



# HIGH COURT OF AUSTRALIA

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### Details of Filing

File Number: S94/2025  
File Title: AA v. The Trustees of the Roman Catholic Church for the Dioc  
Registry: Sydney  
Document filed: Form 27F - Respondent's Outline of oral argument  
Filing party: Respondent  
Date filed: 07 Aug 2025

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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 OUTLINE OF ORAL SUBMISSIONS**

## Part I: Certificate

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

## Part II: Outline of argument

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2. Unless an ordinary duty of care is established, no question can arise of the duty being “non-delegable”: *Hollis v Vabu Pty Ltd* (2001) 207 CLR 21 at [27] (**JBA Vol 3, Tab 17**). The starting point is therefore whether the Court of Appeal erred in overturning the primary judge’s finding of a duty of care. If it did not, the appeal must be dismissed.

### **A. No ordinary duty of care was owed by the Diocese**

3. **Defining the duty.** The content and scope of an ordinary duty of care must be defined with precision: *Brookfield Multiplex Ltd v Owners Corporation Strata Plan 61288* (2014) 254 CLR 185 at [169] (**RBFA, Tab 1**). Three features of the pleaded duty (**ABFM-1 at 15**) stand out. *First*, the specified duty-ower is the Diocese. The primary judge and the Appellant erroneously elide between the Diocese’s knowledge, and that of clergy members generally: **AS [3]-[4], [15]**; **PJ [231] (CAB 60)**; **CA [207] (CAB 192)**. *Second*, the specified harm is “foreseeable and not insignificant harm”. The duty must be referable to harm of the kind or class that was suffered: *Tame* (2002) 211 CLR 317 at [12], [203], [249] (**JBA Vol 5, Tab 29**); *Mallonland* (2024) 98 ALJR 956 at [29] (**RBFA, Tab 3**). *Third*, the person to whom the duty is owed is children “in the care” of the Diocese’s priests, or young people “entrusted” to the pastoral or educational care of the Diocese: **AS [15], [48], [54]**.
4. **Reasonable foreseeability.** The specified harm (sexual abuse by a priest) was not reasonably foreseeable by the Diocese in the 1960s. The conclusion of the primary judge to the contrary hinged on the evidence of Fr Dillon: **PJ [227]-[252] (CAB 59-64)**. The Appellant argued, by notice of contention, that the primary judge ought to have found that the Diocese knew or ought to have known of the risk of the specified harm, because Mr McClung had complained to Fr Doran (a parish priest of the Diocese) that Fr Pickin had sexually assaulted him (**CAB 112**). The Court of Appeal unanimously, and correctly, agreed: (1) that the primary judge erred in relying upon Fr Dillon’s evidence (**ABFM-1 at 443**) to find the Diocese knew of the risk of the specified harm; (2) that there was no cogent evidence that the Diocese knew of the risks posed by priests generally, or Fr Pickin specifically: **CA [12] (CAB 126)**, **[207]-[241] (CAB 192-202)**, **[253] (CAB 206)**.
5. **Attribution.** The Appellant’s argument (**AS [53], AR [7]**) that the knowledge of Fr Doran should be attributed to the Diocese by operation of s 6O was not put below and should not

be entertained now: CA [232] (**CAB 199**). In any event, the argument should not be accepted. Fr Doran was not a “senior member of the Diocese”: CA [229]-[230] (**CAB 198**). Even if Fr Doran’s role included receiving complaints, there was no evidence that there was a corresponding duty to communicate such complaints: CA [228] (**CAB 198**), [234]-[239] (**CAB 200-201**). This is fatal to the Appellant’s argument: *Nationwide News Pty Ltd v Naidu* (2007) 71 NSWLR 471 at [41] (**JBA Vol 7, Tab 45**); *Sargent v ASL Developments Ltd* (1974) 131 CLR 634 at 658 (**RBFA, Tab 4**).

