird v DP,* is best left to the legislature.[31]

34. *Second,* the extension of responsibility for a non-delegable duty, absent fault, to intentional criminal wrongdoing would be incoherent with statute. There now exists in all jurisdictions (except WA and the ACT)[32] a statutory duty on organisations to take reasonable care to prevent the abuse of a child by an individual associated with the organisation,[33] including delegates.[34] In each jurisdiction, the organisation is presumed

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[29] See P Giliker, *Vicarious Liability in Tort* (Cambridge University Press, 2010) at 144, cited at CAB 179 [166] (Leeming JA). See also G Williams, "Liability for Independent Contractors" [1956] *Cambridge Law Journal* 180.

[30] See *Stevens v Brodribb Sawmilling Company Pty Ltd* (1986) 160 CLR 16 at 30 (Mason J), 42-43 (Wilson and Dawson JJ).

[31] The Standing Committee of Attorneys-General (**SCAG**) is currently considering potential reform options in light of *Bird v DP* (2024) 98 ALJR 1349. NSW, Victoria and the ACT have already sought to introduce legislation which would retrospectively extend the operation of their existing vicarious liability regimes (which prospectively extend to persons akin to employees), although progress on these Bills has been paused pending SCAG's review: *Civil Liability Amendment (Organisational Child Abuse Liability) Bill 2025* (NSW); *Wrongs Amendment (Vicarious Liability) Bill 2025* (Vic); *Civil Law (Wrongs) (Organisational Child Abuse Liability) Amendment Bill 2025* (ACT).

[32] The statutory duty is prospective: *Wrongs Act 1958* (Vic) s 93; CLA Sch 1, cl 43; *Civil Liability Act 2003* (Qld) s 86; *Civil Liability Act 1936* (SA) s 50D(1); *Civil Liability Act 2002* (Tas) s 4(7); *Personal Injuries (Liabilities and Damages) Act 2003* (NT) ss 4(2) and 17B(5).

[33] *Wrongs Act 1958* (VIC) 91(2); CLA s 6F; *Civil Liability Act 2003* (Qld) s 33D; *Civil Liability Act 1936* (SA) s 50E; *Civil Liability Act 2002* (TAS) s 49H; *Personal Injuries (Liabilities and Damages) Act 2003* (NT) s 17D.

[34] *Wrongs Act 1958* (VIC) s 90(1)(c); CLA ss 6D, 6E(3); *Civil Liability Act 2003* (Qld) s 33C; *Civil Liability Act 1936* (SA) s 50C; *Civil Liability Act 2002* (TAS) ss 49F, 49G(3); *Personal Injuries (Liabilities and Damages) Act 2003* (NT) s 17C.

to have breached its duty if the plaintiff establishes that the alleged abuse occurred, unless the organisation establishes that it took reasonable precautions to prevent the abuse.[35] This defence cannot be reconciled with a non-delegable duty. Further, as Leeming JA observed at CAB 179-180 [168], if the common law recognises a non-delegable duty, then it must apply at all times, including after the statutory duties commenced. That judge made law cannot be altered prospectively tells dispositively against the extension of non-delegable duties to criminal acts.

35. *Third,* this extension of responsibility for non-delegable duties would leave no room for the operation of vicarious liability where a relationship of employer and employee exists between the relevant parties or in other situations where the relationship is one which may give rise both to a non-delegable duty and a vicarious liability.[36] To extend non-delegable duties to intentional criminal wrongdoing would render irrelevant the bounds of vicarious liability, which is limited to relationships of employment.[37] It would tend to undo the distinction drawn in *Bird v DP,* between relationships of employment and relationships akin to employment, as an employer could be found liable (personally or vicariously) for criminal wrongdoing arising in either relationship.

