HIGH COURT OF AUSTRALIA

GAGELER CJ,
GORDON, EDELMAN, STEWARD, GLEESON, JAGOT AND BEECH-JONES JJ

AA APPELLANT

AND

THE TRUSTEES OF THE ROMAN CATHOLIC CHURCH FOR THE DIOCESE OF MAITLAND-NEWCASTLE RESPONDENT

AA v The Trustees of the Roman Catholic Church for the Diocese of Maitland-Newcastle
[2026] HCA 2
Date of Hearing: 7 August 2025
Date of Judgment: 11 February 2026
S94/2025

ORDER

1. *Appeal allowed with costs.*

2. *Set aside orders 1 and 2 made by the Court of Appeal of the Supreme Court of New South Wales on 15 April 2025 and orders 7 and 8 made by the Court of Appeal on 7 May 2025. In their place, order that the appeal to the Court of Appeal be dismissed with costs save to the extent that order 1 of the orders made by Schmidt A-J on 18 October 2024 be varied to substitute for "$636,480.00" the sum of $335,960.*

On appeal from the Supreme Court of New South Wales

Representation

P D Herzfeld SC and J A G McComish with P A Tierney for the appellant (instructed by Koffels Solicitors and Barristers)

J T Gleeson SC and J C Sheller SC with C J Robertson and P F Bristow for the respondent (instructed by Makinson d'Apice Lawyers)

CATCHWORDS

AA v The Trustees of the Roman Catholic Church for the Diocese of Maitland-Newcastle

Tort – Negligence – Duty of care – Non-delegable duty of care – Historic child sexual abuse – Where priest sexually abused appellant – Where appellant was child – Whether respondent liable to appellant for harm suffered – Whether respondent owed appellant duty of care – Whether respondent owed appellant non-delegable duty of care – Whether non-delegable duty of care owed in respect of harm caused by intentional conduct – Whether *New South Wales v Lepore* (2003) 212 CLR 511 should be re-opened and overruled – Whether sexual abuse by priest breached non-delegable duty causing harm – Whether limitations on damages by *Civil Liability Act 2002* (NSW) applied.

Words and phrases – "assumed duties", "assumpsit duties", "assumption of responsibility", "attribution", "breach", "care, supervision or control", "causation", "common element", "common law duty of care", "control", "damages", "delegate", "duty-holder", "duty of care", "duty to ensure that reasonable care is taken", "factual findings", "imposed duties", "intentional conduct", "intentional criminal act", "liability", "negligence", "non-delegable duty of care", "personal injury", "presbytery", "priest", "re-opened and overruled", "re-opened and overturned", "reasonable care", "reasonably foreseeable", "sexual abuse", "sexual assault", "special dependence or vulnerability", "special relations", "sufficient relationship of proximity", "undertaking", "vulnerability".

Civil Liability Act 2002 (NSW), ss 3B, 3C, 5Q, 6F, Pts 1A, 1B, 2.

1 GAGELER CJ, JAGOT AND BEECH-JONES JJ. The ultimate issue in this appeal is whether the respondent, generally referred to in these reasons as "the Diocese", is liable to the appellant, referred to as AA, for harm AA suffered as a result of Fr Ronald Pickin, a priest performing the function of parish priest at a parish within the geographical area of the Diocese, sexually assaulting AA multiple times in 1969, AA then being a child aged 13 years. Fr Pickin met AA when Fr Pickin taught scripture at the State high school AA attended and invited AA, along with other boys, to the presbytery on Friday nights where Fr Pickin lived. AA went to the presbytery because Fr Pickin was a priest. At the presbytery Fr Pickin gave the boys, including AA, alcohol and cigarettes and allowed them to gamble and keep their winnings from a poker machine Fr Pickin kept in an area off the bedroom in the presbytery. Fr Pickin sexually assaulted AA in that area of the presbytery out of sight of any other boy.

2 For the following reasons the Diocese is liable to AA for breach of a non-delegable common law duty of care it owed to AA in 1969. The duty the Diocese owed to AA in 1969 was a duty to a child to ensure that while the child was under the care, supervision or control of a priest of the Diocese, as a result of the priest purportedly performing a function of a priest of the Diocese, reasonable care was taken to prevent reasonably foreseeable personal injury to the child.

3 That non-delegable duty is to be recognised because no principled basis to distinguish the position of the Diocese in 1969 from that of a school authority at that time is discernible. As between the Diocese and AA at that time, a relationship existed in which, for its own purposes, the Diocese: (1) placed Fr Pickin in the position of performing the functions of parish priest of the Diocese; and (2) as part of the performance of those functions, required Fr Pickin to establish sufficiently familiar relationships with children to enable him to instruct them in their spiritual and personal growth as Catholics and created the circumstances in which he could do so; where the Diocese: (3) knew that children, by reason of their immaturity, were particularly vulnerable to many kinds of harm; (4) alone had practical capacity to supervise and control Fr Pickin's performance of his functions as parish priest; and (5) ought reasonably to have foreseen the risk of harm of personal injury to a child under the care, supervision or control of a parish priest such as Fr Pickin, including from an intentional criminal act of the priest or a third party (including an act of sexual abuse of the child).

4 Because the majority decision in *New South Wales v Lepore*[1] that there can be no common law non-delegable duty in respect of harm caused by an intentional

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1 (2003) 212 CLR 511.

criminal act should be re-opened and overturned, Fr Pickin's acts and the harm they caused AA are within the scope of the non-delegable duty.

5 Accordingly, the judgment entered by the primary judge in the Supreme Court of New South Wales (Schmidt A-J) in AA's favour[2] and set aside by the Court of Appeal of the Supreme Court of New South Wales (Bell CJ, Leeming and Ball JJA)[3] should be restored, albeit that the amount of damages must be reduced to accord with the limitations on damages imposed by the *Civil Liability Act 2002* (NSW) ("the NSW Civil Liability Act").

6 While there are differences between our reasoning and that of each of Gordon J and Edelman J, and we have reasoned to a different result in this case from Steward J, we are authorised by Gordon, Edelman and Steward JJ to record our agreement that a non-delegable common law duty of care requires that the duty-holder has undertaken the care, supervision or control of the person or property of another, or is so placed in relation to that person or their property as to assume a particular responsibility for their or its safety.[4] Further, we and Gordon J and Edelman J agree that a non-delegable duty may be breached by the intentional conduct of the duty-holder or their delegate.[5]

Background

7 The respondent is a statutory corporation constituted under the *Roman Catholic Church Trust Property Act 1936* (NSW), which was accepted in the proceeding commenced by AA in the Supreme Court of New South Wales in 2024 to have been appointed a "proper defendant" for the purposes of Div 4 of Pt 1B of the NSW Civil Liability Act for the unincorporated organisation known as the "Diocese of the Roman Catholic Church for Maitland-Newcastle" and, as such, to incur any liability on the claims made by AA in the proceeding as if the organisation had legal personality and as if anything done by the organisation had

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2 *AA v Trustees, Roman Catholic Church, Diocese of Maitland-Newcastle* (2024) 334 IR 70.

3 *Trustees of the Roman Catholic Church for the Diocese of Maitland-Newcastle v AA* (2025) 117 NSWLR 253.

4 *Kondis v State Transport Authority* (1984) 154 CLR 672 at 687. See our reasons at [13], [16], the reasons of Gordon J at [271]-[273], Edelman J at [334], [343]-[345], [348], and Steward J at [408].

5 See our reasons at [4], [15]-[51], the reasons of Gordon J at [278]-[287], and Edelman J at [334], [336]-[341].

been done by the respondent and any duty owed by the organisation had been owed by the respondent.[6] This is why it is unnecessary to distinguish subsequently in these reasons between the respondent and the Diocese.

8 It was not in dispute in the proceeding that the Roman Catholic Church in Australia was at relevant times divided into geographical areas known as "dioceses", a diocese being "a territory over which a Bishop rules as its proper and ordinary pastor", that each diocese was further subdivided into geographical areas known as "parishes", and that each parish was to have "its own rector as the proper pastor of that territory".[7] Nor was it in dispute that the Bishop of the Diocese had powers of direction and control over incardinated priests, who included Fr Pickin, and that both the conduct and the knowledge of the Bishop (be it what the Bishop knew or what he ought reasonably to have known) were attributable to the Diocese.[8]

9 The primary judge found that Fr Pickin had sexually assaulted AA multiple times in 1969, causing AA both immediate personal injury and ongoing consequential psychological harm. The primary judge held the Diocese liable for that harm on the principal basis that it was vicariously liable for Fr Pickin's wrongful acts of sexually assaulting AA.[9] The primary judge also held that the Diocese owed AA a common law duty of care which it breached by inaction on the part of the Bishop. Although AA also claimed that the common law duty of care the Diocese owed him was "non-delegable", the primary judge did not determine AA's claim on that basis.[10] The primary judge gave judgment for AA against the Diocese in the sum of $636,480 on the undisputed basis that the limitations on personal injury damages imposed by the NSW Civil Liability Act

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6 Section 6O(b) and (e) of the NSW Civil Liability Act. This section, which forms part of Div 4 of Pt 1B of that Act, applies to child abuse proceedings in respect of abuse perpetrated before the commencement of that Division by force of cl 45 of Sch 1 of that Act.

7 See Bouscaren, Ellis and North, *Canon Law: A Text and Commentary*, 4th ed (1963) at 152-153.

8 See *Hamilton v Whitehead* (1988) 166 CLR 121 at 127, approving *Tesco Supermarkets Ltd v Nattrass* [1972] AC 153 at 170.

9 *AA v Trustees, Roman Catholic Church, Diocese of Maitland-Newcastle* (2024) 334 IR 70 at 104-105 [210]-[219].

10 *AA v Trustees, Roman Catholic Church, Diocese of Maitland-Newcastle* (2024) 334 IR 70 at 105-112 [220]-[272].

did not apply to the Diocese's vicarious liability for Fr Pickin's intentional acts of sexually assaulting AA and ordered the Diocese to pay AA's legal costs of the proceedings.

10 The Court of Appeal allowed an appeal by the Diocese against the orders of the primary judge. Leeming JA concluded that the primary judge's fact-finding had miscarried,[11] a conclusion with which Ball JA disagreed.[12] Bell CJ indicated that he was "inclined to agree with" Leeming JA's analysis of the primary judge's fact-finding but considered it unnecessary to "resolve the factual questions".[13] AA accepted that the primary judge's holding that the Diocese was vicariously liable for the wrongful acts of Fr Pickin could not stand following this Court's decision in *Bird v DP (a pseudonym)*.[14] The Court of Appeal unanimously held that the Diocese did not owe AA the common law duty of care the primary judge had found.[15] Applying *Lepore*, the Court of Appeal also unanimously held that there could be no non-delegable duty owed by the Diocese in respect of an intentional criminal act of one of its priests.[16]

11 On appeal by special leave to this Court, AA argued that the Court of Appeal erred in holding that the Diocese did not owe him a non-delegable duty of care which was breached by the sexual abuse committed against him by Fr Pickin.

12 Pursuant to a notice of contention, the Diocese argued that, if Bell CJ is to be understood as having reached no conclusion as to whether Leeming JA was correct to conclude that the primary judge's fact-finding had miscarried, this Court should: remit the matter to the Court of Appeal to complete the process of determining whether the primary judge's fact-finding had miscarried and, if so

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11 *Trustees of the Roman Catholic Church for the Diocese of Maitland-Newcastle v AA* (2025) 117 NSWLR 253 at 284-290 [131]-[152].

12 *Trustees of the Roman Catholic Church for the Diocese of Maitland-Newcastle v AA* (2025) 117 NSWLR 253 at 310-314 [253]-[271].

13 *Trustees of the Roman Catholic Church for the Diocese of Maitland-Newcastle v AA* (2025) 117 NSWLR 253 at 259-260 [16].

14 (2024) 98 ALJR 1349; 419 ALR 552.

15 *Trustees of the Roman Catholic Church for the Diocese of Maitland-Newcastle v AA* (2025) 117 NSWLR 253 at 259 [13], 299 [196]-[197], 305-308 [228]-[241], 310 [253].

16 *Trustees of the Roman Catholic Church for the Diocese of Maitland-Newcastle v AA* (2025) 117 NSWLR 253 at 260 [17], 290-294 [156]-[168], 310 [253].

satisfied, determine the factual issues; or conclude for itself that the primary judge's fact-finding had miscarried and remit the matter to the Court of Appeal to determine the factual issues; or decide that AA failed to prove that Fr Pickin sexually assaulted him and therefore failed to establish breach of the duty of care and the causation of harm resulting from Fr Pickin sexually assaulting him.

Outline of principal conclusions

13 The reasons that follow explain that: (1) to the extent the majority in *Lepore* held that there could be no common law non-delegable duty in respect of harm caused by an intentional criminal act, *Lepore* should be re-opened and overturned; (2) the primary judge did not make the factual errors identified by Leeming JA; (3) on the facts as found by the primary judge, the Diocese in 1969 owed AA the non-delegable duty of care already described; (4) Fr Pickin's sexual assaults of AA meant that the Diocese breached that duty, causing AA the harm as found by the primary judge; and (5) the limitations on personal injury damages imposed by the NSW Civil Liability Act apply to the determination of the extent of the liability of the Diocese.

14 The rest of these reasons for judgment is structured as follows:

***Lepore* should be re-opened and overturned on non-delegable duties**

Non-delegable duties in general

15 Non-delegable duties were well-established in the common law of Australia before *Lepore*.[17] In *The Commonwealth v Introvigne*[18] Mason J explained that a "school authority owes to its pupil a duty to ensure that reasonable care is taken of them whilst they are on the school premises during hours when the school is open for attendance",[19] being "a duty the performance of which cannot be delegated".[20]

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17 (2003) 212 CLR 511.

18 (1982) 150 CLR 258.

19 (1982) 150 CLR 258 at 269, Gibbs CJ agreeing at 260 and Murphy J reaching the same view at 274.

20 (1982) 150 CLR 258 at 270.

The source of the non-delegable duty included that the "immaturity and inexperience of the pupils and their propensity for mischief suggest that there should be a special responsibility on a school authority to care for their safety, one that goes beyond a mere vicarious liability for the acts and omissions of its servants".[21]

16 In *Kondis v State Transport Authority*[22] Mason J, with whom Deane and Dawson JJ agreed, continued the analysis started in *Introvigne* by identifying the long pedigree of non-delegable duties of care in the common law[23] and explained that non-delegable duties had been recognised where the person on whom the non-delegable duty was imposed had "undertaken the care, supervision or control of the person or property of another or is so placed in relation to that person or [their] property as to assume a particular responsibility for [their] or its safety, in circumstances where the person affected might reasonably expect that due care will be exercised".[24] Mere foreseeability of the risk of harm is a necessary but not a sufficient condition to give rise to such a non-delegable duty.[25]

17 In *Burnie Port Authority v General Jones Pty Ltd*[26] Mason CJ, Deane, Dawson, Toohey and Gaudron JJ noted that it had "long been recognized that there are certain categories of case in which a duty to take reasonable care to avoid a foreseeable risk of injury to another will not be discharged merely by the employment of a qualified and ostensibly competent independent contractor" and in which the duty to take reasonable care to avoid a foreseeable risk of injury to another is a "duty to ensure that reasonable care is taken"; or, put differently, is a duty pursuant to which "the requirement of reasonable care ... extends to seeing that care is taken". Their Honours endorsed the explanation of those categories of case Mason J gave in *Kondis*, adding that "from the perspective of the person to whom the duty is owed", the relationship giving rise to a non-delegable duty is one of "special dependence or vulnerability on the part of that person".[27]

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21 (1982) 150 CLR 258 at 271.

22 (1984) 154 CLR 672.

23 (1984) 154 CLR 672 at 679-686.

24 (1984) 154 CLR 672 at 687.

25 (1984) 154 CLR 672 at 687.

26 (1994) 179 CLR 520.

27 (1994) 179 CLR 520 at 550-551.

18 Although Mason CJ, Deane, Dawson, Toohey and Gaudron JJ said in *Burnie Port Authority* that the law of negligence had come "to dominate the territory of tortious liability for unintentional injury to the person or property of another",[28] their Honours cannot be taken to have meant that the field of negligence is confined to unintentional injury. So much is clear from their reference to *McInnes v Wardle*[29] as an example of a case of non-delegable duty of care. There the defendant was held liable for the intentional criminal act of the defendant's independent contractor in lighting a fire on the defendant's land when the "defendant knew, or ought reasonably to have known, that fire would be employed if, as was likely, its use was found necessary or expedient in the opinion of the independent contractor".[30] As Evatt J put it in *McInnes v Wardle*, the defendant had "failed in *his* duty to see that reasonable care was used".[31]

19 Accordingly, in saying, as Mason CJ, Dawson, Toohey, Gaudron and McHugh JJ did in *Northern Territory v Mengel*,[32] that "the recent trend of legal development, here and in other common law countries, has been to the effect that liability in tort depends on either the intentional or the negligent infliction of harm", their Honours also said that this is "not a statement of law but a description of the general trend", of which *Burnie Port Authority* was then a recent example.[33] Their Honours were not suggesting that liability in negligence cannot apply to intentional acts or intentional acts intended to cause harm.

20 Consistently with *Introvigne*, *Kondis* and *Burnie Port Authority*, in *Northern Sandblasting Pty Ltd v Harris*[34] Brennan CJ explained a "non-delegable duty" of care to be a duty of care which the person on whom it is imposed is unable to discharge by engaging a competent person to perform the function to which the duty relates and which requires instead for its discharge that the person engaged in fact takes reasonable care in the performance of that function. In his Honour's words, "[i]n cases where this special duty is imposed on a person in relation to a particular task, that person is under a duty not only to use reasonable care but to

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28 (1994) 179 CLR 520 at 544.

29 (1931) 45 CLR 548.

30 See *Burnie Port Authority* (1994) 179 CLR 520 at 553.

31 (1931) 45 CLR 548 at 553 (emphasis in original). See also at 556 per McTiernan J.

32 (1995) 185 CLR 307.

33 (1995) 185 CLR 307 at 341-342.

34 (1997) 188 CLR 313.

ensure that reasonable care is used by any independent contractor whom [that person] employs to perform that task".[35] To the same effect, Lord Sumption in *Woodland v Swimming Teachers Association*,[36] having regard to the reasoning in *Introvigne*, *Kondis* and *Burnie Port Authority*, observed that the "expression 'non-delegable duty' has become the conventional way of describing those cases in which the ordinary principle is displaced and the duty extends beyond being careful, to procuring the careful performance of work delegated to others".

21 That the "ordinary principle" applicable to a common law duty of care is "displaced" in the case of a non-delegable duty by an "extend[ed]" and "more stringent" duty of care explains why statements to the effect that "[i]n order that there be a non-delegable duty of care there must first be a duty of care" and the "first step must be to determine whether the [defendant] was under any duty and only then may it be determined whether that duty was delegable"[37] are not to be applied literally. No two-stage process of analysis is required. Rather, a non-delegable duty to ensure that reasonable care is taken is a "special" kind of common law duty of care in negligence. It is a duty which obliges the duty-holder not merely to take reasonable care to avoid a foreseeable risk of injury to another person but to ensure that reasonable care is taken to avoid a foreseeable risk of injury to that other person by any delegate of the duty-holder, being a person performing for the duty-holder a function to which the duty relates.