6. **Further factors.** The lack of any assumption of responsibility or entrustment also tells against the existence of an ordinary duty. A close examination of the relationship between the Appellant and the Diocese shows it was limited to attending weekly scripture classes, arranged by the school, and intermittent attendance at mass: PJ [213] (**CAB 56**); **ABFM-1 at 314**; CA [205] (**CAB 191-192**); **ABFM-1 at 441**; PJ [10] (**CAB 10-11**); PJ [137] (**CAB 38**); PJ [218] (**CAB 57**); PJ [229] (**CAB 59**); PJ [139] (**CAB 40**); **ABFM-2 at 505-506**. In each case, the Diocese did not exercise exclusive control over the Appellant’s care. There are no findings to support the assertion that young people generally “experienced” the trust, power, intimacy or control of diocesan clergy: *contra* **AS [25], [28], [29], [55], AR [13], [18]**. The evidence of the Appellant’s brother, Mr McClung and BB rises no higher than that priests were respected members of society: **ABFM-1 at 336, 355, 340**. Fr Dillon’s evidence was that any contact the Diocese had with young people was mediated by the presence of other adults, and the expectations on priests to engage with young people were confined to the classroom, the school, or church: **ABFM-1 at 441-442; ABFM-2 at 561**. The Court of Appeal were entitled to proceed on the true basis that Fr Pickin was only an assistant priest: CA [203] (**CAB 191**).

**B. Lepore should not be re-opened and overruled**

7. At least four of the majority justices in *Lepore* held that the non-delegable aspect of a duty of care is not a vehicle to extend 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: *New South Wales v Lepore* (2003) 211 CLR 511 (**JBA Vol 4, Tab 24**) at [20], [31]-[38] (Gleeson CJ), [265]-[270] (Gummow and Hayne JJ), [340] (Callinan J). See also Gaudron J at [97], [99]-[105], [123]-[126], [134]. Neither *Willmot v Queensland* (2024) 98 ALJR 1407 (**JBA Vol 7, Tab 49**) nor *Bird v DP* (2024) 98 ALJR 1349 (**JBA Vol 6, Tab 32**) detract from the authority of *Lepore*. The safe working cases referred to at **AS [38]** did not hold that a non-delegable duty could be “breached by intentional wrongdoing”.

8. *Lepore* should not be reopened: **RS [26]-[29]**; nor overruled: **RS [30]-[36]**.

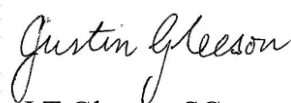
**C. No non-delegable duty of care was owed by the Diocese**

9. The principles relevant to establishing the existence and scope of a non-delegable duty of care (**RS [41]-[49]**) are not in dispute. The Diocese did not assume the requisite level of responsibility for the care, supervision or control of the Appellant (see [6]). Even if a non-delegable duty is found, the activity that produced the risk of criminal wrongdoing – hosting boys in the presbytery, and supplying them with beer, without an additional adult present, had no connection to the Respondent’s enterprise: the presbytery gatherings were outside the hours of class, mass or other church event, they did not involve religious education, and the activity was against the accepted practice of the Diocese at the time: PJ [208] (**CAB 55**); **ABFM-1 at 442**; **ABFM-2 at 561-562**.

**D. Notice of Contention (CAB [260])**

10. **Ground 1.** If either Ground of Appeal succeeds, this Court should remit the matter to the Court of Appeal to complete the s 75A rehearing process: **RS [62]-[64]**.
11. **Ground 2.** Alternatively, the Court of Appeal should have concluded that the Appellant failed to establish that he was sexually assaulted by Father Pickin: **(1)** The Appellant contended for three different times when the assaults occurred, none of which the primary judge accepted. **(2)** Contrary to the finding that the abuse occurred while Mr Perry was in an adjacent room with other boys, the Appellant’s case was that Mr Perry was absent from the presbytery at the time of the abuse. **(3)** While it was put to Mr Perry was that he might have gone to a different part of the presbytery at some point, that falls short of Mr Perry being in another part of the presbytery and at that time the Appellant was abused. **(4)** The scenario found by the primary judge is inherently unlikely given the nature and extent of the abuse alleged. **(5)** Ball JA’s reasoning has its own problems. **RS [66]-[71]**.
12. The Appellant failed to establish breach of duty (which was argued in the Court of Appeal without issue) and causation. For the same reasons above at [4], the particular harm was not foreseeable. The posited precautions were either not reasonable or were in fact taken. A section 5B enquiry is still required in respect of a non-delegable duty: **RS [72]-[74]**. Even if the precautions were taken, it would not have made a difference: **RS [75]**.

Dated: 7 August 2025



J T Gleeson SC

J C Sheller SC

C J Robertson

P F Bristow