36. *Fourth,* such an extension is unlikely to have a deterrent effect. As Gleeson CJ observed in *Lepore*, "*the problem only arises where there has been no fault, and therefore no failure to exercise reasonable care to prevent foreseeable criminal behaviour on the part of the employee*".[38] In the event the sanctions provided by the criminal law have failed to deter a person who has committed the crime, it is difficult to see what further deterrent effect is achieved by imposing no-fault liability on an institution with which they are associated.[39]

E. Balance of Ground 1 – non-delegable duty of care

E.1 The findings (or not) below

37. The Appellant pleaded that the duty of care was non-delegable.[40] However, the case was

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35 *Wrongs Act 1958* (VIC) s 91(3); CLA s 6F(3); *Civil Liability Act 2003* (Qld) s 33E(2); *Civil Liability Act 1936* (SA) s 50F; *Civil Liability Act 2002* (TAS) s 49H(3); *Personal Injuries (Liabilities and Damages) Act 2003* (NT) s 17E.

36 *Lepore* (2003) 212 CLR 511 at [269] (Gummow and Hayne JJ).

37 *Prince Alfred College* (2016) 258 CLR 134 at [80] (French CJ, Kiefel, Bell, Keane and Nettle JJ); *Schokman* (2023) 278 CLR 165 at [12], [34] (Kiefel CJ, Gageler, Gordon and Jagot JJ).

38 *Lepore* (2003) 212 CLR 511 at [36] (Gleeson CJ).

39 *Lepore* (2003) 212 CLR 511 at [36] (Gleeson CJ), [267] (Gummow and Hayne JJ).

40 ASC [34] (ABFM-1 at 15). See also ASC [36] and [37] (ABFM-1 at 17-18).

run at first instance on the basis of vicarious liability in a pre-*Bird v DP* environment.[41] It follows that the issues relevant to any relationship between the Appellant and the Respondent for the purposes of establishing a non-delegable duty of care were neither explored nor the subject of findings of the primary judge.[42] It was in part on this basis in *Bird v DP* at [40] – [43], that it was found that it was inappropriate to deal with the non-delegable duty ground on appeal.

38. The nature and content of the non-delegable duties articulated in the NOC (CAB 111-112) were not identified or pleaded at trial and hence not directly the subject of evidence or controverted by the Respondent. The Appellant now seeks to repurpose its vicarious liability case as a non-delegable duty of care case. In doing so, the nature of the duty is recast yet again: AS [25], [32].

39. Nowhere in the pleaded case or in the findings below is the task that was delegated to Fr Pickin clearly identified. This matter is squarely in dispute, contrary to AS [30]. The content of AS [29] does not assist the Appellant. A relevant assumption of responsibility must bear some connection to the duty alleged, and must extend beyond a mere capacity.[43] The vague contention that young people during the relevant time period "*experienced*" the "*trust, deference, power, hierarchy, intimacy and control of the diocesan clergy*" (AS [29]), is insufficient to equate to an assumption of responsibility for the care of those young people.

E.2 Essence of a non-delegable duty

40. A non-delegable duty of care is: *"'a duty … of a special and 'more stringent' kind' and not merely a duty to take care, but a 'duty to ensure that reasonable care is taken'; to 'ensure that the duty is carried out'; or to 'procur[e] the careful performance of work [assigned] to others'"*.[44] It is not a duty to prevent any kind of harm.[45] That would be true strict liability. The duty is owed directly by the defendant because of an antecedent

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[41] Non-delegable duty was not addressed in the plaintiff's submissions at first instance: ABFM-2. It was addressed only in the context of the assessment of damages and the operation of s 5Q of the CLA in the plaintiff's oral closing submissions: ABFM-2 at 290E-L.

[42] The only references to a non-delegable duty of care in the primary judge's judgment are at CAB 11-12 [11] and CAB 60-61 [235]. See also CAB 175-176 [156] (Leeming JA).

[43] See *Modbury* (2000) 205 CLR 254 at [23] (Gleeson CJ).

[44] *Willmot* (2024) 98 ALJR 1407 at [49] (Gageler CJ, Gordon, Jagot and Beech-Jones JJ) (Citations omitted). See also *Bird v DP* (2024) 98 ALJR 1349 at [36] (Gageler CJ, Gordon, Edelman, Steward and Beech-Jones JJ).