22 In *Lepore*, McHugh J referred to the Full Court of the Supreme Court of Victoria in *Richards v Victoria*[38] rejecting that "reasonable foreseeability was relevant in determining the existence of the duty" and holding that the "relationship of school authority and pupil gave rise to a duty of care 'prior to and independently of the particular conduct alleged to constitute a breach of that duty'".[39] McHugh J also noted that this Court accepted that principle in *Victoria v Bryar*.[40] The point McHugh J was making is that, as between a school authority and a pupil, "the relationship of school authority and pupil belongs to the class of cases in which a

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35 (1997) 188 CLR 313 at 330-332.

36 [2014] AC 537 at 573 [5].

37 *Burnie Port Authority* (1994) 179 CLR 520 at 550, *Hollis v Vabu Pty Ltd* (2001) 207 CLR 21 at 34 [27] and *Jones v Bartlett* (2000) 205 CLR 166 at 228 [217].

38 [1969] VR 136.

39 (2003) 212 CLR 511 at 564 [141], quoting [1969] VR 136 at 140.

40 (1970) 44 ALJR 174.

duty of care springs from the relationship itself".[41] That is, any inquiry into the persons to whom the non-delegable duty is owed by reference to reasonable foreseeability is subsumed into a determination of the persons within the class of "special dependence or vulnerability"[42] with respect to the person who owes the non-delegable duty. McHugh J was not suggesting that the non-delegable duty which such a relationship causes to exist can be a duty to do other than ensuring the taking of reasonable care to avoid reasonably foreseeable harm. So much is clear from *Victoria v Bryar*, in which this Court approved the description of the duty in *Richards v Victoria* in these terms: "[the] duty not being one to insure against injury, but to take reasonable care to prevent it, requir[ing] no more than the taking of reasonable steps to protect the plaintiff against risks of injury which ... (the teacher) should reasonably have foreseen".[43] As will be apparent, the reasoning in *Introvigne*, *Kondis* and *Burnie Port Authority* accords with this approach to the class of common law non-delegable duties of care.

The reasoning in Lepore

23 In *Lepore*,[44] four members of this Court (Gleeson CJ, with whom Callinan J relevantly agreed, and Gummow and Hayne JJ) held that there cannot be a non-delegable duty in respect of the intentional criminal act of one person causing harm to another person. Two members (McHugh J and Gaudron J) disagreed, and one (Kirby J) found it unnecessary to decide.

24 Where there was no lack of reasonable care on the part of a school authority for the safety of pupils and the authority would not be vicariously liable for intentional criminal acts, Gleeson CJ rejected liability of the authority on the basis of it owing a non-delegable duty of care to pupils to ensure that reasonable care for their safety was taken from harm from intentional criminal acts. Having observed that the "failure to take care of the plaintiff which resulted in the Commonwealth's liability in *Introvigne* was a negligent omission on the part of the teachers at the school, acting in the course of their ordinary duties",[45] his Honour considered that, in the context of a non-delegable duty to ensure reasonable care is taken, "[i]ntentional wrongdoing, especially intentional criminality, introduces a

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41 (2003) 212 CLR 511 at 564 [141].

42 *Burnie Port Authority* (1994) 179 CLR 520 at 551.

43 (1970) 44 ALJR 174 at 175, quoting [1969] VR 136 at 141.

44 (2003) 212 CLR 511.

45 (2003) 212 CLR 511 at 531 [31].

factor of legal relevance beyond a mere failure to take care".[46] That further legal relevance was seen by his Honour to lie in several overlapping considerations. Prime amongst them was that, if a non-delegable duty of care extended to an intentional criminal act, liability under such a non-delegable duty could extend beyond that possible under the doctrine of vicarious liability given that the latter liability is confined to acts in the course of employment whereas the former is not so confined.[47] Whilst his Honour accepted that the non-delegable duty of care of a school authority is to ensure that reasonable care is taken to protect the safety of students, his Honour was concerned that extending the non-delegable duty of care to intentional criminal acts would convert the duty into one of absolute liability if the safety of a student is not protected from such an act.[48] Recognising, consistently with the reasoning in *Introvigne*, *Kondis* and *Burnie Port Authority*, that in "cases where the care of children, or other vulnerable people, is involved, it is difficult to see what kind of relationship would not give rise to a non-delegable duty of care",[49] his Honour considered liability of that kind to be "too broad, and the responsibility with which it fixes school authorities [to be] too demanding".[50]

25 Gummow and Hayne JJ observed that all of the cases in which non-delegable duties had previously been considered in this Court had been cases in which the plaintiff had been "injured as a result of negligence" and in which the question had been "whether a person other than the person who was negligent was to be held liable to the injured plaintiff for the damage thus sustained".[51] Their Honours considered the case before them, involving an intentional criminal act, to be different.[52] Characterising a non-delegable duty of care as a species of vicarious liability in which liability is strict and does not depend on default by the duty-holder,[53] their Honours said that "to hold that a non-delegable duty of care requires the party concerned to ensure that there is no default of any kind committed by those to whom care of the plaintiff is entrusted would remove the duty altogether

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46 (2003) 212 CLR 511 at 532 [31].

47 (2003) 212 CLR 511 at 532 [32].

48 (2003) 212 CLR 511 at 532-533 [33].

49 (2003) 212 CLR 511 at 533-534 [35]-[36].

50 (2003) 212 CLR 511 at 533 [34].

51 (2003) 212 CLR 511 at 599 [256].

52 (2003) 212 CLR 511 at 599 [256].

53 (2003) 212 CLR 511 at 599 [257].

from any connection with the law of negligence"[54] in that such a duty: "would be a duty to bring about a result that no person (employee or independent contractor) who was engaged to take steps connected with the care of the plaintiff did anything to harm the plaintiff";[55] "would introduce a new and wider form of strict liability to prevent harm, a step sharply at odds with the trend of decisions in this Court rejecting the expansion of strict liabilities", making the duty-holder an insurer of the person to whom harm was done;[56] would "remove any need to consider whether the party concerned could or should have done something to avoid the harm";[57] and would further "give no room for any operation of orthodox doctrines of vicarious liability".[58] In any event, their Honours considered that the intentional infliction of harm is not negligence.[59]

26 *Introvigne* having established that "the duties owed by education authorities to their pupils are non-delegable", Gaudron J observed that what was in issue in *Lepore* was "the nature of a duty of that kind".[60] Her Honour noted that the "relationships which give rise to a non-delegable or personal duty of care have been described as involving a person being so placed in relation to another as 'to assume a particular responsibility for [that other person's] safety' because of the latter's 'special dependence or vulnerability'".[61] In her Honour's words, in this context "safe" means safe from "a foreseeable risk of harm", not safe from any risk of harm, and "the duty is a duty to take reasonable care".[62] Her Honour said that if "a pupil is injured on school premises during school hours because reasonable care has not been taken to provide a safe school environment, the school authority is

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54 (2003) 212 CLR 511 at 601 [266].

55 (2003) 212 CLR 511 at 601 [266].

56 (2003) 212 CLR 511 at 601-602 [266].

57 (2003) 212 CLR 511 at 602 [267].

58 (2003) 212 CLR 511 at 602 [269].

59 (2003) 212 CLR 511 at 602-603 [270].

60 (2003) 212 CLR 511 at 551 [99].

61 (2003) 212 CLR 511 at 551 [100], quoting *Burnie Port Authority* (1994) 179 CLR 520 at 551.

62 (2003) 212 CLR 511 at 552 [103].

thereby shown to be in breach of its personal or non-delegable duty to provide a safe environment".[63] As her Honour put it:[64]

> "[T]o describe the duty of a school authority as non-delegable is not to identify a duty that extends beyond taking reasonable care to avoid a foreseeable risk of injury. It is simply to say that, if reasonable care is not taken to avoid a foreseeable risk of injury, the school authority is liable notwithstanding that it engaged a 'qualified and ostensibly competent' person to carry out some or all of its functions and duties."

27 Gaudron J is to be understood as saying that describing the duty of a school authority as non-delegable does not mean that the person performing the functions for the school authority in respect of the pupils (eg, a teacher) is required to do more than take reasonable care to avoid a foreseeable risk of injury to the pupils. In other words, if the person performing the functions for the school authority takes reasonable care to avoid a foreseeable risk of injury to the pupils, the school authority has complied with its non-delegable duty to ensure that reasonable care is taken of the pupils. It is only if the person performing the functions for the school authority does not take reasonable care to avoid a foreseeable risk of injury to the pupils, and that injury occurs, that the school authority has breached its non-delegable duty to ensure that reasonable care is taken of the pupils.

28 McHugh J concluded that "a State education authority owes a duty to a pupil to take reasonable care to prevent harm to the pupil. The duty cannot be delegated. ... The State is liable even if the teacher intentionally harms the pupil. The State cannot avoid liability by establishing that the teacher intentionally caused the harm even if the conduct of the teacher constitutes a criminal offence. It is the State's duty to protect the pupil, and the conduct of the teacher constitutes a breach of the State's own duty. ... In a non-delegable duty case ... the liability is direct – not vicarious. The wrongful act is a breach of the duty owed by the person who cannot delegate the duty."[65] According to McHugh J the "duty arises on the enrolment of the child. It is not confined to school hours or to the commencement of the teachers' hours of employment at the school. If the authority permits a pupil to be in the school grounds before the hours during which teachers are on duty, the authority will be liable if the pupil is injured through lack of reasonable

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63 (2003) 212 CLR 511 at 553 [105].

64 (2003) 212 CLR 511 at 553 [105] (footnote omitted), quoting *Burnie Port Authority* (1994) 179 CLR 520 at 550.

65 (2003) 212 CLR 511 at 562 [136].

supervision."[66] Further, the "duty extends to protecting the pupil from the conduct of other pupils or strangers and from the pupil's own conduct".[67] Further again, the "defendant who is under a non-delegable duty is liable for the conduct of employees and independent contractors because the defendant has expressly or impliedly undertaken to have the duty performed".[68] According to his Honour, the "vital issue in all cases of non-delegable duties is to determine with precision what the duty is", it having been decided in *Introvigne* that a school authority must "ensure that reasonable care is taken of pupils attending the school".[69] Such a duty is not an absolute duty to prevent harm to a pupil. Rather, if "the education authority has delegated the performance of some aspect of its duty to a teacher, the authority will be liable if the teacher failed to take reasonable care for the safety of the pupil".[70] As that was the educational authority's duty, "the assault [of the pupil] by his teacher breached the duty to take reasonable care of him".[71] "An action for negligent infliction of harm is not barred by reason of the intentional act of the person causing the harm."[72]

29 It will be apparent that the majority and minority views in *Lepore* in respect of a non-delegable duty extending or not extending to intentional criminal acts of the delegate of the non-delegable duty-holder reflected both a different focus and a different understanding of the concept of a non-delegable duty. The focus of the majority was on the scope of potential liability. The minority's focus was on whether the liability was within the scope of the relationship found to give rise to the non-delegable duty. Doctrinally, the majority conceived of a non-delegable duty as having the potential to swallow vicarious liability if not confined. The minority conceived of a non-delegable duty as a common law duty of care confined by its own terms.

30 In evaluating these differences, it must be recognised that a non-delegable duty of care can be breached either by the duty-holder personally failing to take reasonable care or by the delegate not taking reasonable care to avoid a foreseeable

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66 (2003) 212 CLR 511 at 564 [142].

67 (2003) 212 CLR 511 at 565 [143].

68 (2003) 212 CLR 511 at 566 [146].

69 (2003) 212 CLR 511 at 570 [158], referring to (1982) 150 CLR 258 at 271.

70 (2003) 212 CLR 511 at 571 [160].

71 (2003) 212 CLR 511 at 572 [161].

72 (2003) 212 CLR 511 at 572 [162].

risk of injury to the person to whom the duty-holder owes the non-delegable duty. The contravening conduct in each of those situations is conduct amounting to a failure to take reasonable care by reason of which the duty-holder fails to ensure that reasonable care is taken. Accordingly, it is not right to conceive of the non-delegable duty as imposing absolute liability. Although a non-delegable duty may result in liability being imposed on the duty-holder without personal fault on the part of the duty-holder, the non-delegable duty-holder cannot be liable for breach of a non-delegable duty unless either the duty-holder personally or the delegate has defaulted in the taking of reasonable care in respect of the person to whom the duty is owed. Consistent with the view of McHugh J, an intentional criminal act of a delegate which injures the person to whom the duty-holder owes the non-delegable duty is necessarily a failure by the delegate to take reasonable care and therefore a failure by the duty-holder to ensure that reasonable care is taken. Further, while the non-delegable duty-holder may not be at personal fault, this does not mean that a non-delegable duty-holder is (or was) incapable of taking steps to minimise the risk that the delegate might fail to take reasonable care including by intentional criminal acts. This is because there can be no non-delegable duty to prevent harm that is not itself reasonably foreseeable. If harm is reasonably foreseeable the risk of that harm usually can be avoided or minimised.

Re-opening and overturning Lepore *on non-delegable duties*

31 Within the framework of the considerations relevant to the re-opening of a decision of this Court identified in *John v Federal Commissioner of Taxation*,[73] it is necessary to give weight to the consideration that "such a course is not lightly undertaken". Other considerations in this case outweigh that consideration, however.

32 The decision in *Lepore* that a non-delegable duty of care cannot extend to a duty to ensure reasonable care is taken to protect a person from an intentional criminal act did not "rest upon a principle carefully worked out in a significant succession of cases".[74] To the contrary, there was no hint in the reasoning in *Introvigne*,[75] *Kondis*,[76] or *Burnie Port Authority*,[77] or the cases analysed therein,

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73 (1989) 166 CLR 417 at 438-440.

74 *John v Federal Commissioner of Taxation* (1989) 166 CLR 417 at 438.

75 (1982) 150 CLR 258.

76 (1984) 154 CLR 672.

77 (1994) 179 CLR 520.

that a non-delegable duty to ensure that reasonable care is taken could not extend to an intentional criminal act.

33 It is also apparent that there were significant differences in the reasons of the majority in *Lepore*.

34 The primary concern of Gleeson CJ, about inconsistency between the potential scope of liability under a non-delegable duty of care and under the doctrine of vicarious liability, was focused on maintaining conceptual coherence in the common law.[78] The incoherence Gleeson CJ perceived, however, pre-supposed that a non-delegable duty of care is an exception to the doctrine that vicarious liability is confined to the employer-employee relationship.[79] That is not the conceptual underpinning of the reasoning in *Introvigne*, *Kondis* and *Burnie Port Authority*, each of which conceived of a non-delegable duty of care as a more stringent kind of duty than that imposed by the ordinary law of negligence, able to be imposed only where the relevant kind of harm was reasonably foreseeable.[80] So conceived, the limitation that such duties cannot extend to harm from intentional criminal acts creates incoherence with both the doctrines of vicarious liability, in which an employer can be vicariously liable for the intentional criminal acts of employees, and ordinary duties of care in negligence, which can extend to harm from intentional criminal acts of third parties.[81]

35 His Honour's related concern about the spectre of over-reaching liability appears likewise to have been based on a narrower view of the doctrine of vicarious liability than has otherwise been accepted. As has recently been said by this Court, an "unauthorised, intentional or even criminal act may be committed in the course or scope of employment, and therefore render the employer [vicariously] liable".[82]

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78 See *Sullivan v Moody* (2001) 207 CLR 562 at 581 [55].

79 eg, *Leichhardt Municipal Council v Montgomery* (2007) 230 CLR 22 at 34-35 [23]-[24].

80 eg, (1982) 150 CLR 258 at 271; (1984) 154 CLR 672 at 681, 686; (1994) 179 CLR 520 at 550.

81 eg, *Modbury Triangle Shopping Centre Pty Ltd v Anzil* (2000) 205 CLR 254 at 265-266 [26]; *Lepore* (2003) 212 CLR 511 at 522 [2], 571-573 [161]-[164], 615-616 [311]-[314]. See also *Williams v Milotin* (1957) 97 CLR 465 at 470; *Gray v Motor Accident Commission* (1998) 196 CLR 1 at 9-10 [22].

82 *CCIG Investments Pty Ltd v Schokman* (2023) 278 CLR 165 at 176-177 [16].

36 The concern of Gummow and Hayne JJ – that, if a non-delegable duty of care extended to harm from an intentional criminal act, the liability imposed would be far removed from the law of negligence – was founded on three main propositions: (1) that neither vicarious liability nor negligence can extend to intentional criminal acts; (2) that such a duty would be to ensure no default of any kind occurred in the care of the plaintiff; and (3) that there would be no need to consider if the duty-holder could or should have done anything to avoid the harm.

37 As to proposition (1), in respect of vicarious liability, three decisions of this Court after *Lepore* confirm that an employer can be vicariously liable for the intentional criminal acts of an employee, the test being the scope of employment not the character of the act.[83] In respect of negligence, in *Lepore* itself Gleeson CJ accepted that a school authority's duty to take reasonable care for the safety of its pupils extends to safety from harm from intentional wrongful and even criminal acts. In Gleeson CJ's words:[84]

> "The relationship between school authority and pupil is one of the exceptional relationships which give rise to a duty in one party to take reasonable care to protect the other from the wrongful behaviour of third parties even if such behaviour is criminal. Breach of that duty, and consequent harm, will result in liability for damages for negligence."

38 That an intentional criminal act can amount to a breach of a common law duty of care reflects that "negligence is not a state of mind, but conduct that falls below the ... impersonal standard of how a reasonable person should have acted in the circumstances".[85] It is only if a plaintiff seeks to plead an intention to cause harm that it has been said that the cause of action must be brought in trespass.[86]

39 Proposition (2) (that the duty would be to ensure no default of any kind in the care of the plaintiff occurred) is inconsistent with the nature of a non-delegable

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83 *Prince Alfred College Inc v ADC* (2016) 258 CLR 134 at 150-153 [48]-[56], 156 [68], 159-160 [80]-[81]; *CCIG Investments Pty Ltd v Schokman* (2023) 278 CLR 165 at 176-177 [16]; *Bird v DP (a pseudonym)* (2024) 98 ALJR 1349 at 1367 [64]; 419 ALR 552 at 571.

84 (2003) 212 CLR 511 at 522 [2] (footnote omitted), citing *Modbury Triangle Shopping Centre Pty Ltd v Anzil* (2000) 205 CLR 254 at 265 [26].

85 Sappideen et al, *Fleming's The Law of Torts*, 11th ed (2024) at 143 [6.20].

86 *Williams v Milotin* (1957) 97 CLR 465 at 470; *Lepore* (2003) 212 CLR 511 at 572 [162], 602-603 [270].

duty being one to ensure reasonable care is taken to protect the plaintiff from reasonably foreseeable risks of harm.[87]

40 Proposition (3) (the irrelevance of precautions to avoid harm) overlooks the requirements inherent in the kind of relationship capable of giving rise to a non-delegable duty to ensure that reasonable care is taken. Those inherent requirements include the vulnerability of the plaintiff to a kind of reasonably foreseeable harm and therefore pre-suppose that there would be measures a non-delegable duty-holder could have taken at least to minimise the risk of that harm occurring. The point is merely that liability for breach of a non-delegable duty does not require it to be found that there were reasonable measures the non-delegable duty-holder could and should have taken to avoid harm occurring.

41 Accordingly, and as McHugh J pointed out in *Lepore*, the idea that a person subject to a non-delegable duty cannot take steps to protect themselves from potential liability is incorrect. As his Honour said, an educational authority, amongst other things, can institute systems that will weed out or give early warning signs of potential offenders, deter misconduct by conducting unannounced inspections, prohibit teachers from seeing a pupil without the presence of another teacher, and encourage teachers and pupils to complain to the school authorities and parents about any signs of aberrant or unusual behaviour on the part of a teacher.[88]

42 Returning to the so-called "*John* factors" relevant to re-opening a decision of this Court, it is apparent that the majority reasoning in *Lepore* has not led to a useful result. To the contrary, it has consistently been recognised as problematic. In dealing with the issue of an employer's liability for an intentional criminal act of an employee, five members of this Court in *Prince Alfred College Inc v ADC*[89] said that "as a result of the differing views expressed in the judgments in this Court in *New South Wales v Lepore*, there is a need for some guidance to be provided by this Court to intermediate appellate courts so as to reduce the risk of unnecessary appellate processes arising out of the existing uncertainties".[90]

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87 eg, *Pafburn Pty Ltd v The Owners – Strata Plan No 84674* (2024) 99 ALJR 148 at 154 [20]; 421 ALR 133 at 138.

88 (2003) 212 CLR 511 at 572-573 [164].

89 (2016) 258 CLR 134.

90 (2016) 258 CLR 134 at 143 [10]. See also at 141 [3], 148 [38], 158 [75].

43 The guidance provided concerned an employer's potential vicarious liability only, as the application to re-open *Lepore* in *Prince Alfred College* did not address the considerations relevant to the question of non-delegable duties.[91] The upshot, however, was confirmation that an employer can be vicariously liable for an intentional criminal act of an employee as such an act can be within the course of the employee's employment.[92] The factors said to be relevant to the intentional criminal act being within the course of the employee's employment, described as the employment being the "occasion" and not the mere "opportunity" for the acts, being "any special role that the employer has assigned to the employee and the position in which the employee is thereby placed vis-à-vis the victim" including the employee's role involving "authority, power, trust, control and the ability to achieve intimacy with the victim",[93] have been noted to be those very factors which may indicate the existence of a relationship between a duty-holder and a plaintiff sufficient to give rise to a non-delegable duty,[94] but that is unsurprising given that the nature of the problem confronting the common law doctrines in both is to find stable and explanatory touchstones of liability.

44 Subsequently, in *CCIG Investments Pty Ltd v Schokman* the Court confirmed the conclusion in *Prince Alfred College*, that an employer can be vicariously liable for an intentional criminal act of an employee as such an act can be within the course of the employee's employment.[95] The Court also continued to refuse to expand the scope of vicarious liability to independent contractors and other non-employees (in contrast to the approaches in the United Kingdom and Canada[96]) and, in so doing, recognised that, in contrast to *Lepore*, non-delegable duties of care have been held to apply to intentional criminal acts.[97]

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91 (2016) 258 CLR 134 at 147 [36].

92 (2016) 258 CLR 134 at 150-153 [48]-[56], 156 [68], 159-160 [80]-[81].

93 (2016) 258 CLR 134 at 159-160 [80]-[81].

94 eg, Santayana, "Vicarious liability, non-delegable duties and the 'intentional wrongdoing problem'" (2019) 25 *Torts Law Journal* 152.

95 See (2023) 278 CLR 165 at 176-177 [16].

96 eg, *Lister v Hesley Hall Ltd* [2002] 1 AC 215; *Various Claimants v Catholic Child Welfare Society* [2013] 2 AC 1; *BXB v Trustees of the Barry Congregation of Jehovah's Witnesses* [2024] AC 567; *Bazley v Curry* [1999] 2 SCR 534.

97 See (2023) 278 CLR 165 at 197-200 [75]-[81]. See also *Bird v DP (a pseudonym)* (2024) 98 ALJR 1349 at 1364 [52]; 419 ALR 552 at 567.

45 In *Bird* the Court recognised that its insistence on "a threshold requirement of an employment relationship for a finding of vicarious liability" had been and could be described as "harsh", particularly in the context of the perpetrator of sexual abuse of children where perpetrators may not be employed by their principal,[98] but explained that the scope of vicarious liability could not be expanded in respect of one kind of relationship without destabilising the doctrine as a whole.[99] In both *Bird* and *Willmot v Queensland*,[100] moreover, the reasoning underlying *Lepore* was doubted, in *Bird* by characterising the case of *Morris v C W Martin & Sons Ltd*[101] as having involved "a breach of a personal, non-delegable duty owed by the sub-bailee to the bailor of goods" for the intentional criminal acts of the sub-bailee's delegate and confirming that "breach of a non-delegable duty is not a species of vicarious liability but, rather, is a form of direct liability"[102] and in *Willmot* by stating that "it was never part of the State's [non-delegable] duty to abuse [the plaintiff] or allow her to be abused".[103]

46 While Lord Sumption in *Woodland* rightly said that "[t]he main problem about this area of the law is to prevent the exception from eating up the rule",[104] the exception being the imposition of a non-delegable duty and the rule being fault-based liability, the classes of relationship which have been found to give rise to a non-delegable duty are limited. Gleeson CJ's concern in *Lepore*, that "[i]n cases where the care of children, or other vulnerable people, is involved, it is difficult to see what kind of relationship would not give rise to a non-delegable duty of care", creating a spectre of potentially extensive no-fault liability for organisations responsible for such care,[105] is not to be lightly dismissed. This concern, however, provides no principled basis for excluding intentional criminal acts from the scope of non-delegable duties to ensure reasonable care is taken.

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98 See (2024) 98 ALJR 1349 at 1367 [64]; 419 ALR 552 at 571.

99 See (2024) 98 ALJR 1349 at 1367-1368 [65]-[67], see also at 1404 [250]; 419 ALR 552 at 571-572, see also at 620.

100 (2024) 98 ALJR 1407; 419 ALR 623.

101 [1966] 1 QB 716.

102 (2024) 98 ALJR 1349 at 1364 [52]; 419 ALR 552 at 567.

103 (2024) 98 ALJR 1407 at 1424 [50]; 419 ALR 623 at 638.

104 [2014] AC 537 at 582 [22].

105 (2003) 212 CLR 511 at 534 [36].

47 The concern that the imposition of a non-delegable duty to ensure that reasonable care is taken in respect of a plaintiff makes the defendant an insurer of the plaintiff[106] does not reflect the reality that a non-delegable duty of this kind may be recognised only in the case of a pre-existing relationship between a defendant and a plaintiff characterised by an assumption of responsibility of care to prevent reasonably foreseeable harm to the plaintiff on the part of the defendant and particular vulnerability to that kind of harm on the part of the plaintiff. Consider, for example, the non-delegable duty owed by a school to a pupil. The non-delegable duty is constrained by the requirements of foreseeability and the standard of reasonable care in the circumstances. The school's non-delegable duty is not breached merely because a student is injured during school hours and on school grounds.[107] A school will be liable only if it or its delegate has failed to act with reasonable care and that failure has caused the harm. Once it is accepted, as it must be, that a delegate of a school inflicting intentional harm upon a student is an obvious example of a failure by that delegate to exercise reasonable care, then resulting liability of the school for failing to ensure its delegate took reasonable care accords with the requirements of both principle and policy.

48 The difficulty which the reasoning in *Lepore* presents to the common law is that, if it stands, it will continue to stultify the coherent development of principle. In the case of a non-delegable duty of care, as in the case of vicarious liability, the fact of the harm being the result of an intentional criminal act may be relevant to satisfaction of the pre-conditions to liability. In the case of a non-delegable duty of care, the pre-condition is the existence of a relationship of the relevant kind and the harm being of a foreseeable kind within the scope of legal responsibility created by that relationship. In the case of vicarious liability, the pre-condition is the act causing harm being within the course of the employee's employment. In neither case does the quality of the act as an intentional criminal act, as a matter of logical inevitability, take the act outside the applicable pre-condition of potential liability. So much is indirectly apparent from the reasoning in *Woodland*,[108] in which Lord Sumption identified indicia of the existence of a non-delegable duty of care including by reference to *Introvigne*, *Kondis* and *Burnie Port Authority*.[109] It is made directly apparent in the subsequent decision of the Supreme Court of the

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106 eg, *Scott v Davis* (2000) 204 CLR 333 at 416-417 [246]-[248]; *Lepore* (2003) 212 CLR 511 at 601-602 [266].

107 *Lepore* (2003) 212 CLR 511 at 552 [103].

108 [2014] AC 537.

109 [2014] AC 537 at 579-583 [17]-[23].

United Kingdom, *Armes v Nottinghamshire County Council*,[110] in which Lord Reed said that he was not "able to agree that a non-delegable duty cannot be breached by a deliberate wrong".[111]

49 Finally, in terms of the so-called "*John* factors", *Lepore* has not been independently acted upon by Commonwealth, State or Territory legislatures. The NSW Civil Liability Act does not purport to regulate the imposition of any duty of care,[112] let alone a non-delegable duty to ensure reasonable care is taken. In every jurisdiction in Australia legislatures have enacted provisions dealing with institutional child sexual abuse in response to the 2015 *Redress and Civil Litigation Report* of the Commonwealth Royal Commission into Institutional Responses to Child Sexual Abuse. None of these statutory regimes is expressed to replace or exclude common law liability.[113] Moreover, the regime enacted by Div 3 of Pt 1B of the NSW Civil Liability Act operates only prospectively from 26 October 2018.[114]

50 The exclusion of an intentional criminal act from a non-delegable duty of care established by *Lepore* reflected judicial policy choices which are unable to be sustained consistently with principle, have not led to any useful result but rather have created incoherence in the common law, and have not been independently acted upon. For these reasons *Lepore*, to the extent it decided that a non-delegable duty to ensure that reasonable care is taken cannot apply to an intentional criminal act, should be overturned.

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110 [2018] AC 355.

111 [2018] AC 355 at 375 [51].

112 *Adeels Palace Pty Ltd v Moubarak* (2009) 239 CLR 420 at 432-433 [13].

113 *Civil Liability Act 1936* (SA), s 50G(3); *Wrongs Act 1958* (Vic), ss 44 and 47, read with s 89(1); *Civil Liability Act 2002* (NSW), ss 6H(3) and 6J (definition of "child abuse proceedings"); *Civil Liability Act 2002* (Tas), ss 49J(2) and 49L (definition of "child abuse proceedings"); *Civil Liability Act 2002* (WA), Pt 2A; *Civil Law (Wrongs) Act 2002* (ACT), Ch 8A; *Civil Liability Act 2003* (Qld), Sch 2 (definition of "claim"); *Personal Injuries (Liabilities and Damages) Act 2003* (NT), ss 4(1) and 17G(3).

114 *Civil Liability Amendment (Organisational Child Abuse Liability) Act 2018* (NSW), s 2(2) and Sch 1 [4]. Part 1B of the NSW Civil Liability Act commenced on the date of assent to the Act, 26 October 2018, other than Pt 1B Div 4, which commenced on 1 January 2019.

51 The overturning of *Lepore* to this extent does not mean that AA succeeds in the proceedings. It means only that the Court of Appeal's application of *Lepore* to decide that AA had to fail in respect of the claimed non-delegable duty of care because the acts of Fr Pickin were intentional criminal acts[115] cannot stand.

The disputed status of the primary judge's finding of the sexual assaults

Did the Court of Appeal overturn the finding?

52 The primary judge found that Fr Pickin had sexually assaulted AA on about six occasions in mid-1969 when AA was in his second year at high school and was 13 years old. The sexual assaults occurred in the presbytery of St Patrick's Church where Fr Pickin lived. They occurred on Friday nights in the bedroom of the presbytery after Fr Pickin had invited AA and another boy or other boys from the high school where Fr Pickin taught them religion to the presbytery, where Fr Pickin provided them with alcohol and cigarettes and allowed them to play a poker machine he had in an area off the bedroom in the presbytery. The sexual assaults involved Fr Pickin placing his penis in AA's mouth while AA was drunk. AA recalled waking from unconsciousness to find that he was lying on the floor of the bedroom of the presbytery "usually ... with [Fr Pickin's] dick in [my] mouth".[116] When, in cross-examination before the primary judge, it was put to AA that another boy who had gone to the presbytery with AA on each occasion (his school friend, Alan Perry) had never left AA alone with Fr Pickin and the sexual assaults of AA had never occurred, AA responded "I'm saying it is true, and I was the one that suffered. No one else. Not you or him, it was me."

53 AA said that he stopped going to the presbytery on Friday nights despite Fr Pickin telling him to continue to do so because he "just couldn't go any more". Before this he could not think how to disobey a priest even though he felt that what Fr Pickin had made him do was "disgusting" and made him "angry and ashamed" which he had to "bottle[] ... up inside". AA said that from Fr Pickin's sexual assaults he lost respect for priests, lost his religion, and started "resenting people in authority". AA did not feel "safe and comfortable" anywhere and had spent most of his life feeling "sad, angry and anxious" which he tried to manage by abusing alcohol and drugs.

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115 *Trustees of the Roman Catholic Church for the Diocese of Maitland-Newcastle v AA* (2025) 117 NSWLR 253 at 260 [17], 290-294 [156]-[168], 310 [253].

116 *AA v Trustees, Roman Catholic Church, Diocese of Maitland-Newcastle* (2024) 334 IR 70 at 94-99 [139]-[182].

54 Contrary to the submissions for the Diocese, the Court of Appeal did not overturn the primary judge's ultimate factual findings to the effect that Fr Pickin had sexually assaulted AA as described above. Leeming JA considered those factual findings to be affected by vitiating error, but Ball JA disagreed, and Bell CJ's reasons cannot be understood as saying more than that, had it been necessary for his Honour to decide the factual issues, he would have agreed with Leeming JA. That is not sufficient to overturn the primary judge's factual findings.

55 Accordingly, the primary judge's factual findings as described above stand.

Are the findings affected by material error?

56 Given the conclusions Leeming JA expressed to the effect that the primary judge's key factual findings were affected by material error and Bell CJ's indication of an inclination to agree with those conclusions, it is appropriate to determine the question of material error by the primary judge by reference to those conclusions, which need to be understood in the context of the facts which the parties agreed and the hearing that was conducted before the primary judge.

57 Consistent with the Diocese's admissions on the pleadings, the parties agreed the following facts:[117]

> "1. The [Diocese] is a proper defendant for the purposes of Part 1B of the *Civil Liability Act 2002*.
>
> 2. At all material times, the Diocese ... had the care and control of Catholic Churches in the Diocese.
>
> 3. The Bishop of the Diocese (the Bishop) had powers of direction and control over incardinated priests.
>
> 4. At all material times, Fr Pickin was an incardinated priest of the Diocese.
>
> 5. The Bishop appointed Fr Pickin as the parish priest of St Patrick's Church.
>
> 6. Fr Pickin attended Wallsend High School to provide religious scripture classes to students.

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117 *AA v Trustees, Roman Catholic Church, Diocese of Maitland-Newcastle* (2024) 334 IR 70 at 77 [10].

7. In 1969 [AA] was in second form at Wallsend High School and received instructions in the Catholic faith from Fr Pickin.

8. There were occasions when [AA] attended St Patrick's Church Presbytery with Alan Perry and Fr Pickin.

9. [AA] and Perry were given beer and cigarettes by Fr Pickin.

10. Fr Pickin had a poker machine in the Presbytery which he made available to the boys to play.

11. Fr Pickin invited boys to go on holidays with him around the time of the alleged assaults.

12. Sexual abuse of [AA] by Fr Pickin, if it occurred, constituted battery.

13. At all material times the 1917 Code of Canon Law and Presbyteroum [sic] Ordinis were in existence."

58 The parties conducted the hearing before the primary judge, and the primary judge determined the proceedings, on the basis of the Diocese's admissions and the agreed facts.

59 Leeming JA, based on other evidence admitted before the primary judge, concluded that Fr Pickin was not the parish priest of St Patrick's Church appointed by the Bishop but was only the assistant priest of the appointed parish priest, Fr O'Dwyer.[118] Reasoning from this conclusion, his Honour evaluated the primary judge's factual findings, saying, amongst other things: (1) the "trial seems to have been conducted on the basis that Fr Pickin lived alone at the presbytery. But the parish priest was required to live in the presbytery, sharing that accommodation with Fr Pickin";[119] (2) the "distinction between parish priest and assistant priest will be important when considering the extent to which some other person or entity is liable for the tortious conduct of the latter";[120] (3) the "Bishop unquestionably had power to appoint a priest as assistant to a parish priest, and to remove him. But the immediate supervisor of an assistant priest located in a parish would be the

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118 *Trustees of the Roman Catholic Church for the Diocese of Maitland-Newcastle v AA* (2025) 117 NSWLR 253 at 261 [24].

119 *Trustees of the Roman Catholic Church for the Diocese of Maitland-Newcastle v AA* (2025) 117 NSWLR 253 at 267 [53].

120 *Trustees of the Roman Catholic Church for the Diocese of Maitland-Newcastle v AA* (2025) 117 NSWLR 253 at 267 [54].

parish priest";[121] (4) the "trial was conducted on that incorrect basis" (that Fr Pickin was the parish priest) and that incorrect basis "affected the findings of the primary judge";[122] and (5) the "facts that Fr Pickin would have been supervised by the parish priest Fr O'Dwyer, and if he lived in the presbytery would have shared that accommodation with Fr O'Dwyer, bear upon those particulars of breach. If the findings sought by [AA] were to be made, it would be desirable to note that the litigation was conducted on the basis, probably incorrect, that Fr Pickin lived alone in the presbytery."[123]

60 The Diocese's admission on the pleadings that Fr Pickin was the parish priest should have been the beginning and end of the question of his status. The circumstances in which a case may be decided either by a judge at first instance or by an intermediate court of appeal on a basis different from that disclosed by the pleadings are generally "limited to those in which the parties have deliberately chosen some different basis for the determination of their respective rights and liabilities".[124] Neither before the primary judge nor in the Court of Appeal was there any attempt by the Diocese to depart from its pleaded admission that Fr Pickin was the parish priest.

61 Had the Diocese sought leave to withdraw its admission, the Diocese would have been required to prove that the fact was wrong and explain its error.[125] As the Diocese never applied to withdraw its admission, it did not have to prove that Fr Pickin was not the parish priest or was not performing the functions of parish priest in substitution for Fr O'Dwyer. This is important in circumstances where not only did the parties conduct the hearing before the primary judge on the admitted and agreed basis, and not resile from that agreed position before the Court of Appeal, but also, as explained below, the evidence was all to the effect that Fr Pickin alone was performing the functions of the parish priest and was living

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121 *Trustees of the Roman Catholic Church for the Diocese of Maitland-Newcastle v AA* (2025) 117 NSWLR 253 at 268 [55].

122 *Trustees of the Roman Catholic Church for the Diocese of Maitland-Newcastle v AA* (2025) 117 NSWLR 253 at 271 [75], [76].

123 *Trustees of the Roman Catholic Church for the Diocese of Maitland-Newcastle v AA* (2025) 117 NSWLR 253 at 272 [79].

124 *Banque Commerciale SA, en Liquidation v Akhil Holdings Ltd* (1990) 169 CLR 279 at 284, 286-287.

125 eg, *Jeans v Commonwealth Bank of Australia Ltd* (2003) 204 ALR 327 at 330-331 [17]-[20].

alone in the presbytery. In the face of all this, it was wrong for an appellate judge to unilaterally conclude to the contrary based on documentary records of Fr O'Dwyer being appointed as parish priest and Canon Law.