[45] *Lepore* (2003) 212 CLR 511 at [22], [31] (Gleeson CJ), [103] (Gaudron J), [261] (Gummow and Hayne JJ), [340] (Callinan J).

relationship between it and the plaintiff; it is a direct liability as opposed to a vicarious one.[46] It cannot be discharged by entrusting the performance of the defendant to another.[47] It is breached when the person engaged by the defendant fails to exercise reasonable care.[48]

E.3 Establishing the duty

41. Because of the special and more stringent nature of non-delegable duties, they are limited to specific, policy driven occasions which may be loosely grouped as public safety, protection of property rights, and the protection of vulnerable parties.[49] The special protective relationships include but are not limited to hospital and patient, school and pupil, and employer and employee.[50] They do not presently include a diocese and any particular class of persons.

42. There is considerable conceptual debate and confusion about the particular features giving rise to a non-delegable duty of care, their genesis and their place in the current legal landscape vis-à-vis vicarious liability, as Leeming JA observed: CAB 179 [166]. Accordingly, they should not be extended beyond the limited number of existing categories without a "*sound doctrinal basis*", and unless there is a pressing practical reason for expansion.[51] That is a course which the Court followed in *Montgomery*,[52] declining to extend the established categories of non-delegable duties to highway authority and road users.

43. To the extent non-delegable duties have been recognised, the critical indicia are high levels of: (1) assumption of responsibility; and (2) vulnerability of the plaintiff.[53] The touchstone in respect of both is control. In *Kondis*, Mason J argued that a non-delegable duty would arise: "*because the person on whom it is imposed has undertaken the care, supervision or control of the person … or is so placed in relation to that person … as to*

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46 *Bird v DP* (2024) 98 ALJR 1349 at [36] (Gageler CJ, Gordon, Edelman, Steward and Beech-Jones JJ).
47 *Lepore* (2003) 212 CLR 511 at [20] (Gleeson CJ).
48 *Kondis* (1984) 154 CLR 672 at 694 (Deane J).
49 P Giliker, *Vicarious Liability in Tort* (Cambridge University Press, 2010) at 117-118.
50 *Bird v DP* (2024) 98 ALJR 1349 at [37] (Gageler CJ, Gordon, Edelman, Steward and Beech-Jones JJ).
51 *Leichhardt Municipal Council v* ***Montgomery*** (2007) 230 CLR 22 at [156] (Hayne J).
52 (2007) 230 CLR 22.
53 *Bird v DP* (2024) 98 ALJR 1349 at [37] (Gageler CJ, Gordon, Edelman, Steward and Beech-Jones JJ); *Burnie Port Authority* (1994) 179 CLR 520 at 551 (Mason CJ, Deane, Dawson, Toohey and Gaudron JJ); *Kondis* (1984) 154 CLR 672 at 687 (Mason J); *Introvigne* (1982) 150 CLR 258 at 271 (Mason J). See also *Montgomery* (2007) 230 CLR 22 at [123] (Kirby J).

assume a particular responsibility for [their] safety, in circumstances where the person affected might reasonably expect that due care will be exercised".[54]

44. In the hospital cases, that undertaking is established when the hospital accepts the plaintiff as a patient for treatment.[55] In *Introvigne*, in finding that the Commonwealth had a non-delegable duty to a pupil enrolled at a public school in the Australian Capital Territory, it was significant that the parents were obliged to have their child enrolled at a school maintained by the Commonwealth or a private school, and to cause their child to attend that school.[56] Similarly, in *Woodland*, Lord Sumption said the antecedent relationship "*places the claimant in the actual custody, charge, or care of the defendant ...*".[57] In the hospital and the school cases, it is clear that the party which owes the duty has control of the circumstances to which the beneficiary of the duty is exposed, and the beneficiary of the duty, in the one case because of infirmity and in the other because of age, is unable to assert any independent control over the way in which they are treated.[58] The same element of control exists in respect of the relationship between employer and employee.[59] What is significant in that relationship is that the employer has the exclusive responsibility for the system of work "*... to which he subjects his employee and the employee has no choice but to accept and rely on the employer's provision and judgment in relation to these matters*".[60]

E.4. Scope of the duty

45. Once a non-delegable duty of care is established it is then necessary to ascertain its scope. Despite its stringent nature, the scope of any such duty is not akin to strict liability. It falls short of that in three aspects.

46. *First*, the duty is to guard against a foreseeable risk of a particular kind or class.[61] For example, if a pupil is killed on school grounds by an asteroid, the school's non-delegable duty to that pupil cannot be said to extend to that class of risk.

47. *Second*, the risk must arise in relation to a sphere of activity which sufficiently implicates

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54 *Kondis* (1984) 154 CLR 672 at 687 (Mason J) (emphasis added).
55 See, eg, *Cassidy v Ministry of Health* [1951] 2 KB 343.
56 *Introvigne* (1982) 150 CLR 258 at 271 (Mason J).
57 ***Woodland*** *v Swimming Teachers' Association* [2014] 1 AC 537 at [23] (Lord Sumption JSC).
58 *Montgomery* (2007) 230 CLR 22 at [152] (Hayne J).
59 *Kondis* (1984) 154 CLR 672 at 687 (Mason J).
60 *Kondis* (1984) 154 CLR 672 at 687-688 (Mason J).
61 *Lepore* (2003) 212 CLR 511 at [103] (Gaudron J). See also *Woodland* [2014] AC 537 at [7] (Lord Sumption JSC).

the duty ower's enterprise,[62] and the aspect of that enterprise which has been delegated. In the context of a school and pupil, if a pupil trips over and is injured on school grounds in the course of an ordinary school day, the activity is captured by the duty ower's enterprise.[63] If a pupil trips over and is injured on a school camp, that activity is likely also captured because, similarly, the pupil is "*beyond the control and protection of his parent and is placed under the control of the schoolmaster*".[64] In the grey area is an activity (leading to injury) occurring before the school bell, or involving the pupil's commute to school. Establishing a duty in respect of such an activity will require an assessment of the limit of the duty ower's enterprise (a fact-specific inquiry).[65]

10 48. So much is also apparent from the hospital and patient cases which in determining the limit of the duty ower's enterprise consider whether the hospital was a place where the person in need of treatment went to obtain that treatment or alternatively, where medical care facilities were provided for the use of a physician and his patient. In the former case, the duty ower's enterprise is implicated,[66] in the latter it is not.[67] Closer scrutiny of the facts is necessary.[68]

49. *Third,* while the duty can be expressed positively, the duty is still one to take reasonable care; it is not a duty to guarantee an outcome.[69]

E.5 No non-delegable duty here

50. Contrary to AS [35], the existing categories of special protective relationship should not
20 be extended to include the Respondent and a class of persons that would include the Appellant. The Appellant has mischaracterised the critical indicia. While the Respondent accepts that the Appellant, by reason of his age (although he was in high school), was vulnerable, being "*subject to the churches educational and pastoral care*" is in no way analogous to the cases discussed above where an assumption of responsibility has been

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62 See *Bazley v Curry* [1999] 2 SCR 534 at [22], [36]–[40] (McLachlin J).
63 *Lepore* (2003) 212 CLR 511 at [105] (Gleeson CJ).
64 *Lepore* (2003) 212 CLR 511 at [139] (McHugh J), quoting *Richards v Victoria* [1969] VR 136 at 138-139 (Winneke CJ).
65 See, eg, *Trustees of Roman Catholic Church for Diocese of Bathurst v Koffmann* (1996) Aust Torts Reports 81-399.
66 *Albrighton v Royal Prince Alfred Hospital* [1980] 2 NSWLR 542.
67 *Ellis v Wallsend District Hospital* (1989) 17 NSWLR 553 at 604 (Samuels JA). See also, *Elliott v Bickerstaff* (1999) 48 NSWLR 214.
68 *Ellis v Wallsend District Hospital* (1989) 17 NSWLR 553 at 604-605 (Samuels JA).
69 *Lepore* (2003) 212 CLR 511 at [104] (Gaudron J); *Northern Sandblasting* (1997) 188 CLR 313 at 330-331 (Brennan CJ).

established. Even if it was, the evidentiary foundation for that contention does not exist.