62 Even accepting that Fr Pickin was not appointed as the parish priest but was appointed the assistant priest to Fr O'Dwyer, Leeming JA's analysis did not allow for the probability based on the evidence that Fr Pickin, although appointed the assistant priest, was in fact performing the functions of the parish priest and living alone at the presbytery because, for one reason or another, Fr O'Dwyer was not performing those functions at the relevant time. To the extent his Honour based his analysis on Canon Law as in force in 1969[126] to describe the distinction between a parish priest and an assistant priest as "basic" in order to reinforce his Honour's conclusions, it is relevant that, while one fundamental principle of Canon Law was "One Parish: One Pastor",[127] an even more fundamental principle was that "[a]lways the needs of the parish must be provided for".[128] Accordingly, in the case of both foreseen and unforeseen absences of a pastor, Canon Law provided that "a substitute must be left in charge" of the parish.[129] Unless the substitute acted for less than a week, Canon Law also provided that the substitute "takes the place of the pastor in everything which relates to the care of souls" in the parish and has "the full and ordinary jurisdiction of a pastor".[130]

63 Suffice to say that an intermediate appellate court, which has not had the benefit of watching a trial unfold in real time and is not responding to a properly supported application to withdraw an admission, is not in a sound position to infer that the parties have made a fundamental error in agreeing a fact consistent with the admissions and conducting a hearing on that basis.

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126 *Trustees of the Roman Catholic Church for the Diocese of Maitland-Newcastle v AA* (2025) 117 NSWLR 253 at 266-267 [50].

127 Bouscaren, Ellis and North, *Canon Law: A Text and Commentary*, 4th ed (1963) at 202.

128 Bouscaren, Ellis and North, *Canon Law: A Text and Commentary*, 4th ed (1963) at 214.

129 Bouscaren, Ellis and North, *Canon Law: A Text and Commentary*, 4th ed (1963) at 214.

130 Bouscaren, Ellis and North, *Canon Law: A Text and Commentary*, 4th ed (1963) at 223-224.

64 While Leeming JA said that "the status wrongly attributed to Fr Pickin does not alter the outcome of this litigation",[131] that is so only to the extent that his Honour applied *Lepore* to decide that a non-delegable duty of care could not extend to harm caused by the alleged intentional criminal acts of Fr Pickin. His Honour's view that the parties wrongly attributed the status of parish priest to Fr Pickin plainly affected the conclusion he reached of material errors in fact-finding by the primary judge and the ordinary duty of care the Diocese might have owed to AA. This indicates that caution is required in respect of his Honour's attribution of fact-finding errors to the primary judge, that attribution being undoubtedly affected by the erroneous view that the hearing had miscarried by reason of the parties' agreement to a supposed falsehood.

65 This need for caution is reinforced by the fact that Leeming JA recorded that AA was further cross-examined before the primary judge,[132] but also criticised the primary judge for saying that AA's account of waking up on the floor of the bedroom in the presbytery with "Father Pickin's dick in his mouth" remained "quite a vivid memory" for AA.[133] Referring to the primary judge's "perception that [AA's] memory was 'vivid'",[134] his Honour said: (1) the "'vividness' of [AA's] account plainly drove the [primary judge's] fact-finding process";[135] (2) it is an error to suppose that memory is other than "fluid and malleable";[136] (3) as AA was "not cross-examined [before the primary judge] on the sexual assaults when he was recalled at trial" his Honour was in "a materially equivalent position" to the primary judge; and (4) having seen the evidence of AA taken on commission "in

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131 *Trustees of the Roman Catholic Church for the Diocese of Maitland-Newcastle v AA* (2025) 117 NSWLR 253 at 272 [80].

132 *Trustees of the Roman Catholic Church for the Diocese of Maitland-Newcastle v AA* (2025) 117 NSWLR 253 at 275 [92].

133 *Trustees of the Roman Catholic Church for the Diocese of Maitland-Newcastle v AA* (2025) 117 NSWLR 253 at 281 [119], 283 [124], referring to *AA v Trustees, Roman Catholic Church, Diocese of Maitland-Newcastle* (2024) 334 IR 70 at 97 [164], 99 [177].

134 *Trustees of the Roman Catholic Church for the Diocese of Maitland-Newcastle v AA* (2025) 117 NSWLR 253 at 281 [120].

135 *Trustees of the Roman Catholic Church for the Diocese of Maitland-Newcastle v AA* (2025) 117 NSWLR 253 at 284 [131].

136 *Trustees of the Roman Catholic Church for the Diocese of Maitland-Newcastle v AA* (2025) 117 NSWLR 253 at 285-286 [135]-[136], quoting *Gestmin SGPS SA v Credit Suisse (UK) Ltd* [2020] 1 CLC 428 at 434 [15]-[17].

precisely the same form that it was available to the primary judge", AA "presents as giving the same unemotional account on this point as he did in relation to the balance of his evidence".[137]

66 These conclusions appear to overlook that in the cross-examination before the primary judge AA gave evidence about the sexual assaults (part of which has already been referred to above), including this evidence (emphasis added):

> "Q. What Mr Perry says about never leaving you alone with Father Picken is accurate, isn't it?
>
> A. No.
>
> ...
>
> Q. Your version of events, which involved Mr Perry leaving you while you were at the Presbytery, is not truthful, is it?
>
> A. No, that's what I was told.
>
> Q. Your version of events alleging the very serious abuse that you say you suffered at the hands of Father Picken is not true, is it?
>
> A. Pardon?
>
> *Q. I'll be clear about it. Your evidence asserting that you were the victim of sexual abuse at the hands of Father Picken is not true. That's what I'm putting to you?*
>
> *A. I'm saying it is true, and I was the one that suffered. No one else. Not you or him, it was me.*"

67 Not having seen AA give this evidence, Leeming JA was not in a position materially equivalent to the primary judge to determine the reliability of AA's evidence. Indeed, having not seen AA give any evidence, his Honour was not able to characterise the whole of AA's evidence as an "unemotional account". But, equally importantly, even if the whole of AA's evidence involved an "unemotional account", that is not inconsistent with the primary judge's characterisation of his memory of the sexual assaults being "vivid". The primary judge was addressing the quality of the memory not the quality of AA's testimony about the memory and was implicitly contrasting AA's vivid memory of the sexual assaults (being drunk,

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137 *Trustees of the Roman Catholic Church for the Diocese of Maitland-Newcastle v AA* (2025) 117 NSWLR 253 at 286 [137].

coming to lying on the floor of the bedroom of the presbytery, with Fr Pickin's "dick in his mouth") with AA's poor memory of collateral details. Recognising that memory does not function as a fixed recording of an event and is imperfect does not mean that it may be assumed that demonstrated inconsistencies as to details about an event, in and of themselves, prove that the event did not occur at all.

68 Leeming JA further concluded that the primary judge had not considered, as required, whether AA's account was "a sincerely held but unreliable belief of what had occurred half a century earlier",[138] it not having been suggested by the Diocese that AA was simply lying. The primary judge, however, was not bound to record that she had considered and rejected the possibility that AA was simply mistaken about the sexual assaults AA said that Fr Pickin had inflicted on him in circumstances where on the evidence: (1) Fr Pickin was performing the functions of the parish priest at St Patrick's Church, of which AA and his family were parishioners; (2) Fr Pickin attended Wallsend High School, when AA and Mr Perry were pupils, to instruct AA in the Catholic faith; (3) Fr Pickin occupied the presbytery as his residence on his own; (4) Fr Pickin invited AA and Mr Perry to the presbytery, where he gave them beer and cigarettes and allowed them to play a poker machine installed off the bedroom in the presbytery; (5) Mr Perry accepted that it was possible that he and AA were not always in the same room at the presbytery, as AA liked playing the poker machine off the bedroom in the presbytery and Mr Perry did not; and (6) Fr Pickin had "a sexual interest in boys", "sought out opportunities to achieve intimacy with boys, including by using Church premises for that purpose", "had a tendency to sexually abuse boys who were in his care when he was able to do so", and "exploited his position as a priest by asserting his authority to enable him to act on his sexual interest in boys".[139]

69 Leeming JA considered AA's evidence to be "demonstrably unreliable" in five respects.[140] On analysis, however, none of the five examples given by his Honour undermine the fundamental reliability of AA's account of the fact of the sexual assaults. Two of those examples will suffice to expose the problems with the underlying reasoning.

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138 *Trustees of the Roman Catholic Church for the Diocese of Maitland-Newcastle v AA* (2025) 117 NSWLR 253 at 286 [136].

139 *Trustees of the Roman Catholic Church for the Diocese of Maitland-Newcastle v AA* (2025) 117 NSWLR 253 at 277 [102].

140 *Trustees of the Roman Catholic Church for the Diocese of Maitland-Newcastle v AA* (2025) 117 NSWLR 253 at 286-287 [138].

70 The first is that AA gave three different accounts of when the sexual assaults occurred and the primary judge's finding that they occurred in mid-1969 is inconsistent with all three accounts (Leeming JA's third example).[141] This example is immaterial once it is recognised that AA's supposedly "three different accounts" were of the sexual assaults occurring in the beginning of 1968, the middle of 1968 and the beginning of 1969. It is hardly surprising that AA sought to identify the time of the sexual assaults specifically even if, in truth, he could not do so beyond saying they occurred sometime in his first years of high school. The primary judge correctly recognised the important fact to be that AA's evidence unequivocally connected the start of the sexual assaults to the time when Fr Pickin started teaching at the school (which was in 1969) and that it was not suggested to AA that the visits to the presbytery (which were agreed to have occurred) occurred when he was in his third or fourth and final year of school. That is, on the evidence, that the (undisputed) visits to the presbytery occurred in 1969 is overwhelmingly likely.[142] The primary judge also explained on a rational basis why it was likely that the visits to the presbytery occurred in mid-1969, saying that the "evidence did not place their visits to the presbytery at the beginning of the year, it being dark when they went there after their dinner at 6 pm".[143]

71 The second is that AA's "account in cross-examination and re-examination was that there was no one other than Mr Perry and Fr Pickin in the presbytery [(Leeming JA's fifth example)]. That was rejected by the primary judge, who found that there was at least one other boy present on every occasion [AA] was assaulted."[144] This example does not accord with the primary judge's reasons. The sole reference in the primary judge's reasons said to support this example is her Honour's statement that "Mr Perry remaining in the living area of the presbytery with other boys drinking, smoking and talking while AA went to play the poker machine would have helped provide Father Pickin with an opportunity to assault

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141 *Trustees of the Roman Catholic Church for the Diocese of Maitland-Newcastle v AA* (2025) 117 NSWLR 253 at 286 [138].

142 *AA v Trustees, Roman Catholic Church, Diocese of Maitland-Newcastle* (2024) 334 IR 70 at 96 [157].

143 *AA v Trustees, Roman Catholic Church, Diocese of Maitland-Newcastle* (2024) 334 IR 70 at 96 [156].

144 *Trustees of the Roman Catholic Church for the Diocese of Maitland-Newcastle v AA* (2025) 117 NSWLR 253 at 287 [138].

AA, while he was out of sight, on which I am satisfied he acted."[145] This is not a finding that at least one boy other than Mr Perry was also present in the presbytery on *every occasion* AA was sexually assaulted. It is a finding that, as "on *some occasions* other boys were with them at the presbytery",[146] to the extent that such boys other than Mr Perry and AA were present, Fr Pickin still had the opportunity to sexually assault AA in the bedroom of the presbytery near where the poker machine was located.

72 It is also not the case that, as Leeming JA put it, the primary judge "gave no explicit weight to the aspects of [AA's] evidence that were demonstrably unreliable, save for a generalised mention at the beginning and end of the reasons".[147] To the contrary, and by way of example only, the primary judge: (1) said "[t]here were problems with AA's evidence, it must be accepted";[148] (2) recognised that the fallibility of human memory ordinarily increases with time;[149] (3) accepted that AA was giving evidence about events that occurred when he had been given alcohol as a minor;[150] and (4) recognised certain inconsistencies and uncertainties in AA's evidence.[151] The primary judge also, however, correctly recognised that incorrect memories of surrounding details may have "few, if any,

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145 *AA v Trustees, Roman Catholic Church, Diocese of Maitland-Newcastle* (2024) 334 IR 70 at 98 [169].

146 *AA v Trustees, Roman Catholic Church, Diocese of Maitland-Newcastle* (2024) 334 IR 70 at 98 [167] (emphasis added).

147 *Trustees of the Roman Catholic Church for the Diocese of Maitland-Newcastle v AA* (2025) 117 NSWLR 253 at 283 [128].

148 *AA v Trustees, Roman Catholic Church, Diocese of Maitland-Newcastle* (2024) 334 IR 70 at 90 [108].

149 *AA v Trustees, Roman Catholic Church, Diocese of Maitland-Newcastle* (2024) 334 IR 70 at 92 [121].

150 *AA v Trustees, Roman Catholic Church, Diocese of Maitland-Newcastle* (2024) 334 IR 70 at 92 [121].

151 eg, *AA v Trustees, Roman Catholic Church, Diocese of Maitland-Newcastle* (2024) 334 IR 70 at 95 [140], 95 [142], 95 [144], 95-96 [145], 96 [146], 96 [153], 96 [154].

implications for a person's reliability about the central details of a traumatic event, given what was even then known about human memory".[152]

73 The primary judge was right to reason on the assumed basis that there was no rational possibility that a person other than Fr Pickin sexually assaulted AA in the presbytery with AA misremembering the identity of the perpetrator. AA either was lying about the sexual assaults (which the Diocese did not put), had convinced himself that they had occurred when they had not, or was under a delusion that they had occurred. Having seen AA give evidence before her, including his statement that "I'm saying it is true, and I was the one that suffered. No one else. Not you or him, it was me", the primary judge was entitled to accept AA's evidence that the sexual assaults occurred.

74 Finally, Leeming JA said this:[153]

> "A poor short-term memory, in an ageing man suffering from a number of medical conditions, does not of itself preclude a reliable memory of disturbing events from his childhood. But when to those facts there is added a sustained abuse of alcohol from early childhood accompanied by illicit drugs as a teenager and young man, coupled with the frailty and malleability of much human memory, the possibility that [AA] has an imperfect memory of traumatic events of his childhood becomes quite real. And the possibility that [AA's] memory of childhood traumatic events is poor needs to be evaluated in light of the fact that it is established that [AA] has an unreliable memory of the time of the traumatic events, and whether they occurred merely with Mr Perry or with other boys as well, and whether or not Mr Perry was with him in the presbytery when they occurred."

75 It is one thing to have an "imperfect memory of traumatic events". It is another either to have persuaded oneself that a traumatic event occurred when it did not or to suffer from a delusion that a traumatic event occurred when it did not. There is simply no suggestion in the evidence that AA's mental state or memory was so imperfect that he had convinced himself or was under a delusion that Fr Pickin sexually assaulted him. Further, the psychiatric report of Dr Apler said that AA "maintained normal memory and concentration throughout the two-and-a-half-hour interview" which occurred in 2024. It is no more than speculation to

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152 *AA v Trustees, Roman Catholic Church, Diocese of Maitland-Newcastle* (2024) 334 IR 70 at 92 [122]-[123], referring to *Reed v The Queen* [2006] NSWCCA 314 at [64] and *JL v The King* [2023] NSWCCA 99 at [96].

153 *Trustees of the Roman Catholic Church for the Diocese of Maitland-Newcastle v AA* (2025) 117 NSWLR 253 at 288 [143].

suggest that as AA had abused drugs and alcohol in earlier years the possibility that AA had convinced himself or was under a delusion that Fr Pickin sexually assaulted him became "quite real". If that had been so it would have been expected that the psychiatric experts would have identified such an impairment of mind in AA but they did not. In any event, it was only the primary judge who saw and heard AA give evidence and therefore the primary judge had a substantial (indeed, unique) advantage over Leeming JA in assessing the quality of AA's evidence. Reviewing the evidence on paper was no substitute for that advantage.

76 For these reasons it cannot be accepted that the primary judge's fact-finding in respect of the occurrence of the sexual assaults miscarried.

The non-delegable duty of care

AA's pleaded and reformulated non-delegable duty

77 AA's pleaded case was that the Diocese owed AA, as a child in the care of one of its priests, a duty to take reasonable care to avoid AA suffering foreseeable and not insignificant harm and that this duty of care was non-delegable. During the hearing the non-delegable duty was reformulated to be a duty of the Diocese to ensure that reasonable care was taken to avoid reasonably foreseeable personal injury to children invited onto Diocesan premises caused by the conduct of Diocesan priests at those premises. The pleaded duty, however, was not abandoned on behalf of AA. Rather, senior counsel for AA explained that the narrower duty (confined to a child on Diocesan premises) was all that was required in the case for AA to succeed.

78 While imperfect, AA's reformulated non-delegable duty does not fail to identify the kind of harm or the relevant person or class within the scope of the duty. Nor does it defer the question of reasonable foreseeability to a consideration of breach of the postulated duty. Even if the postulated duty did not expressly refer to "reasonably foreseeable personal injury" it is as inherent within every non-delegable duty as it is with an ordinary duty of care that the risk of the relevant kind of harm be reasonably foreseeable.[154] Nor is it immediately apparent that, as the Diocese would have it, the non-delegable duty must be framed to refer only to the reasonably foreseeable risk of an intentional infliction of harm by assault and battery to or sexual assault of a child within the scope of the non-delegable duty. "Personal injury" is a common description of a form of harm to a person rather

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154 eg, *Tame v New South Wales* (2002) 211 CLR 317 at 331 [12], 386 [203], 401 [249]. See also *Lepore* (2003) 212 CLR 511 at 552 [103].

than to a person's property, reputation or economic interests. Psychological harm consequential on personal injury is itself a form of personal injury.[155]

79 It is always possible to criticise a duty of care or a non-delegable duty as too broad or too narrow.[156] The question is not whether the drafting of the claimed duty can be improved, but whether the substance of a claimed duty exists or should be recognised either with or without modifications to ensure that, if such a duty is recognised or rejected, the decision to do so is based on stable factors having broad explanatory power. What is clear is that, in framing any common law duty, and its breach, an approach which focuses only on the facts of the specific case is likely to lead to a formulation of the duty which involves arbitrary elements.[157]

80 As will be explained, on the one hand, the pleaded non-delegable duty may be said to have been too broad because it was premised on the fact that every child "in the care of [a] priest[]" of a diocese is owed a non-delegable duty by that diocese to ensure reasonable care is taken of the child while under the care of the priest. The duty would be imposed irrespective of the circumstances in which the child came to be under the care of the priest. That cannot be right, because a non-delegable duty of a diocese can only arise from a relationship between the diocese and the child, and a child may come under the care of a priest for reasons unconnected to the priest purportedly performing any function of the priest of the diocese. If that were so, a diocese's duty would extend beyond the scope of the relationship between the diocese and the child.

81 On the other hand, the reformulated duty of care, in selecting from potentially relevant circumstances the fact of invitation of a child onto diocesan premises by a priest (or other person whom a diocese had authorised or armed to invite people onto diocesan premises) and the presence of the child on those premises, may be said to be too narrow. A child may be present on diocesan premises other than by specific invitation of a priest (or other authorised person), yet the child's presence on those premises may be because of a diocese's relationship to the child. And a child may come under the care of a priest as part of that relationship in locations other than diocesan premises. As discussed below,

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155 *Mount Isa Mines Ltd v Pusey* (1970) 125 CLR 383 at 394; *Baltic Shipping Co v Dillon* (1993) 176 CLR 344 at 405.

156 See Giles, "Duty of Care, Scope and Breach" (2009) 9 *The Judicial Review* 165.

157 eg, *Graham Barclay Oysters Pty Ltd v Ryan* (2002) 211 CLR 540 at 611-612 [192]; *CAL No 14 Pty Ltd v Motor Accidents Insurance Board* (2009) 239 CLR 390 at 418 [68].

the reasoning in *Introvigne*[158] and cases applying it thereafter, in which the non-delegable duty of a school has been held to extend beyond school premises to locations in which the school has care, supervision or control of the child as a pupil of the school, should be applied to frame the relevant non-delegable duty.[159]

The primary judge's relevant findings

82 While the primary judge did not consider the claimed non-delegable duty, she did consider whether, in 1969, there was a reasonably foreseeable risk, and therefore a risk that the Diocese ought to have foreseen, that a Diocesan priest might cause a child harm by sexually assaulting the child and concluded that there was such a reasonably foreseeable risk in 1969.

83 It goes without saying that personal injury caused by an intentional sexual assault is a more confined class of harm than mere personal injury. The primary judge's analysis assumed that the test of reasonable foreseeability had to be applied to the confined class of personal injury, being sexual assault. As will be explained, the better view is that the kind of personal injury ought not to be so confined for the purpose of the analysis. That said, for present purposes, the primary judge's findings remain relevant.

84 The primary judge's key findings included that at the relevant time: (1) a diocesan Bishop had paramount authority over a priest's duties, responsibilities and priorities; (2) a diocesan Bishop had ultimate authority over the use of all properties in the diocese; (3) a standard expectation of a diocesan Bishop was that a parish priest would engage with young people of the parish and this would have been regarded by a diocesan Bishop as a most important and valued part of a parish priest's Ministry; (4) the actual use made of a presbytery depended on the parish priest in residence, because it was his home; (5) the Catholic Church had few written rules and stipulations about how a parish priest should engage with young people of the parish or use the presbytery; (6) the course of study to be a priest contained limited preparation for their pastoral function in a parish; (7) consistent with the views of the Catholic Church, a diocesan Bishop and parish priests expected that people of the parish would give the priest their trust, loyalty and co-operation, Catholics being exhorted to follow priests as their pastors and fathers; and (8) a diocesan Bishop and parish priests knew that "priests were given an

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158 (1982) 150 CLR 258.

159 See fn 184 below.

exaggerated dignity and respect, which could and did become dangerous at times".[160]

85 The primary judge also found that: (1) the Diocese required Fr Pickin to live alone at the presbytery to perform his pastoral obligations to the people of the parish; (2) as part of those obligations, the Diocese required and expected Fr Pickin to engage with children of the parish in respect of their spiritual education and growth in the Catholic religion; (3) in pursuit of those obligations, the Diocese authorised Fr Pickin to teach Catholic religion to children at AA's high school; (4) that teaching role was intended by the Diocese to and did give Fr Pickin direct access to the school's pupils being instructed in the Catholic faith; and (5) the Diocese permitted Fr Pickin to invite people, including children, to the presbytery at any time that suited Fr Pickin.[161] In referring in these findings to "the Diocese", it is apparent that the primary judge was referring to the conduct of the Bishop of the Diocese, Bishop Toohey, being conduct which the primary judge rightly attributed to the Diocese.

86 Leeming JA's criticisms of these findings are affected by his Honour's errors as identified above. Leeming JA's most important criticism is that the primary judge wrongly elevated Fr Dillon's evidence from evidence of "likely knowledge" of "some people in positions of high authority in the Church, such as Bishops ... who would have been aware of complaints and allegations" of sexual misconduct by priests against children to evidence of the existence of such specific knowledge on the part of the Diocesan Bishop, Bishop Toohey.[162] Leeming JA also said that if that had been the effect of Fr Dillon's evidence it would have to have been given little weight as Fr Dillon was "ordained on 1 June 1969, in Victoria, did not purport to have expertise of the level of knowledge of the Bishop of Maitland (or any other senior clergy in New South Wales) in 1969, and did not provide any reasons for any such opinion".[163]

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160 *AA v Trustees, Roman Catholic Church, Diocese of Maitland-Newcastle* (2024) 334 IR 70 at 102-103 [204]-[207].

161 *AA v Trustees, Roman Catholic Church, Diocese of Maitland-Newcastle* (2024) 334 IR 70 at 104 [211]-[214].

162 *Trustees of the Roman Catholic Church for the Diocese of Maitland-Newcastle v AA* (2025) 117 NSWLR 253 at 302 [210].

163 *Trustees of the Roman Catholic Church for the Diocese of Maitland-Newcastle v AA* (2025) 117 NSWLR 253 at 303 [210].

87 Fr Dillon's evidence did not suggest that, as a priest ordained in Victoria in 1969, he could not give useful and reliable opinions about the operation of the Diocese of Maitland in that year. Nor would such a limitation on Fr Dillon's capacity be expected. The Diocese of Maitland was a Catholic diocese. The evidence all supported the inference (taken as a given by the primary judge) that the Diocese of Maitland was conducted in accordance with the same basic requirements as every other Catholic diocese in Australia. Fr Dillon was trained to be a Catholic parish priest, and the Diocese did not challenge the proposition that Fr Dillon was, by training and experience, "very familiar with the laws, rules and customs of the Catholic Church, especially in its management and operation of Parishes", meaning the Catholic parishes of Australia. The proposition that Fr Dillon could not give reliable evidence about a diocese because it is in New South Wales and not Victoria is inconsistent with Fr Dillon's evidence, the universal application of Canon Law in the Catholic religion, and the universal application of papal decrees including the *Presbyterorum Ordinis: Decree on the Ministry and Life of Priests* as published by Pope Paul VI in 1965, relied on by both parties in their pleadings and about which Fr Dillon gave evidence.

88 Fr Dillon's evidence was also correctly understood by the primary judge. The evidence was that in 1969 *community awareness* of the potential for priests to sexually abuse children was "minimal ... if not totally unknown" and that amongst the "*Catholic populace*"[164] there was "minimal if any suspicion that a trusted religious leader could or would ever pose any kind of threat to a young parishioner". Further, at that time, amongst the vast majority of priests, the crime of sexual abuse of children by priests was "virtually unknown". However, Fr Dillon said, "a likely exception to this overall lack of awareness would be the knowledge of some people in positions of high authority in the Church, such as Bishops, Religious Superiors and Provincials etc. who would have been aware of complaints and allegations made against other priests, brothers and nuns".

89 In other words, Fr Dillon was drawing a clear distinction in probable knowledge of the risk of priests sexually assaulting children between, on the one hand, the community and most ordinary priests and, on the other hand, some people in positions of high authority in the Church, such as Bishops. While Fr Dillon's evidence was not that every Bishop was likely to have known of the risk of sexual assaults by priests, it is evidence that within the class of Bishops some are likely to have so known. That evidence is relevant to what the class of Bishops in Australia as a whole ought to have been able to reasonably foresee and therefore ought reasonably to have known at the time. To make liability for negligence or a non-delegable duty to ensure reasonable care is taken depend on

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164 Emphasis added.

actual knowledge of a defendant, rather than what the defendant ought to have known because it was reasonably foreseeable, would be a fundamental error.

90 The likely knowledge of some in high authority in the Church (eg, Bishops), on Fr Dillon's evidence, is likely (meaning probable) knowledge of actual complaints of alleged child sexual abuse by priests. That probable actual knowledge on the part of some Bishops of complaints of alleged child sexual abuse by priests is relevant to the question whether the risk of such child sexual abuse by priests was reasonably foreseeable by Bishops in Australia as a class in 1969, the relevant risk being a not far-fetched or fanciful risk.[165] The primary judge was right to frame the question by reference to whether the Bishop of the Diocese, as a member of the class of Bishops in Australia or individually, ought reasonably to have known of a not far-fetched or fanciful risk of priests of a diocese sexually abusing a child. Because the question is focused on a risk of harm, that the actual knowledge of some Bishops was confined to alleged rather than proved child sexual abuse by priests is not to the point. Actual knowledge of an allegation on the part of a Bishop can support an inference of constructive knowledge (that which ought reasonably to have been known) of a risk on the part of that Bishop, particularly if the harm involved is serious. Moreover, actual knowledge of an allegation on the part of some Bishops can support an inference of constructive knowledge (that which ought reasonably to have been known) of a risk on the part of all Bishops in Australia because it would not be assumed that, as members of that geographically, numerically and functionally confined class, each Bishop operated in total isolation from the others.

91 Fr Dillon gave other evidence relevant to all Bishops and dioceses in Australia including, for example, that in 1969: (1) priests would engage with youth of the parish by such means as youth groups, movie nights, camping, sporting teams, choirs and any number of other activities "bring[ing] people together under the banner of the Church"; (2) a priest engaging in "personal" or "one-on-one" instruction of a young person was "not common" and even then leaving a child alone with an adult, even a trusted and respected person such as a priest, would be seen as unwise or imprudent despite the community then having minimal or no knowledge of the potential for a priest to sexually abuse a child; (3) on rare occasions a priest might give a single student instruction such as for baptism, confirmation or other sacraments, but the most effective way to instruct children was seen to be in small classes; (4) use of a priest's personal rooms in a presbytery for such instruction was "unheard of" and priests would see parishioners in their front door near the front entrance to the presbytery; (5) a Bishop could direct a parish priest about permissible uses of a presbytery; (6) using a presbytery for

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165 *Sullivan v Moody* (2001) 207 CLR 562 at 576 [42], 583 [64]; *Sydney Water Corporation v Turano* (2009) 239 CLR 51 at 70 [45].

parish administration and parish-related meetings, functions and events was common, but it would depend on the approach of the priest, who might see the presbytery as "private" space; (7) if there were children in a presbytery there would be and it was common sense to have another adult present to "maintain[] law and order"; (8) however, the Catholic Church "really provided very few rules and stipulations in this area at that time" ("this area" being supervision of children while on Church property); (9) supplying alcohol and cigarettes to a child in a presbytery would have been "totally foolhardy and irresponsible", "just totally out of order in every way possible" and "quite reprehensible", and "should be condemned"; (10) very few things were written down about how parish priests should conduct themselves and that was left to the "common sense and good judgment" of the parish priests; and (11) priest training provided no instruction about these matters and parish priests had to "learn[] as [they] went".

92 The primary judge drew several inferences from this evidence. First, Bishops of dioceses in Australia must have known that training for the priesthood did not include training about how a priest should conduct themselves in their functions as a parish priest. Second, Bishops of dioceses in Australia must have known that there were few, if any, written instructions about how a priest should conduct themselves in their functions as a parish priest. Third, Bishops of dioceses in Australia must have known that this lack of instruction and training extended to how priests should conduct themselves in their functions as a parish priest when engaging with children. Fourth, Bishops of dioceses in Australia must have known that in performing their functions as a parish priest, priests were required and expected to engage with children to a sufficient degree and extent to ensure their education and spiritual growth consistent with Church doctrines. Fifth, Bishops of dioceses in Australia must have known that in performing their functions as a parish priest, priests could and did use Church property including presbyteries which were the residences of priests. Sixth, Bishops of dioceses in Australia must have known that in using Church property including presbyteries which were their residence to perform their functions as a parish priest, priests could and did invite others, including children, onto that property.

93 Fr Dillon's evidence, that if children were on Church property with a priest another adult would be present to maintain law and order, that it would have been "unheard of" for a priest to be instructing a child or children in his personal rooms in a presbytery, and that instruction of children was seen to be most effective in small classes, plainly relates to the "vast majority" of priests properly performing their functions. As Fr Dillon said, however, it was also clear that it was not uncommon for priests to take their exaggerated status to the point of it being dangerous, which must mean, at the least, that it was clear to Bishops in 1969 as a class that some priests could not be relied upon to properly perform their functions.

94 In this case, there was also evidence specific to the position of Bishop Toohey in his role as Bishop of the Diocese of Maitland in 1969, being a report from a psychiatrist from 1987 to the then Bishop of Maitland, Bishop Clarke, following consultations with Fr McAlinden. The subject-matter of the report was "in connection with [Fr McAlinden's] sexual activity involving children". The report records that Fr McAlinden "at all times ... maintained his innocence". The report also records that Fr McAlinden told the psychiatrist that he had been the subject of "previous similar allegations" (that is, of sexual activity involving children), the first allegation having occurred in 1954 "when the late Bishop Toohey had cause to discuss the issue with Father McAlinden at that time".

95 It is not to the point that Fr McAlinden always maintained his innocence of the allegations of his sexual activity involving children, beginning in 1954 and which came to the notice of Bishop Toohey in that year. Nor is it to the point that we do not know the precise nature of the alleged "sexual activity" involved or what was discussed between Bishop Toohey and Fr McAlinden in 1954. What matters is that an allegation had been made that a priest of the Diocese had "sexual activity" involving children, Bishop Toohey knew about the allegation, and it had caused Bishop Toohey to talk to Fr McAlinden about it. In the face of this evidence, it could not be suggested that Bishop Toohey, in 1969, had no reason to reasonably foresee that a priest of the Diocese might commit acts of sexual abuse against a child. Even if Bishop Toohey believed Fr McAlinden, Bishop Toohey was on notice that there was a real risk, in the sense of a not far-fetched or fanciful risk, that a priest of the Diocese might sexually abuse a child by exploiting, in some or other way, his role as a priest.[166]

96 In these circumstances Leeming JA's observation that in the "absence of evidence of any knowledge or belief or suspicion by the Bishop or senior priests in the Diocese that Fr Pickin posed a risk to children, I do not see how [the Diocese] ... owed a duty of care to [AA]"[167] has the wrong focus. Whether framed as an ordinary duty of care or as a non-delegable duty of the Diocese, it was not necessary for AA to prove that the Diocese ought to have known that Fr Pickin specifically presented a risk of harm to children by committing acts of sexual abuse against them. For a risk of harm to be reasonably foreseeable, all that is required is that a reasonable person in the defendant's position would foresee that a class of

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166 It is therefore unnecessary to decide whether, as AA contended, the knowledge of another priest of the Diocese of Fr Pickin sexually assaulting a boy, before Fr Pickin's sexual assault of AA, is attributable to the Bishop of the Diocese by reason of the provisions of Pt 1B of the NSW Civil Liability Act.

167 *Trustees of the Roman Catholic Church for the Diocese of Maitland-Newcastle v AA* (2025) 117 NSWLR 253 at 308 [241].

circumstances might (not would) involve a real (meaning a not far-fetched or fanciful) risk of a class of harm being suffered by a class of people.[168] It is only at the stage of determining breach of such a duty that a court ascertains if the facts fall within the scope of the duty. The relatively low threshold of reasonable foreseeability of harm at the duty stage explains both why mere reasonable foreseeability alone cannot establish a common law duty of care and why such reasonable foreseeability is required to establish every such common law duty of care including a common law non-delegable duty.

97 It must be noted that the primary judge accepted the Diocese's submission that the Friday evenings that AA went to the presbytery were not a "Church event".[169] So much may be accepted if by "Church event" what is meant is an event officially or formally approved by the Church, such as a parish priest holding a Church service. That AA's attendance at the presbytery did not involve "Church events" does not mean, however, that those visits were unconnected to Fr Pickin performing or purportedly performing the functions of parish priest. Fr Pickin met AA at the high school where, with Bishop Toohey's inferred approval and authorisation, Fr Pickin was teaching religion and AA, a child of Catholic parents, was one of his students. AA said that when Fr Pickin first invited him to the presbytery, AA thought it was to further his religious instruction. As a Catholic, AA was taught to believe that priests were representatives of God, were holy men, could be trusted and should be "respected and obeyed without question". When Fr Pickin gave him beer and cigarettes at the presbytery, AA thought that Fr Pickin was able to do so and that it was okay. When he left to go to the presbytery after dinner on Friday nights, AA told his father and stepmother he was going to see Fr Pickin. There was a youth club at the back of the Church which his father and stepmother, as Churchgoers, knew about. His father and stepmother never asked why he was going to see Fr Pickin or what occurred when he was with Fr Pickin.

98 None of these circumstances are explicable other than on the basis that Fr Pickin was the parish priest. It follows that AA was present at the presbytery as a result of Fr Pickin purportedly performing functions as a parish priest. While at the presbytery, the evidence is clear. Fr Pickin was the sole adult. AA, while at the presbytery, was under the care, supervision or control of Fr Pickin.

99 That in drawing the inference of reasonable foreseeability in 1969 on the part of the Bishop of the Diocese, and therefore the Diocese, the primary judge

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168 *Sullivan v Moody* (2001) 207 CLR 562 at 576 [42], 583 [64]; *Sydney Water Corporation v Turano* (2009) 239 CLR 51 at 70 [45].

169 *AA v Trustees, Roman Catholic Church, Diocese of Maitland-Newcastle* (2024) 334 IR 70 at 105 [218].

made one error may be accepted. The primary judge wrongly referred to the "Cunneen Report" to the effect that "the then Bishop of the Diocese [had] to deal with the risks which priests posed in the 1950's".[170] As Leeming JA noted, this report was not in evidence before the primary judge, although it had been referred to in oral submissions.[171] The error is not material because the primary judge said only that her conclusion of the reasonable foreseeability of the risk "accords with the Cunneen Report". The primary judge did not use the Cunneen Report as evidence to support the view she had reached based on other evidence.

100 For these reasons, the circumstances relied on by the primary judge were sufficient to establish a not far-fetched or fanciful risk of harm of a priest of a diocese sexually abusing a child in 1969 that Bishops of dioceses in Australia ought to have reasonably foreseen.

The relationship between the Diocese and AA

101 In terms of a non-delegable duty, it is necessary to consider the relationship between the Diocese and a child in the position of AA in 1969. The relationship explains why the relevant reasonably foreseeable harm is not the sexual assault of a child by a priest (as discussed above) but personal injury to the child whether intentionally inflicted or not (albeit provided the personal injury occurs in certain circumstances, to be described). As part of this analysis, it should go without saying that children, as a class, are particularly vulnerable to harm from a lack of reasonable care by adults. So much was conceded by the Diocese. This is part of the explanation for schools being subject to a non-delegable duty to their pupils. Similarly, although they may be adults, patients of a hospital are particularly vulnerable to harm from a lack of reasonable care by those caring for or given access to them in a hospital.

102 An obvious aspect of the vulnerability of children as a class is their vulnerability to an adult wrongfully exploiting their authority over the child. The existence of this vulnerability would have been as obvious in 1969 as it is today. Indeed, the evidence of Fr Dillon that at that time a parish priest had a particular responsibility to assist children in their personal and spiritual growth reflects this recognised vulnerability of children.

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170 *AA v Trustees, Roman Catholic Church, Diocese of Maitland-Newcastle* (2024) 334 IR 70 at 106 [231].

171 *Trustees of the Roman Catholic Church for the Diocese of Maitland-Newcastle v AA* (2025) 117 NSWLR 253 at 303 [211]-[212].

103 The vulnerability of a child in 1969 in the relationship between a diocese and the child had two special characteristics (similar to those present in the school and child relationship). First, from the perspective of a diocese, the relationship was instrumental, involving interests of the diocese in the child for reasons beyond the child itself, being the purpose of promulgation of religion. Second, priests were instructed to pay particular regard to children because children are immature, impressionable and easily led, and therefore were perceived to be liable to require religious instruction. The younger the child the greater the immaturity, but there is no reason for any arbitrary cut-off before 18 years of age when considering the legal consequences of the relationship between a diocese and a child.