51. The interaction which gave rise to Fr Pickin's invitation to the Appellant and Mr Perry to attend the presbytery on a Friday night, and Friday nights thereafter, arose incidentally from Fr Pickin's role teaching scripture at the School, a government school. The State of New South Wales, through the School, probably owed the Appellant a recognised non-delegable duty of care. However, there is no evidence or findings about the the relationship between the Appellant and the Respondent at the point in time when the Appellant met Fr Pickin save that we know the Appellant met Fr Pickin for the first time through the School.[70]

52. At AS [36], the Appellant draws a parallel with the hospital cases because the patient, or in this case the Appellant, has no say over the terms on which the hospital or the Respondent's personnel are engaged. That may be true, although the authorities cited do not appear to consider the proposition. More significantly however, the submission ignores the fact that in the hospital cases the patient has been admitted for treatment. The same cannot be said of the Respondent here.

53. The entrustment contended for at AS [37] may not be confined to the classroom or to school hours – matters which go to the scope of any duty – but it is confined by the relationship between the parties which exists at the time the event leading to injury occurs. *Geyer v Downs*[71] is not dissimilar to *Commonwealth v Introvigne* – which it predated – in that the event leading to injury occurred shortly prior to the school bell ringing. However, the relationship between the pupil and the "*schoolmaster*" had come into existence by then. Critically, the pupils were enrolled at the school, and beyond the control and protection of their parents.

54. Similarly, the Appellant's submissions at AS [38] again ignore the fact that in the employer cases, the employee is subjected to the employer's system of work.

55. There is also no evidence or findings that the Appellant and/or Mr Perry was in any way required to attend the presbytery. The evidence summarised at AS [29] does not meet the requisite high threshold – being a legal requirement to attend (in the school cases), a medical admission (in the hospital cases), or a contractual requirement to attend (in the employment cases). The Appellant's evidence to the effect that when Fr Pickin invited

[70] ABFM-1 at 364, ll 115-116. See also CAB 40 [140], 206 [255].
[71] (1977) 138 CLR 91.

him to the presbytery he thought it was to further his religious instruction was not accepted by the primary judge: CAB 59-60 [229]. The invitation was not for a Church event: CAB 49 [190], 57 [218]. The Appellant's own evidence was contrary to any suggestion that he was required or compelled to attend the presbytery in that he said he eventually simply stopped going: CAB 39-40 [139]. There is no evidence that the boys were not free to leave at any point, as they did. No one had to sign them out or discharge them or note that they had left for the day.

56. It was never contended that the Appellant and/or Mr Perry were regular parishioners which might engage the evidence relied upon at AS [39]. The slim evidence about the relationship between the Catholic Church broadly and the Appellant in this case was to the contrary, as set out above at [7].

57. None of the above supports the Appellant's contention at AS [37] that the Appellant was "*entrusted to the care of an institution*".[72] There is no evidence or findings that the Appellant's parents or anyone else were involved in "*placing*" the Appellant in the care, or the "*actual custody*" of the Respondent when he attended the presbytery (or scripture classes at the School).[73] There is no evidence or findings that anyone other than the Appellant, Mr Perry, possibly some other boys, and Fr Pickin were aware of the events at the presbytery.[74]

58. AS [40] is incorrect regarding the nature of the delegation in circumstances in which the evidence was predicated on the incorrect assumption that Fr Pickin was the parish priest: CAB 52-54 [204].[75] It is also contrary to the Appellant's own evidence. Fr Dillon said that Church practice was that children should be supervised by adults including volunteer parents while at the presbytery in what are plainly structured events: CAB 55 [206]. Fr Dillon described the actions of Fr Pickin in using the presbytery to host adolescent boys

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[72] Cf *Lepore* (2003) 212 CLR 511 at [36] (Gleeson CJ). The examples were a childcare centre and something akin to after school care as that concept is understood in this country.

[73] The primary judge said it may be "sensibly inferred" that the Appellant's parents allowed him to accept Fr Pickin's invitation: CAB 56 [213]. The evidence was to the contrary: ABFM-2 at 506. This finding was only raised in the vicarious liability case, and so was not considered by the COA.