104 From the evidence it must be inferred that the Diocesan Bishop, Bishop Toohey, expected and authorised Fr Pickin to interact with and achieve sufficient familiarity with children in the parish to aid their education and spiritual growth as a Catholic. Bishop Toohey did so for the ends and purposes of the Catholic Church. It therefore can be said that the Diocese enabled and required Fr Pickin, as the parish priest, to achieve the Diocese's purpose of aiding children's education and spiritual growth as Catholics, for the Diocese's own purposes, knowing that children are particularly vulnerable as a class to harm because of their immaturity, inexperience and impressionability. While there is no doubt that the focus of this Diocesan requirement was the children of Catholic parents in the Diocese, it is not apparent that this Diocesan requirement was limited to children whose parents were Catholic. All that can be said is that not being the child of Catholic parents, not attending Catholic Church services at the parish Church, and not attending a Catholic school would have placed practical limitations on a parish priest's opportunity to form any relationship with such children.

105 Mere vulnerability, like reasonable foreseeability, is a necessary but not a sufficient condition for the imposing of a non-delegable duty in this context. An important further consideration is whether it can be said that in 1969 the Diocese had assumed or undertaken a particular or special responsibility in respect of the safety of children where the persons ordinarily responsible for the child (in the case of AA, his father and stepmother) might reasonably expect such care for the child to have been taken.

106 That a parent or a person *in loco parentis* does not owe a child a non-delegable duty to ensure that reasonable care is taken of the child merely by reason of their status as parent or as a person *in loco parentis* does not mean that the imposition of such a duty on a school authority or school (or an entity in an analogous position, such as a diocese) is unprincipled. It was no part of the reasoning in *Introvigne* that the school was acting under any form of delegation of

care of a child from a parent. As Mason J explained in *Introvigne*,[172] that thesis had been rejected in *Ramsay v Larsen*.[173] While it is commonly said that a school is *in loco parentis* in respect of its pupils, that, as *Ramsay v Larsen* discloses, is not the legal foundation of the non-delegable duty to ensure reasonable care is taken that a school owes its pupils. The source of the duty is the legal relationship between the school and the pupils in respect of which teachers perform functions on behalf of the school, not on behalf of the parents.[174] This is why, as Stephen J said in *Geyer v Downs* in respect of a school's duty to a pupil injured before school hours on school grounds, the temporal extent of the duty "will be determined by the circumstances of the relationship on the particular occasion in question", the question being "whether the particular circumstances of the occasion in question reveal that the relationship of schoolmaster and pupil was or was not then in existence".[175]

107 As Lord Sumption said in *Woodland*,[176] in the context of a non-delegable duty of care, schools and parents are not comparable. School employees and contractors are "paid professionals" performing a function of the school. In contrast, "the custody and control which parents exercise over their children is not only gratuitous, but based on an intimate relationship not readily analysable in legal terms".[177] As a result, Lord Sumption said, "the common law has always been extremely cautious about recognising legally enforceable duties owed by parents on the same basis as those owed by institutional carers".[178] As Beldam LJ put it in *Surtees v The Royal Borough of Kingston upon Thames*:[179]

> "Save in exceptional cases, little useful purpose would be served by an action at law brought for the benefit of an injured child against its parents for damages to be paid from a fund already being used in part for [their] benefit. Understandably, therefore, the law has approached with great

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172 (1982) 150 CLR 258 at 269.

173 (1964) 111 CLR 16.

174 (1964) 111 CLR 16 at 28-30.

175 (1977) 138 CLR 91 at 93-94.

176 [2014] AC 537.

177 [2014] AC 537 at 585 [25].

178 [2014] AC 537 at 585 [25].

179 [1992] PIQR P101 at P121.

> caution the problems raised by intruding into a relationship as close as that normally to be found between parent and child to lay down duties of care which, if rigorously applied, could tend to disturb family harmony. It has not, however, been similarly reluctant to use as a yardstick for those who look after children in nurseries or kindergartens the standard of care to be expected of the reasonably careful parent."

108 The caution with which the common law in England and Australia has intruded into the relationship between a parent and a child reflects the common law's acceptance of its own limits. As Barwick CJ put it, "the moral duties of conscientious parenthood do not as such provide the child with any cause of action when they are not, or [are] badly, performed or neglected", but a parent can be under a duty of care to a child (as can a stranger to the child) by reason of a situation and its elements.[180]

109 The other difference between a parent in relation to a child and a person *in loco parentis* to a child by reason of a circumstance or situation has already been mentioned. The ordinary human assumption is that a person becomes a parent of a child unconnected to any ultimate societal, cultural, spiritual or other object, end or purpose for the child. That is, the parental relationship to the child is assumed to be non-instrumental. In contrast, a relationship between a person or body and a child which is not parental but by which the person or body is *in loco parentis* to the child may be an instrumental relationship, even if an object of the relationship is the child's well-being (such as the child's education, health or growth as a person). In such an instrumental relationship, as between the person or body *in loco parentis* to the child and the child, there is an object, end or purpose the person or body intends to be achieved, whether for reward or not. In the case of a school, for example, the instrumental object, end or purpose is the education of the child to satisfy a statutory mandate (for a government school) or a contract with parents (for a non-government school). In the case of a religious institution, for example, the instrumental object, end or purpose is to enhance the child's affiliation with the religion.

110 While it may be said that imposing a non-delegable duty on the Diocese is "novel", in that such a non-delegable duty has not previously been recognised, recognition of such a duty is analogous to the non-delegable duty that the common law has long imposed on school authorities. On analysis, leaving aside the issue raised by the confining of a non-delegable duty to the unintentional acts of a

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180 *Hahn v Conley* (1971) 126 CLR 276 at 283-284, referring to *McCallion v Dodd* [1966] NZLR 710. See also *Posthuma v Campbell* (1984) 37 SASR 321 at 329-331.

delegate in *Lepore*,[181] the imposition of such a duty on the Diocese raises no issue of legal principle not already considered and resolved by those cases. Imposing a non-delegable duty on the Diocese, accordingly, is an incremental development consistent with common law principle.[182]

111 It is relevant that the non-delegable duty of a school authority is not confined to school hours or school grounds but extends to such times and places that the school permits the pupil, as a pupil, to be present.[183] This includes, for example, school camps and sporting and other events supervised by teachers of the school.[184]

112 There are many conceivable circumstances in which parents in 1969 would have permitted their child to be under the care, supervision or control of a priest either alone or with the capacity for the priest to isolate the child from other children and adults because the priest was purportedly performing a function of a priest. In common with a school, while many of these circumstances would relate to Church (or school) property, others (such as sporting events, youth camps, movie nights and other such events "under the banner of the Church") would not be confined to Church property.

113 Many similarities are apparent in the relationship between a school authority and a child and a diocese and a child. A school authority generally does not run the school but arranges for others to do so and a diocese does not perform the functions of parish priest but arranges for priests appointed by the diocese to do so. While education of children is compulsory, parents can choose whether their children will be educated in schools or not and, similarly, while religion is not compulsory, parents who wish their children to be raised in a religion can arrange for that to occur by the children attending a religious school, attending scripture classes in a government school, attending religious services, and engaging with priests for spiritual education and growth. In both cases, to the knowledge of the

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181 (2003) 212 CLR 511.

182 *Sutherland Shire Council v Heyman* (1985) 157 CLR 424 at 481; *Crimmins v Stevedoring Industry Finance Committee* (1999) 200 CLR 1 at 32-33 [73].

183 *Lepore* (2003) 212 CLR 511 at 564 [142].

184 eg, *Geyer v Downs* (1977) 138 CLR 91 at 93; *Ayoub v Trustees of the Roman Catholic Church for the Diocese of Parramatta* (2001) 34 MVR 563 at 567 [18]; *Gugiatti v Servite College Council Inc* (2004) Aust Torts Reports ¶81-724 at 65,260 [19]; *New South Wales v T2* [2025] NSWCA 165 at [60], [63]-[77]. See also, by analogy, *Fitzgerald v Hill* (2008) Aust Torts Reports ¶81-969 at 62,141 [76]-[77].

school authority and the school (on the one hand) and to the knowledge of the diocese and the priest (on the other hand), the parents entrust their children's safety from reasonably foreseeable risks of harm to the school and to the priest. In entrusting their children's safety to the school (on the one hand) and to the priest (on the other hand) parents and the school authority (on the one hand) and parents and the diocese (on the other hand) know that teachers at the school and priests interacting with a child have a high level of authority and control over the child and that the child, by reason of immaturity, inexperience and impressionability, will be particularly vulnerable to any abuse of that authority. Further, in entrusting their children's safety to the school (on the one hand) and the priest (on the other hand) parents have no control over the appointment of the teachers at the school or the appointment of a priest of the parish and no control over the systems the school authority (on the one hand) and the diocese (on the other hand) use to ensure the suitability and ongoing review of the teachers or the priest for the task entrusted to them – control of those matters being wholly within the hands of the school authority and the diocese, as the case may be. Both a school authority and a diocese, whilst aiming to enhance the welfare of the child, are doing so for their own ends, being education of a child to fulfil a statutory remit or contractual obligation in the case of a school and promulgation of religion in the case of a diocese. The relationship in both cases is ultimately instrumental, unlike the relationship of a parent and child.

Framing the non-delegable duty of the Diocese

114 In the case of a diocese of the Catholic Church in Australia in 1969, the non-delegable duty of care should be framed so that it directly ties the fact of the child being under the care, supervision or control of a priest of the diocese to the circumstance of the priest having purportedly performed a function of a priest of the diocese. If a child is under the care, supervision or control of a priest of a diocese by reason of circumstances unconnected to the fact of the priest having purportedly performed a function of a priest of the diocese, the diocese's relationship with the child is irrelevant to the harm suffered. Being a priest of the diocese, in such a case, is a merely collateral or incidental fact. But if a child is under the care, supervision or control of a priest of a diocese as a result of the priest having purportedly performed a function of a priest of the diocese, the child's circumstances are directly related to the relationship between the diocese and the child.

115 It may be accepted that, when sexually assaulting AA, Fr Pickin was not in fact performing a function of a priest of the Diocese. The relevant question, however, is whether AA came to be under the care, supervision or control of Fr Pickin in the presbytery as a result of Fr Pickin having purportedly performed a function of a priest of the Diocese. The answer to that question is clearly "yes". It was the relationship between the Diocese and AA that enabled Fr Pickin, as a priest

of the Diocese performing the functions of parish priest, to meet AA and to invite AA to the presbytery and resulted in AA accepting that invitation and AA's parents permitting him to go. It was that relationship which enabled Fr Pickin to assume he had control over AA to the extent that AA would not try to physically prevent Fr Pickin from carrying out the sexual assaults. It was that relationship which enabled Fr Pickin to assume AA would not be able to tell anyone about the sexual assaults. It was that relationship which meant that AA felt that he had no choice but to return to the presbytery when Fr Pickin invited him to do so until AA simply "couldn't go any more". Accordingly, the presence of AA at the presbytery enabling the sexual assaults that Fr Pickin inflicted on AA at the presbytery resulted from the purported performance by Fr Pickin of his functions as a priest of the Diocese.

116 In contrast to the proposed direct connection between the function or purported function of a priest and a child being in the care, supervision or control of a priest of a diocese, the pleaded non-delegable duty that the Diocese had to ensure reasonable care was taken of AA as a child in the care of one of the Diocese's priests is too broad. It does not identify any fact, matter or circumstance as to how the child came to be under the care of a priest. As noted, if a child came to be under the care of a diocesan priest by some means unconnected to the priest purportedly performing any function as a priest of the diocese it is difficult to see how there could be any relevant antecedent relationship between the diocese and that child. It is even more difficult to see how the diocese could have assumed any responsibility to the child. In such a case, the fact the priest was a priest would be merely incidental to the child being under the care of the priest.

117 The reformulated non-delegable duty put on behalf of AA (that the Diocese had to ensure that reasonable care was taken to avoid reasonably foreseeable personal injury to children invited onto Diocesan premises caused by the conduct of Diocesan priests at those premises) is both too narrow and too broad. As discussed, "diocesan premises" may not be the only location where a priest of a diocese has the care, supervision or control of a child as a result of the priest purportedly performing a function of a priest of the diocese. When the non-delegable duty of a school authority or school is considered, it makes no sense to impose a non-delegable duty on a diocese for harm caused by such a priest where the child is in a church or a presbytery but not to impose a non-delegable duty if the priest, for example, is in a school the diocese has approved and authorised the priest to attend to instruct children in religion or is driving a child in his own car (in connection with purportedly performing some function as a priest) or is in the child's own house (in connection with purportedly performing some function as a priest).

118 Similarly, it would make no sense to confine the non-delegable duty to a case where a priest (or other authorised person) has invited a child onto diocesan

premises. Fr Pickin did invite AA to the presbytery but that is no reason to formulate a non-delegable duty in such a way. In any event, the concept of a priest inviting a child to a location is bound up with the limitation of the posited duty to diocesan premises, which itself is unprincipled. A priest is not given control of a government school or a priest's car by a diocese, but, if a child is under the care, supervision or control of a priest of a diocese at the school or in a car as a result of the priest purportedly performing a function of a priest of the diocese, the child's presence and the fact of the child being under the priest's care, supervision or control are part of the diocese's pre-existing relationship with the child.

119 A child being under the care, supervision or control of a priest of a diocese as a result of the priest purportedly performing a function of a priest of the diocese effectively maintains the requisite connection between the relationship of a diocese and a child without other arbitrary and illogical limitations. A child under the care, supervision or control of a priest of a diocese as a result of the priest purportedly performing a function of a priest of the diocese may or may not be a "child of the parish" in the sense that the child may or may not live in the parish. Residence or non-residence in a parish, however, is a purely arbitrary distinction. Similarly, a child may or may not be Catholic but may still be under the care, supervision or control of a priest of a diocese as a result of the priest purportedly performing a function of a priest of the diocese. When the proper rationale for the non-delegable duty is exposed, there is no basis for discriminating between Catholic and non-Catholic children in this context.

120 It would also make no sense to confine the non-delegable duty to personal injury to a child "caused by the conduct of a priest" if by this it is meant that the priest must be the person inflicting the personal injury on the child. Assume, for example, a case in which a child is under the care, supervision or control of a priest as a result of the priest purportedly performing a function of a priest of the diocese. If the priest intentionally permits a third party to injure the child there is no relevant difference in the relationship between the diocese and the child than if the priest themselves injured the child. Similarly, if a priest's failure to take reasonable care to prevent injury to the child is the cause of the injury why would that not be within the scope of the same relationship and assumption by the diocese of a positive duty?

121 The proposed non-delegable duty thus accords with the nature and scope of the relationship between a diocese and a child by three key qualifying factors. First, the child must in fact be under the care, supervision or control of a priest of a diocese. Second, the child must be in that position as a result of the priest purportedly performing a function of a priest of the diocese. Third, the harm must be reasonably foreseeable personal injury to the child.

122 For these reasons the relevant non-delegable duty of care in this case should be recognised to be as already stated: that in 1969 the Diocese owed a duty to a child to ensure that while the child was under the care, supervision or control of a priest of the Diocese, as a result of the priest purportedly performing a function of a priest of the Diocese, reasonable care was taken to prevent reasonably foreseeable personal injury to the child. The scope of this duty extended to the harm caused to AA by the Diocese failing to ensure that reasonable care was taken against the foreseeable risk of personal injury to AA, including from the intentional infliction of such injury by the Diocese's own delegates, specifically priests, and by third parties.

NSW Civil Liability Act

A late emerging issue

123 Late in the hearing of the appeal it emerged that the parties disagreed about the operation of provisions of the NSW Civil Liability Act in respect of the liability of the Diocese for breach of a non-delegable duty of care (if found to exist). The parties were permitted to file further written submissions dealing with this issue. Those submissions, however, do not fully confront what has been described as the "infelicity of the expression"[185] of provisions of the NSW Civil Liability Act, which is not confined to the inaptness of the heading to Div 2 of Pt 1A ("Duty of care") when Pt 1A concerns breach and causation, not duty.[186]

Statutory provisions

124 Section 3B of the NSW Civil Liability Act provides that:

> "(1) The provisions of this Act do not apply to or in respect of civil liability (and awards of damages in those proceedings) as follows—
>
> (a) civil liability of a person in respect of an intentional act that is done by the person with intent to cause injury or death or that is sexual assault or other sexual misconduct committed by the person—the whole Act except—

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185 *Reed v Warburton* [2011] NSWCA 98 at [21].

186 See fn 112 above.

(ia) Part 1B (Child abuse—liability of organisations),[187] and

...".

125 According to s 3C:

"Any provision of this Act that excludes or limits the civil liability of a person for a tort also operates to exclude or limit the vicarious liability of another person for that tort."

126 Part 1A comprises ss 5-5T. By s 5, "***negligence*** means failure to exercise reasonable care and skill".

127 Section 5A provides that:

"(1) This Part applies to any claim for damages for harm resulting from negligence, regardless of whether the claim is brought in tort, in contract, under statute or otherwise.

(2) This Part does not apply to civil liability that is excluded from the operation of this Part by section 3B."

128 Section 5B provides that:

"(1) A person is not negligent in failing to take precautions against a risk of harm unless—

(a) the risk was foreseeable (that is, it is a risk of which the person knew or ought to have known), and

(b) the risk was not insignificant, and

(c) in the circumstances, a reasonable person in the person's position would have taken those precautions.

(2) In determining whether a reasonable person would have taken precautions against a risk of harm, the court is to consider the following (amongst other relevant things)—

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187 As noted, Pt 1B commenced on 26 October 2018, other than Pt 1B Div 4, which commenced on 1 January 2019.

(a) the probability that the harm would occur if care were not taken,

(b) the likely seriousness of the harm,

(c) the burden of taking precautions to avoid the risk of harm,

(d) the social utility of the activity that creates the risk of harm."

129 Section 5C provides that:

"In proceedings relating to liability for negligence—

(a) the burden of taking precautions to avoid a risk of harm includes the burden of taking precautions to avoid similar risks of harm for which the person may be responsible, and

...".

130 Section 5D provides that:

"(1) A determination that negligence caused particular harm comprises the following elements—

(a) that the negligence was a necessary condition of the occurrence of the harm (***factual causation***), and

(b) that it is appropriate for the scope of the negligent person's liability to extend to the harm so caused (***scope of liability***).

...

(3) If it is relevant to the determination of factual causation to determine what the person who suffered harm would have done if the negligent person had not been negligent—

(a) the matter is to be determined subjectively in the light of all relevant circumstances, subject to paragraph (b), and

(b) any statement made by the person after suffering the harm about what he or she would have done is inadmissible except to the extent (if any) that the statement is against his or her interest.

(4) For the purpose of determining the scope of liability, the court is to consider (amongst other relevant things) whether or not and why responsibility for the harm should be imposed on the negligent party."

131 Section 5E provides that in "proceedings relating to liability for negligence, the plaintiff always bears the onus of proving, on the balance of probabilities, any fact relevant to the issue of causation".

132 Section 5Q provides that:

"(1) The extent of liability in tort of a person (***the defendant***) for breach of a non-delegable duty to ensure that reasonable care is taken by a person in the carrying out of any work or task delegated or otherwise entrusted to the person by the defendant is to be determined as if the liability were the vicarious liability of the defendant for the negligence of the person in connection with the performance of the work or task.