[74] Cf *Geyer v Downs* (1977) 138 CLR 91 where the headmaster knew the grounds were utilized prior to the bell ringing.

[75] *Contra* AS [31]. The findings relied on at AS [27]-[28] (CAB 17 [39], 52 [204], 57 [218]-[219] and 59-60 [228]-[229]) and AS [40] (CAB 57 [216], 55-57 [210]-[215]) are all referable to Fr Pickin being a parish priest (see CAB 14-15 [24], 15 [28], 16 [35], 17 [39], 17-18 [40]). Regarding CAB 55-56 [210], cf the primary judge's observations about *Prince Alfred* in which Fr Dillon also gave evidence about the role of an assistant priest: CAB 51 [197] – CAB 52 [202].

and supply them with alcohol and cigarettes to underage children as "*totally foolhardy and irresponsible*": CAB 55 [208]. Providing alcohol and cigarettes to underage children would be "*out of order for a priest, reprehensible and to be condemned*" (CAB 55 [208]) and that "*[u]se of the priest's personal room or rooms would have been unheard of, even in those 'innocent times'*": ABFM-1 at 442.

59. Contrary to AS [41], the Appellant does not meet the defining features as enunciated in *Woodland*: there was no antecedent relationship placing the Appellant in the "*actual custody, charge or care of*" the Respondent.

60. At its highest, the Appellant was on the premises of the Respondent at the (unsanctioned) invitation of Fr Pickin. The law does not support a finding that being an occupier of premises is sufficient, without more (e.g. a substance stored in, or an activity conducted on, the premises is positively dangerous),[76] to found a non-delegable duty. There is nothing positively dangerous about Church premises being used as a residence for a priest.[77]

E.6 Scope of any non-delegable duty limited

61. Even if it could be established that a non-delegable duty of care existed between the Appellant and the Respondent, the scope of such a duty would not extend to the kind of harm alleged to have been caused to the Appellant. This argument proceeds on the assumption that an ordinary duty of care has been established, such that the risk of abuse was foreseeable (contrary to the submissions at [16]-[17] above). Even if this were established, the Respondent's acceptance of an invitation to provide religious instruction to high school aged children at the School, does not bring the risk of sexual abuse within the sphere of its enterprise. That is so where the abuse was both temporally (i.e. outside of the hours of Church events and religious instruction) and geographically separate from the Respondent's enterprise (i.e. outside the classroom), and where there was no knowledge of the presbytery being used in the unsanctioned way as it was by Fr Pickin. Fr Pickin's acts were random and wholly unconnected to the Respondent's enterprise.

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[76] *Burnie Port Authority* (1994) 179 CLR 520 at 557-558 (Mason CJ, Deane, Dawson, Toohey and Gaudron JJ).
[77] See, generally, *Northern Sandblasting Pty Ltd* (1997) 188 CLR 313.

Part VI: Argument on the Respondent's NOC

A. Ground 1 – Bell CJ at [16]

62. Leeming JA found error in the primary judge's fact finding: CAB 174 [152]. That Bell CJ agreed is apparent at CAB 127 [16], where his Honour states that he is "*inclined to agree with Leeming JA's careful and detailed analysis in relation to the challenge to the primary judge's findings of sexual assault*" and refers to "*the success of that challenge*" (in respect of those grounds of appeal). Bell CJ determined that it was not necessary to rehear or remit the matter, under s 75A of the *Supreme Court Act 1970* (NSW), because of the finding of an absence of any duty of care owed by the Respondent to the Appellant. Consideration of a rehearing or remitter could only have arisen in circumstances in which Bell CJ agreed with Leeming JA that there was material error in the fact-finding process.

63. If, contrary to the above, Bell CJ did not express a final view on whether there were material errors in the primary judge's fact-finding process, then the Court should remit the matter to the COA (NOC Ground 1a). Alternatively, the Court should conclude for itself that there were such errors and then remit the matter to the COA to complete the s 75A rehearing process (NOC Ground 1b).

64. Also to be remitted is the issue of breach, at least as regards the ordinary duty, and causation; both being issues before the COA.[78] Both Bell CJ and Leeming JA (with whom Ball JA agreed on this point) held that it was not necessary to resolve the factual questions relating to breach and causation, because of the absence of any duty (CAB 127 [16], CAB 203 [245], CAB 206 [253]). Leeming JA indicated that the findings on breach were "*problematic*", and that it was "*far from obvious*" that causation was established (CAB 202-203 [242]-[243]).

B. Ground 2 – The Court determines all outstanding issues.

65. If a duty of care is found (ordinary or non-delegable), and the Court decides to determine all issues in the case now, the Court should find that the COA should have concluded that: (1) the Appellant failed to establish that he was sexually assaulted by Fr Pickin; and (2) the Appellant failed to establish breach at least in respect of the ordinary duty of care, and causation in respect of both duties.

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[78] The issue of breach was addressed in submissions to the COA by reference to Ground 5 of the NOA. No issue in this respect was raised by the Appellant in submissions in response. The issue of causation was raised by Ground 6 of the NOA (CAB 107 [6]).

B.1 The Court should find that the Appellant failed to prove he was assaulted

66. The two witnesses who gave evidence concerning events at the presbytery involving Fr Pickin were the Appellant and Mr Perry. Each gave different accounts as to: (a) in which year and when they attended the presbytery; (b) who was at the presbytery; and (c) what happened at the presbytery.

67. Mr Perry's evidence was that the presbytery gatherings were irregular and were properly characterised as social events, involving a number of students: ABFM-1 at 359 [10]. He recalled that they took place when he was approximately 15 or 16 (i.e. 1970 or 1971): ABFM-1 at 359 [9]. He and the Appellant arrived and left together (CAB 133 [34]), and he did not leave the Appellant alone at the presbytery at any time (although it was possible Mr Perry was in a different part of the presbytery to the Appellant at times): ABFM-1 at 360 [14], ABFM-2 at 194. He did not notice the Appellant to have been highly intoxicated or distressed, or anything unusual about the Appellant or Fr Pickin: ABFM-1 at 360 [15]-[16].

68. The Appellant's evidence as to when the alleged abuse occurred changed: see CAB 148 [183] - CAB 150 [89], CAB 159 [115]. The Appellant denied anyone else other than Mr Perry was present at all at the presbytery: CAB 162 [121]. As well, he gave evidence that Mr Perry was absent from the presbytery *at the time* of the abuse. This was explained by the Appellant in three ways: *first*, Mr Perry was sent away by Fr Pickin to the shops: ABFM-1 at 307 [17]-[18]. S*econd*, Fr Pickin told the Appellant that he had sent Mr Perry away: ABFM-1 at 326 [15]-[16]. *Third*, Fr Pickin told the Appellant that Mr Perry had gone home: ABFM-2 at 124-125 ll 39-49.

69. These explanations are plainly inconsistent with Mr Perry's evidence that he had never left the Appellant alone at the presbytery, which should be preferred by the Court (as it was by the COA): CAB 169 [138(4)], 209 [263]. If Mr Perry's evidence of being by the Appellant's side on these evenings is accepted, then the abuse could not have occurred because the primary judge also found, consistent with Mr Perry's evidence, that he knew nothing about any abuse, having not observed it and having not been told about it until called to give evidence in the proceedings: ABFM-1 at 360 [16]-[17], CAB 42 [151], 46-47 [175]-[176].

70. The primary judge, notwithstanding having accepted Mr Perry's evidence that he never left to go to any shops (CAB 42 [150]) and that other boys were at the presbytery (CAB

32 [105], 45 [167], [169], CAB 59 [229]), concluded that the abuse had occurred but in circumstances where Mr Perry was in an adjacent room distracted by the company of other students: CAB 32 [105], 33 [112], 44 [163], 45 [169]. That finding was not open on the evidence because: (a) it was not part of the Appellant's case; (b) it was never the subject of any cross-examination of Mr Perry; and (c) it is inherently unlikely given the extent and nature of the sexual abuse claimed by the Appellant and its frequency as alleged by him. A finding that Mr Perry, a generally credible witness (CAB 47 [176]), was oblivious, or indifferent, to his friend being the victim of serious sexual abuse on six occasions when he was only a short distance away was simply not open: see CAB 31 [101].