(2) This section applies to an action in tort whether or not it is an action in negligence, despite anything to the contrary in section 5A."

The issue

133 Before the primary judge the parties "agreed that [damages] must be assessed at common law, if the Diocese was [vicariously liable] for the assaults, involving as they did trespass and battery: s 3B *Civil Liability Act*".[188] This agreement is consistent with authority in New South Wales that s 3B(1)(a) of the NSW Civil Liability Act operates so that the vicarious liability of a person for the intentional acts of another person is to be treated as the same liability as the liability of that other person.[189] On this basis, the provisions of the NSW Civil Liability Act do not apply to a person's vicarious liability for the intentional act of another person other than to the extent of the exceptions in s 3B(1)(a).

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188 *AA v Trustees, Roman Catholic Church, Diocese of Maitland-Newcastle* (2024) 334 IR 70 at 112 [273].

189 eg, *New South Wales v Bujdoso* (2007) 69 NSWLR 302 at 304 [2], 317 [66]; *Zorom Enterprises v Zabow* (2007) 71 NSWLR 354 at 358-359 [13]; *Dean v Phung* (2012) Aust Torts Reports ¶82-111 at 66,341 [10]; *Croucher v Cachia* (2016) 95 NSWLR 117 at 125 [33].

134 Neither party in this appeal challenged the correctness of these decisions. Both parties accepted that if Fr Pickin had been a co-defendant with the Diocese, Fr Pickin's liability would be in respect of his own intentional act so that s 3B(1)(a) would apply and his liability would have been determined under common law and not the provisions of the NSW Civil Liability Act other than Div 4 of Pt 1B.

135 The disagreement between the parties that emerged late in the hearing of the appeal encompassed whether the same reasoning that has been applied to vicarious liability ought to apply to the liability of a person subject to a non-delegable duty so as to exclude the application of the provisions of the NSW Civil Liability Act (other than those specified in s 3B(1)(a)). The disagreement extended to how the provisions of the NSW Civil Liability Act would apply to the Diocese if s 3B(1)(a) is not engaged to exclude its application.

Consideration

136 In the absence of persuasive argument to the contrary, this appeal is to be resolved on the basis that s 3B(1)(a) of the NSW Civil Liability Act is not engaged in respect of the liability of the Diocese for breach of its non-delegable duty, with the consequence that the provisions of the NSW Civil Liability Act apply to the liability of the Diocese in accordance with their terms.

137 First, characterising the vicarious liability of an employer or principal as liability "in respect of" the liability of an employee "in respect of" an intentional act that is done by the employee makes apparent sense in the context of s 3B(1)(a). In contrast to the doctrine of vicarious liability, however, there is no attribution of the delegate's liability to the holder of a non-delegable duty to ensure reasonable care is taken (and to the extent that it is relevant in this context, there is no basis for attributing any intention on the part of the delegate to the holder of the non-delegable duty). The non-delegable duty-holder's liability is a direct and personal liability of the duty-holder for not having ensured that reasonable care was taken.

138 Second, applying an apparently ordinary grammatical meaning to the provisions, s 3B(1)(a) determines if any provision of the NSW Civil Liability Act applies, including s 5Q. On this basis, s 3B(1)(a) would not be construed assuming s 5Q applies to the liability. Rather, s 3B(1)(a) would be construed and applied according to its own terms and that construction and application would determine if s 5Q applies.

139 In considering the application of the provisions of the NSW Civil Liability Act, it is necessary to observe that the Act is based on recommendations in the *Review of the Law of Negligence: Final Report* dated September 2002 ("the Ipp

Report").[190] The Ipp Report assumed that a non-delegable duty, being a duty to ensure reasonable care is taken, is not itself a duty to take reasonable care.[191] Consequentially, the Ipp Report further assumed that a breach of a non-delegable duty is not "negligence" in the sense of a failure to exercise reasonable care and skill.[192] This in part explains why the Ipp Report recommended the enactment of a provision such as s 5Q under which "liability for breach of a non-delegable duty shall be treated as equivalent to vicarious liability for the negligence of the person to whom the doing of the relevant work was entrusted by the person held liable for breach of the non-delegable duty".[193]

140 The conception of a non-delegable duty in the Ipp Report is not reconcilable with the analysis in *Introvigne*, *Kondis* and *Burnie Port Authority*. As explained, those cases conceive of a non-delegable duty to ensure reasonable care is taken as a "special" or "stringent" duty of care. That is, there is "a duty of a specified person, or a person within a specified class, to exercise reasonable care within a specified area of responsibility to avoid [a foreseeable risk of] specified [harm] to another specified person, or to a person within another specified class",[194] albeit that the duty "to exercise reasonable care", in the case of a non-delegable duty, is to be understood to mean a duty to ensure reasonable care is exercised and the breach of that results from either the duty-holder themselves not exercising reasonable care or the duty-holder's delegate not exercising reasonable care. Either way, a non-delegable duty is a creature of the law of negligence.

141 Ultimately, however, it is unnecessary to reach a concluded view on whether or not the definition of "negligence" in s 5 of the NSW Civil Liability Act encompasses a breach of a non-delegable duty to ensure reasonable care is taken. That is because the outcome of the appeal would be the same either way.

142 If the definition of "negligence" in s 5 does not encompass a breach of a non-delegable duty to ensure reasonable care is taken, the provisions of Pt 1A

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190 *Moore v Scenic Tours Pty Ltd* (2020) 268 CLR 326 at 352-353 [74], referring to New South Wales, Legislative Assembly, *Parliamentary Debates* (Hansard), 23 October 2002 at 5765.

191 cf *Introvigne* (1982) 150 CLR 258 at 270; *Kondis* (1984) 154 CLR 672 at 686; *Burnie Port Authority* (1994) 179 CLR 520 at 550.

192 *Review of the Law of Negligence: Final Report* (2002) at [11.10]-[11.11].

193 *Review of the Law of Negligence: Final Report* (2002) at [11.16].

194 *Brookfield Multiplex Ltd v Owners Corporation Strata Plan 61288* (2014) 254 CLR 185 at 240 [169].

which depend on a person being "negligent" (ss 5B-5E) do not apply to a person who has breached a non-delegable duty by failing to ensure reasonable care is taken by another person. Consequentially, breach and causation would be determined in accordance with the common law principles applicable to such a non-delegable duty.

143 If, however, the definition of "negligence" in s 5 does encompass a breach of a non-delegable duty, s 5B(1) and (2) (a "person is not negligent in failing to take precautions against a risk of harm unless ...") would be applied to a breach of a non-delegable duty arising from an intentional criminal act of a delegate only on the basis that the relevant precaution is nothing more than the delegate's failure to refrain from doing the intentional act. In a case such as this, s 5B would be satisfied by the fact that the intentional act was done. Section 5C would then apply according to its terms on the basis that the relevant precaution is nothing more than the delegate's failure to refrain from doing that act. Section 5D(1)(a) would be applied on the basis that the doing of the intentional act must be a "necessary condition of the occurrence of the harm", whereas the condition in s 5D(1)(b) would ask if it is appropriate for the scope of the negligent person's liability to extend to the harm so caused, the "negligent person" being the Diocese as the holder of the non-delegable duty that was breached. On the same basis the "negligent party" in s 5D(4) is the Diocese, the consideration being "whether or not and why responsibility for the harm should be imposed on the negligent party".

144 On either view as to whether the definition of "negligence" in s 5 encompasses a breach of a non-delegable duty, s 5Q(1) would operate to determine the extent of the liability of the Diocese as holder of the non-delegable duty once duty, breach and causation are determined. That is because s 5Q(2) provides that "[t]his section applies to an action in tort whether or not it is an action in negligence, despite anything to the contrary in s 5A".

Breach of the Diocese's non-delegable duty

145 The Diocese challenged breach of the non-delegable duty. Those challenges, however, wrongly assumed that the risk of harm had to be confined to the risk of Fr Pickin specifically sexually assaulting a child and that such a risk was not reasonably foreseeable on the part of the Diocese. As explained, however, the relevant risk of harm was personal injury (rather than sexual assault) while under the care, supervision or control of a priest of the Diocese and, in any event, the risk of a priest of the Diocese sexually assaulting a child was itself reasonably foreseeable for the reasons given.

146 Otherwise, the Diocese's challenges wrongly assumed that the "precautions" AA pleaded as being reasonable precautions the Diocese could have taken to prevent the risk of harm applied to the Diocese's non-delegable duty of

care to ensure reasonable care was taken of AA. Those pleaded precautions, however, would be relevant only if the conduct constituting the breach of the duty had been that of the Diocese itself. Here it was the conduct of a delegate. This is why the only "precaution" that could be relevant if ss 5B and 5C applied to the determination of the liability of the Diocese is the delegate refraining from doing the intentional act.

147 The unavoidable conclusion in this case is that, on the facts as found by the primary judge, the Diocese breached its non-delegable duty to AA. In 1969 AA was a child aged 13 years. While at the presbytery AA was under the care, supervision or control of the only adult present, Fr Pickin. AA was present at the presbytery and thus under the care, supervision or control of Fr Pickin as a result of Fr Pickin purportedly performing the functions of a priest of the Diocese, being teaching scripture at AA's high school, AA visiting Fr Pickin because he was a priest, and AA's parents permitting him to visit Fr Pickin because he was a priest. Fr Pickin sexually assaulted AA, by forcing AA to perform oral sex on Fr Pickin, while AA was under Fr Pickin's care, supervision or control.

148 The Diocese's contentions that the requirements of breach of the non-delegable duty are not satisfied must be rejected.

Causation of harm

149 The Diocese challenged the primary judge's findings of causation of harm. This challenge, however, was based on Leeming JA's observation that "it is far from obvious that if [the pleaded precautions had been taken], it would have made any difference to Fr Pickin's conduct".[195] Again, the difficulty is that the pleaded precautions concerned the pleaded ordinary duty of care. If s 5D of the NSW Civil Liability Act were to be applied, Fr Pickin's intentional sexual assault of AA would be the "negligence". On that basis, the relevant hypothetical is not the Diocese having taken the precautions that AA pleaded to support the claimed ordinary duty of care (as a step along the way to the claimed non-delegable duty) but Fr Pickin not having sexually assaulted AA. The question then becomes whether the fact of Fr Pickin having sexually assaulted AA was a necessary condition of the claimed harm and whether it would be appropriate for the scope of Fr Pickin's liability to extend to that harm so caused.

150 In terms of causation of harm, it is not material that the harm to AA, as found by the primary judge, was not caused by "any act or omission of the Diocese". The relevant question for liability of the Diocese under its non-delegable

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195 *Trustees of the Roman Catholic Church for the Diocese of Maitland-Newcastle v AA* (2025) 117 NSWLR 253 at 309 [243].

duty of care is whether the harm was caused by the act of Fr Pickin. The primary judge analysed the evidence and carefully distinguished the harm resulting from Fr Pickin's sexual assaults of AA and other life events to which AA was subject.[196] No error is apparent in the primary judge's approach, which involved her Honour ultimately applying the observation of Cavanagh J in *SR v Trustees, De La Salle Brothers* that:[197]

> "Assessing damages for historical sexual abuse presents as a difficult task because much of the evidence which might ordinarily be presented in a claim for personal injuries in respect of loss and damage subsequent to the tortious conduct of the defendant is no longer available. ...
>
> It is thus important to observe that the assessment of loss in these types of claims is very much a matter of impression, based on the available evidence, and having regard to what must be the ordinary incidents of life, some good and some bad, which might befall a person ... Assessment of damages is not merely a mathematical exercise. ..."

151 Otherwise, the scope of the Diocese's liability, commensurate with the scope of its non-delegable duty, extends to the harm caused to AA by the Diocese failing to ensure that reasonable care was taken against the foreseeable risk of personal injury to AA, including from the intentional infliction of such injury both by the Diocese's own delegates, specifically priests, and by third parties.

152 The Diocese's contentions that the requirements of causation of harm to AA within the relevant scope of liability are not satisfied must be rejected.

Damages

153 Explained in terms of s 5Q, the Diocese delegated or otherwise entrusted to Fr Pickin the task of performing the functions of a parish priest of the parish of St Patrick's Church in the Diocese. The Diocese was under a non-delegable duty to ensure that Fr Pickin took reasonable care of any child who came under the care, supervision or control of Fr Pickin as a result of Fr Pickin purportedly performing a function as a priest of the Diocese to prevent reasonably foreseeable personal injury to the child. Accordingly, the extent of liability in tort of the Diocese "is to be determined as if the liability were the vicarious liability of [the Diocese] for the

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196 eg, *AA v Trustees, Roman Catholic Church, Diocese of Maitland-Newcastle* (2024) 334 IR 70 at 112-113 [277]-[288].

197 *AA v Trustees, Roman Catholic Church, Diocese of Maitland-Newcastle* (2024) 334 IR 70 at 113-114 [290], applying (2023) 321 IR 441 at 467-468 [170]-[172].

negligence of [Fr Pickin] in connection with the performance of the work or task", the work being the performance of the function of Fr Pickin as the parish priest of the St Patrick's Church parish in the Diocese.

154 No more need be said about damages, however, because in this case the parties agreed that if the provisions of the NSW Civil Liability Act (including s 3C) applied to the Diocese then the award of damages the primary judge made to AA had to be reduced to $335,960 (economic loss of $90,480, plus non-economic loss of $245,480).

Orders

155 For these reasons the following orders should be made:

(1) Appeal allowed with costs.

(2) Set aside orders 1 and 2 made by the Court of Appeal on 15 April 2025 and orders 7 and 8 made by the Court of Appeal on 7 May 2025. In their place, order that the appeal to the Court of Appeal be dismissed with costs save to the extent that order 1 of the orders made by Schmidt A-J on 18 October 2024 be varied to substitute for "$636,480.00" the sum of $335,960.

156 GORDON J. The appellant, AA (a pseudonym), commenced proceedings in the Supreme Court of New South Wales in 2024 alleging that he was sexually abused on multiple occasions in the late 1960s by Father Ronald Pickin (now deceased), a priest of the Diocese of the Roman Catholic Church for Maitland-Newcastle ("the Diocese").

157 The Diocese is an unincorporated organisation under Div 4 of Pt 1B of the *Civil Liability Act 2002* (NSW) ("the CL Act"). There was no dispute that the respondent, the Trustees of the Roman Catholic Church for the Diocese of Maitland-Newcastle, a statutory trustee corporation,[198] was a proper defendant to child abuse proceedings[199] relating to the Diocese as contemplated by s 6L of the CL Act. The respondent could therefore be held liable in child abuse proceedings as if any duty owed by the Diocese were owed by the respondent and as if the Diocese had legal personality.[200]

158 The primary judge concluded that AA, when aged 13, was sexually abused on multiple occasions in 1969 by Father Pickin in the presbytery of St Patrick's Catholic Church in Wallsend ("the presbytery"); that the Diocese was liable in negligence for breach of a duty to take reasonable care owed to AA; that the Diocese was vicariously liable for the sexual abuse committed by Father Pickin; and that AA was entitled to damages for the harm which he suffered as a result of the sexual abuse. The primary judge did not determine the claim that the Diocese breached a non-delegable duty owed to AA. It was an agreed fact that the sexual abuse of AA, if it occurred, constituted battery.

159 The Court of Appeal of the Supreme Court of New South Wales allowed an appeal by the respondent, holding that no duty of care was owed by the Diocese to AA in 1969 and the Diocese owed no non-delegable duty to ensure that a delegate of the Diocese did not intentionally assault or batter a child. AA accepted in the Court of Appeal that the part of the judgment of the primary judge based on vicarious liability could not stand in light of this Court's decision in *Bird v DP (a pseudonym)*.[201]

160 By a grant of special leave, AA appealed to this Court contending that, in respect of the sexual abuse committed against him by Father Pickin, the Diocese owed him a duty of care in negligence (ground 2) and a non-delegable duty of care

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198 *Roman Catholic Church Trust Property Act 1936* (NSW), ss 4(1) and (2)(f), 5A(3)-(5).

199 CL Act, s 6J definition of "child abuse proceedings".

200 CL Act, s 6O(b), (d), (e).

201 (2024) 98 ALJR 1349; 419 ALR 552.

(ground 1). By a notice of contention, the respondent contended that the Court of Appeal's decision should be affirmed on the ground that the Court of Appeal erroneously decided or failed to decide some matter of fact or law, including that AA had failed to establish that he was sexually assaulted by Father Pickin and that AA had failed to establish breach of duty or causation.

161 This appeal raises significant questions about the nature and scope of liability of a particular diocese of the Catholic Church – the Diocese of Maitland-Newcastle – for historic child sexual abuse which was allegedly perpetrated against AA in the late 1960s. The appeal is deliberately described in that way because, as these reasons will explain, the nature and scope of the liability of any person, including any particular diocese of the Catholic Church, for historic child sexual abuse depends on the circumstances of the particular case established by agreed facts, the evidence adduced and accepted, and the findings of fact open to be made on such evidence.

162 For the reasons that follow, the appeal must be allowed with costs. AA proved that he was abused by Father Pickin. He failed to prove that the Diocese owed him a duty, or alternatively breached any duty owed, to take reasonable care to prevent that abuse. However, the Diocese owed a non-delegable duty – a duty to *ensure* that reasonable care was taken to avoid the risk of personal injury to child parishioners in the care of a priest of the Diocese at the presbytery. The facts of this case fall within the scope of that duty because AA, as a child parishioner who was taught to respect and obey priests, was specially vulnerable; the Diocese undertook the care of AA in circumstances where the Diocese appointed Father Pickin to a parish and expected and required him to engage with young people as part of his ministry; the Diocese made the presbytery available to Father Pickin to perform that ministry; and AA's parents entrusted the care of AA to Father Pickin. The Diocese breached that duty to ensure that reasonable care was taken when Father Pickin assaulted AA. The award of damages must be reduced to $335,960 to reflect the fact that AA's claim for the breach of the Diocese's non-delegable duty is subject to the caps on personal injury damages under Pt 2 of the CL Act.

163 These reasons are organised as follows:

D – Bases of liability

1 Common law [221]-[223]

2 CL Act [224]-[232]

E – Negligence

1 Principles [233]-[241]

2 AA's claim in negligence against the Diocese [242]-[270]

F – Non-delegable duty

1 Principles [271]-[296]

2 AA's non-delegable duty claim against the Diocese [297]-[329]

G – Orders [330]

A. Facts and background

164 The primary judge found that AA, when aged 13, was sexually abused on multiple occasions in 1969 by Father Pickin in the presbytery. The sexual abuse consisted of Father Pickin forcing AA to suck Father Pickin's penis. It is necessary to set out, in some detail, the agreed facts at trial, the expert evidence, the tendency evidence and the findings of the primary judge before turning to the judgment of the Court of Appeal.

(1) The Diocese, the Bishop and Father Pickin

165 It was an agreed fact at trial that the Diocese had the care and control of Catholic churches in the Diocese; the Bishop of the Diocese, Bishop John Toohey ("the Bishop"), had powers of direction and control over incardinated priests; at all material times, Father Pickin was an incardinated priest of the Diocese, having been appointed by the Bishop as the parish priest of St Patrick's Church; and Father Pickin attended Wallsend High School to provide religious scripture classes to students. The primary judge made a finding, supported by Father Pickin's personnel file, that the Bishop had exercised control in a variety of ways over Father Pickin.