71. In addition to the inconsistencies with Mr Perry's account, the reliability of the Appellant's account is undermined by the matters summarised by the COA at CAB 168-171 [138]-[143]. These included the following. *First*, the Appellant's account as to the timing of the abuse was unreliable, and the reason given for the error was disingenuous: see CAB 148-149 [83]-[86]. *Second*, the Appellant's evidence of more recent events, including when he last saw Mr Perry, was also unreliable, which (in combination with his life history) indicated that his recollection of the abuse may have been "*imperfect*": CAB 169 [139] - CAB 171 [143]. Correctly, Leeming JA observed that, "*[t]he difficulties with the plaintiff's evidence were so pronounced, and went so directly to the timing and opportunity for the sexual assaults, that it was not sufficient merely to put them to one side under the rubric of 'problems' or 'difficulties'*": CAB 165-166 [132].

B.2 The Court should find that breach and causation are not made out

72. **Breach.** In the event the Court does not accept the framing of the ordinary duty by reference to a particular class of risk (as set out above at [16]), then it should accept, at the breach stage (CLA s 5B), that the particular harm was not reasonably foreseeable, for all the same reasons at [17].

73. If, contrary to the above, the Court finds that the risk of sexual abuse was reasonably foreseeable, then the Court should find that each of the precautions the Appellant pleaded (ABFM-1 at 18) were either not reasonable (CLA s 5B) for the reasons set out at CAB 203 [243]-[244], or were in fact taken (such as not permitting a priest to have children in the presbytery without other adults present, which the evidence of Fr Dillon made clear

was not permitted: ABFM-1 at 442).[79]

74. In respect of any non-delegable duty, the question of breach will turn on the framing of the duty, the particulars of the precautions and indeed, how this Court states the law after *Lepore* and whether fault has any role to play.

75. **Causation.** Even if the precautions had been taken, "*it is far from obvious that … it would have made any difference to Fr Pickin's conduct*": CAB 203 [243]. The Appellant bore the onus of proving on the balance of probabilities, any fact relevant to the issue of causation (CLA s 5E). That analysis was not discharged.[80] The more probable inference from the evidence is that the abuse (if proven) would have been perpetrated in any event, and that the Appellant's pleaded injuries and disabilities were not caused by any act or omission of the Diocese (CLA s 5D).[81]

E. Relief

76. The appeal should be dismissed with costs. Alternatively, the matter should be remitted to the COA.

Part VII: Time

77. It is estimated that 2.5 hours will be required for the presentation of the respondent's oral argument.

Dated: 18 July 2025

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[79] See also RBFM at 90-92 [58]-[65].
[80] *Condos v Clycut Pty Ltd* [2009] NSWCA 200 at [68] (McColl JA, Campbell and Macfarlan JJA agreeing).
[81] See also RBFM at 92-93 [66]-[68].

ANNEXURE TO RESPONDENT'S SUBMISSIONS

No	Description	Version	Provision(s)	Reason for providing this version	Applicable date or dates (to what event(s), if any, does this version apply)
1	*Civil Liability Act 2002* (NSW)	16 June 2022	ss 5B, 5C, 5D, 5E, 6D, 6E, 6F, Sch 1 cl 43	Version in force when proceedings commenced	Current, since 16 June 2022
2	*Wrongs Act 1958* (Vic)	Current	ss 90, 91, 93	For illustrative purposes only	Current
3	*Civil Liability Act 2003* (Qld)	Current	ss 33C, 33D, 33E, 86	For illustrative purposes only	Current
4	*Civil Liability Act 1936* (SA)	Current	ss 50C, 50D, 50E, 50F	For illustrative purposes only	Current
5	*Civil Liability Act 2002* (Tas)	Current	ss 4, 49F, 49G, 49H	For illustrative purposes only	Current
6	*Personal Injuries (Liabilities and Damages) Act 2003* (NT)	Current	ss 4, 17B, 17C, 17D, 17E	For illustrative purposes only	Current