166 It was also an agreed fact that, at all material times, both the 1917 Code of Canon Law and the *Presbyterorum Ordinis* proclaimed in 1965 by Pope Paul VI were in existence. In AA's amended statement of claim, particular aspects of both documents were pleaded. The respondent's response was not to admit two particular paragraphs of the amended statement of claim and, in response to the balance, to admit that each of the Code and the *Presbyterorum Ordinis* were in

existence, to rely upon the whole of each as if set out in full and otherwise not to admit the remainder of the paragraphs. Neither document was tendered in evidence. Unchallenged evidence of some aspects of their contents was given by Father Dillon.

(2) Father Dillon's expert evidence

167 Father Dillon was called by AA to give expert evidence. He was only shortly cross-examined and the respondent did not call any evidence to rebut his opinions.

168 Father Dillon provided two reports, which were structured by him responding to questions. Questions asked of Father Dillon (in italics), and his responses, included:

> "**Question (c):**
>
> *Do you recall whether in the 1960's the instruction in Canon 212 (that members of the Catholic laity should show obedience to the sacred pastors of the Church) was widely promulgated by the Church, if not in word, then in effect, as one of its teachings?*
>
> In Australia in 1969, the Parish Priest was the highest local authority for the members of the Catholic Church, and was answerable only to the Diocesan Bishop. Parish Councils and other areas of lay (parishioners) involvement and support were only beginning to come into use, and even then just on a minor level. There is no question that the priest was the centre and focus of what we might today call the 'governance' of the Parish at its local level.
>
> ...
>
> **Question (d):**
>
> *Do you recall whether the provisions of the Presbyterorum Ordinis, which was proclaimed by Pope Paul VI in 1965, that:*
>
> *(a) priests have a special obligation to the poor and weak entrusted to them;*
>
> *(b) priests are to apply, with special diligence, attention to youth, married people and parents and that it is desirable that these join together in friendly meetings for mutual aid in leading more fully and in a Christian manner a life that is often difficult;*

(c) priests are to possess temporal goods, inter alia, for procuring of honest sustenance of the clergy and the fulfilment of their office and status; and

(d) Catholics should follow priests as their pastors and fathers

informed the instruction of Catholicism in the late 1960's and the respective roles of priests and laity?

The responsibilities of priests towards their parishioners as outlined in Items (a) through to (d) were consistent with the normal and traditional practice of the Church and the expectations of the people of the Parish.

Effectively, most priests worked hard and effectively for the spiritual and in some cases the material benefit of their parishioners, and in return parishioners gave them their trust, loyalty and cooperation on many, if not all levels.

Question (e):

Do you recall whether the principles of 'in persona Christi' and 'in persons [sic] Christi capitis' or other doctrines which defined the status of priests were teachings of the Catholic Church in the late 1960's?

These phrases, introduced only at the time of the Second Vatican Council (1962 – 65) designated that the priest acted 'in persona Christi' (in the person of Christ) or that he was an 'alter Christus' (another Christ), and they clearly demonstrate the exaggerated dignity and respect given priests at the time. This clearly could and did become genuinely dangerous – for the priest and for others – if the priest took it seriously, which was a not uncommon occurrence.

Question (f):

Do you consider that in the 1960's parish priests were under the authority and direction of the Diocesan Bishop?

During the 1960s and indeed at all times before and since, the authority and direction of the Diocesan Bishop were paramount in terms of determining a priest's duties, responsibilities and priorities. He was expected to go where he was sent and to do what he was told by the Bishop. But they were also considered 'co-workers' and 'close co-operators' with the Bishop, to whom they were obliged to make a promise of obedience within the Rite of the Ordination to Priesthood.

...

Question (h):

... [A]re you able to say whether priests ministering to Catholic children in State schools were restricted from having interactions with such children beyond such instruction, whether priests in that situation were permitted to have such additional contact or whether such priests were encouraged to have such additional contact?

While they were many young people being In Catholic schools [sic], there was a general recognition that there were many Catholic children in government schools, and the parish and the priest had a responsibility to assist them in their personal and spiritual growth.

...

Question (i):

What types of authorised activities were engaged in by parish priests in the late 1960's to facilitate contact between priests and young persons?

and

Question (j):

In the late 1960's were parish priests in Australia directed and/or encouraged to reach out to children in Catholic families attending Catholic schools to promote Catholic teachings and encourage participation in Catholic life, including the Holy Sacraments?

It was a standard expectation of all priests that their engagement with the young people of the parish was a most important and valued part of their ministry. This would happen with youth groups, movie nights, camps, sporting teams, Choirs and any number of other activities which would bring people together under the banner of the Church. In addition, the involvement of priests in the Parish School provided an effective and positive (in most cases) connection with the majority of the children of parishioners – usually around 70%.

Question (k):

If you agree with the previous question, was it your experience that Catholic children in state schools were encouraged to participate in the Catholic Faith, including by personal instruction with priests?

'Personal' ie 'one-on-one' instruction of young people was not common in those days and even less so in the years since. Religious Education was seen as being most effective within a 'class' setting with other children. It is also

likely that the risks of children being alone with an adult – even a trusted and respected person (like a priest!) would have been seen as at least 'unwise' or 'imprudent'. However community awareness of the potential for abuse by priests and religious was minimal at the time, if not totally unknown.

Question (l):

In your experience in the late 1960's was it permissible for parish priests to have adults and children attend on them in their residences for the purpose of religious instruction and/or providing pastoral care?

On rare occasions, individual instruction could have been given by the local priest if a single student had to be prepared for Baptism, Confirmation or other Sacraments. But even in the 1960's having a number, even a small number of children and bringing them together for a Sacramental class was seen as a much more effective way of doing this.

... Use of the priest's personal room or rooms would have been unheard of, even in those 'innocent' times. Parishioners were seen by the priest in a front 'parlour['], which was always near the front door of the Presbytery[.]

...

While in recent decades children being alone with a non-family member adult might be viewed by some as 'unwise', if not 'high risk', such reservations or fears were a rarity in the late 1960's. Among Catholic people and even among the vast majority of Priests, Religious Brothers and Sisters, the tragic catalogue of offences and crimes which have been so well documented and proven since the mid-1980's was still virtually unknown.

That said, a likely exception to this overall lack of awareness would be the knowledge of some people in positions of high authority in the Church, such as Bishops, Religious Superiors and Provincials etc who would have been aware of complaints and allegations made against other priests, brothers and nuns.

However, such scandalous matters rarely reached the attention or awareness of the general Catholic populace, and so at that time 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.

Catholic Priests, Brothers and Nuns were the recipients of respect and trust from not only Catholic people, but were held in high regard by the vast majority of the wider general community.

...

Question (m):

... [W]as it the practice in the 1960s and 1970s that the use of properties such as Churches and Presbyteries was maintained by Diocesan authority under the control of their respective Bishops?

The Bishop of a Diocese is the ultimate authority with regard to the use and administration of all properties in the Diocese. A property cannot be sold without his explicit permission, nor can it be used for any purpose in anyway contrary to the wishes or direction of the Bishop.

For those activities and uses that are directly part of the Church's mission, the Parish Priest's authorisation and permission would be normally sufficient for that use or activity to be enacted. ...

Question (n):

In the 1960s and 1970s in circumstances where a priest has been given the use of a Presbytery in a parish, was it the expectation of Bishops that a Priest occupying a Presbytery who hosted members of the Catholic laity, including children at the Presbytery would do so as part of his apostolate consistently with the recognised role, responsibilities and duties of a Priest?

In the 1960's and 1970's, it was common (and still is today) for Presbyteries to be used for purposes other than being solely the priest's residence.

Parish offices, which were the administrative headquarters of the parish, could be quite extensive, and were usually housed within the Presbytery, with constant visits by parishioners, tradespeople etc.

Meeting rooms, kitchen facilities etc were used for committee meetings, social gatherings, religious instruction of individuals and groups etc when and as required.

These uses and activities were all seen as an indispensable components [sic] of the priest fulfilling both his pastoral and administrative responsibilities within the parish to which he had been assigned by the Bishop.

It was around this very time of the 1960's and 1970s that the word Presbytery (meaning the priest's residence) would increasingly give way to the term 'Parish House', as the building and property became increasingly utilised as the focal point of a variety of parish activities other than those which were specifically carried out in the church or school.

> Accordingly for the priest, the Presbytery / Parish House was not just where he lived – it was also where he worked in order to undertake the spiritual, pastoral and administrative responsibilities the Bishop expected of him."

169 The primary judge was satisfied that Father Dillon's evidence (based on his own experiences, qualifications, training and knowledge) established that in the 1960s the Catholic Church had few written rules and regulations about the conduct of parish priests or their use of presbytery premises; that parish priests were given little training in relation to their use, or about their interaction there with children; and that young priests learnt as they went, effectively while they were "on the job". The primary judge found that there was no evidence of any practice or requirement that parish priests *not* invite young people such as AA and Mr Alan Perry to the presbytery, even when they lived there alone, leaving it to individual priests who were under the control of the Bishop. Mr Perry was AA's friend who attended the presbytery with him.

170 Having regard to Father Dillon's evidence on the use of presbytery premises, the primary judge then made the finding that the presbytery was where the Diocese required Father Pickin to live alone to perform his duties as the parish priest, and it left him to determine whom he invited and when he invited others there. This permitted Father Pickin to invite boys to the presbytery at night, even though no other adult was present.

(3) Tendency evidence

171 A tendency notice served by AA relying on s 97 of the *Evidence Act 1995* (NSW) specified:

> "[t]hat while he was a priest, the late [Father Pickin] had the following particular state of mind and/or tendency to act in the following particular ways:
>
> 1. Father Pickin had a sexual interest in boys;
>
> 2. Father [Pickin] sought out opportunities to achieve intimacy with boys, including by using Church premises for that purpose;
>
> 3. Father Pickin had a tendency to sexually abuse boys who were in his care when he was able to do so;
>
> 4. Father Pickin exploited his position as a priest by asserting his authority to enable him to act on his sexual interest in boys[.]
>
> The tendency evidence sought to be adduced bears upon the facts in issue in [AA's] claim including whether: Father Pickin sexually abused [AA]; and the nature of the interactions between Father Pickin and [AA]."

172 The tendency evidence that was admitted under s 97 of the *Evidence Act* was specific paragraphs of the statements from two people: Mr Stephen McClung and BB (a pseudonym). The balance of each statement, subject to some paragraphs that were not read, was admitted without objection. Before the primary judge, senior counsel for the respondent did not submit that the primary judge should not accept the accounts of Mr McClung and BB.

173 There is now no dispute that the tendency evidence was properly admitted under s 97 of the *Evidence Act* as tendency evidence of the character, reputation or conduct of Father Pickin or of a tendency that Father Pickin had to act in a particular way or to have a particular state of mind because that evidence, either by itself or having regard to other evidence adduced, had significant probative value[202] in that it was capable of rationally affecting the probability of the existence of a fact in issue, namely whether AA was assaulted by Father Pickin, to a significant extent.[203] The established tendencies were that Father Pickin, a priest, had a particular state of mind and/or tendency to act in the following ways: Father Pickin had a sexual interest in boys; Father Pickin sought out opportunities to achieve intimacy with boys, including using Church premises for that purpose; Father Pickin had a tendency to sexually abuse boys who were in his care when he was able to do so; and Father Pickin exploited his position as a priest by asserting his authority to enable him to act on his sexual interest in boys.

(a) Mr McClung

174 Mr McClung's evidence was that he was brought up Catholic by his father and attended St Columba's Church every Sunday. He said that he had been abused as a young teenager, aged around 14, by a priest, Father Hodgson, at his Catholic high school. He said that when he was aged around 15, he confessed to the abuse in church. He said that in around 1965 Father Pickin became the assistant priest at St Columba's, that Father Pickin (as well as other priests and nuns) sometimes visited his home, and that for two Christmas periods and one Easter Mr McClung delivered lessons to the congregation.

175 The portions of his statement which were admitted pursuant to the tendency notice were as follows:

> "Delivering these lessons required me to attend St Columba's on Saturday nights and before other services, including Midnight Mass, Good Friday and others, to prepare and dress rehearse things.

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202 *Hughes v The Queen* (2017) 263 CLR 338 at 356-357 [40]-[42].

203 *Evidence Act*, Dictionary, Pt 1 definition of "probative value"; *IMM v The Queen* (2016) 257 CLR 300 at 313 [43]-[44].

> On around a dozen occasions, [Father Pickin] touched my genitals.
>
> [Father Pickin] was very physical and loved to come up and give me a hug, either from in front or from behind. At times while doing that his hands made their way down to my genitals which he fondled over [the] top of my trousers.
>
> This happened mostly in the vestry, which was a connected wing off to the right as you look toward the altar.
>
> On a couple of occasions, [Father Pickin] touched my genitals in the main Church area while physically guiding me on where to move in the course of the service."

176 Later, as a first year university student, Mr McClung went to speak to the parish priest, Father Doran, who had also been his science teacher at high school and whom Mr McClung described as "a practical, level-headed guy who I respected a lot". Mr McClung said that he told Father Doran of the sexual touching by Father Pickin, but not the earlier abuse by the other priest at high school. In cross-examination, he said that his last year of school was 1965, and his first year of university was 1966. It will be necessary to return to this evidence in the context of addressing AA's claim in negligence.[204]

177 Mr McClung's church attendance dropped off while he was at university. Mr McClung married in 1972, with Father Pickin officiating. There were two sons of the marriage, who attended a Catholic school at Merewether where, coincidentally, Father Pickin was the parish priest. Mr McClung said that his family was involved with the Church and he sometimes delivered the Epistle on Sundays. In 1988, after Mr McClung was divorced, Father Pickin moved from Merewether to Beresfield, but nonetheless Mr McClung visited Father Pickin on a few occasions and took him out for dinner or a coffee. He said that on a couple of these occasions "[Father Pickin] became very physical with [him] and attempted to touch [his] genitals".

178 Further, on two or three occasions Mr McClung went with Father Pickin to his beach house in Fingal Bay and, after a few drinks, "[Father Pickin] got handsy and again tried to touch [his] genitals. On one occasion [Father Pickin] got his hand inside [Mr McClung's] trousers and touched [his] penis". Each time Mr McClung refused Father Pickin's advances.

179 In cross-examination, Mr McClung accepted that he had been involved in civil and criminal proceedings in relation to the first priest, but had not made any

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204 See Section E(2) below.

complaint concerning Father Pickin until his statement in these proceedings. He was asked to explain why that was, and he said:

> "The very simple reason that what happened with Father Hodgson happened when I was 13 and 14. What happened with [Father Pickin] happened when I was 15, 16, even 16, 17. I was not the innocent little victim who had only just started at a high school by the time [Father Pickin] was at [St Columba's], my local parish, as an assistant priest. I was older, and I knew what these guys could do, and I knew how to resist that."

180 In cross-examination, Mr McClung gave unchallenged evidence that, when he asked Father Pickin about abuse by a particular priest, Father Pickin responded, "The silly bugger, he was stupid enough to get caught."

(b) BB

181 BB was born in August 1965 and had lived in Wingham all his life. Father Pickin was transferred to Wingham in July 1978 when BB was about to turn 13 years old.

182 BB's father died when he was around 11 years of age. He lived with his mother and one brother, who was six years older than BB. Father Pickin took a lot of the young boys under his wing and he was especially close to those, like BB, who did not have a father or whose father had died. At that time, BB's general perception of priests was that they were authority figures whom BB was always to respect and obey. BB said he never questioned the authority of priests, whom he and his mother saw as "[p]illars of society". He said, "My Mum always bloody worshipped the Priests."

183 BB gave the following evidence which was admitted as tendency evidence:

> "I was sexually abused by Pickin a couple of times at the Wingham Presbytery and a couple of times when he took me on holidays with him to Fingal Bay.
>
> A few times me and a couple of my mates had a sleepover after Church on Saturday nights with Pickin. We stayed and slept over at the Church Presbytery with Pickin. At that time, I was around 11 or 12 years of age.
>
> My mates and I were all watching movies on the TV at Pickin's place. The sexual abuse of me by Pickin was repeated light fondling of my genitals whilst I was lying on the loungeroom floor. Pickin came and lay close to me and fondled me.
>
> At that time of the sexual abuse of me by Pickin, the other boys had either fallen asleep or were lying unaware, as they were watching the TV movie.

> Pickin sexually abused me in this way on around three occasions over a period of around 6 weeks."

184 In re-examination, BB said that he had made no complaint until 2022 to avoid embarrassing his mother. He had brought proceedings based on the abuse, which were compromised before trial. In those proceedings he had only identified a single act of touching in the presbytery. He said, "when I did that, I thought one was enough", "I was just getting sorted out with it all" and "I just thought that was enough said". BB was not cross-examined to suggest that the abuse he described had not occurred. The evidence given by BB was of conduct by Father Pickin which was accepted to have occurred and amounted to a serious criminal offence inflicted upon a child.

(c) Reliance on the tendency evidence

185 The primary judge relied on the tendency evidence and, as the Court of Appeal accepted, she was entitled to do so. That is unsurprising. The respondent did not contend that the events described by Mr McClung and BB did not occur. As Ball JA explained in the Court of Appeal, the uncontested facts, including the tendency evidence, provided "strong corroborative evidence of that given by [AA]", the tendency evidence establishing "that [Father] Pickin had an interest in boys and given the opportunity would sexually abuse them".

186 There were differences between the assaults that Mr McClung and BB each described Father Pickin committing against them and those described by AA but the primary judge found that they had common features which linked them together. Under the heading "Was AA sexually abused by Father Pickin?", the primary judge also made a number of specific findings as to how the tendency evidence supported AA's case. To take just one example, in explaining why AA's evidence was persuasive, her Honour stated:

> "For the following reasons I am satisfied that AA's evidence, that he was assaulted by Father Pickin on a number of occasions in the way he described, must be accepted, it not being too vague, internally inconsistent or unconvincing to permit it being accepted as truthful, despite Mr Perry's evidence.
>
> Reaching the required conclusions depended on both what AA and Mr Perry agreed and disagreed about and how their evidence was led, *as well as how the tendency evidence supported AA's claims*." (emphasis added)

187 The trial before the primary judge was therefore properly conducted on the basis that Father Pickin had, years before and years after the assaults about which AA had given evidence, sexually molested other teenage boys on Church premises. The primary judge found that the evidence of both Mr McClung and BB

supported the existence of the notified tendencies and also made it more likely that the sexual abuse which AA said Father Pickin had inflicted on him had occurred.

188 In the Court of Appeal, Leeming JA's analysis of the tendency evidence was in error. First, his Honour was right to state that the tendency evidence established that Father Pickin was sexually interested in young boys. However, his Honour misstated, by impermissibly narrowing, the identified tendencies of Father Pickin. Contrary to the view expressed by Leeming JA, the tendency evidence established that Father Pickin had a tendency to sexually abuse boys who were in his care when he was able to do so, and not, as Leeming JA stated, a narrower or more limited tendency that he was "prepared to touch their genitals outside their pants, even when other people were nearby". The impermissible narrowing of the tendency evidence by Leeming JA likely infected his Honour's reasoning on the weight to be given to the tendency evidence as well as on whether AA had established to the requisite standard that he had been sexually abused by Father Pickin as he had alleged. Second, the conclusion expressed by Leeming JA that the primary judge placed little weight on the tendency evidence was inconsistent with her Honour's reasons for judgment. The primary judge did place some weight on the tendency evidence (which was uncontested) and her Honour was right to do so.

B. Primary judge's fact-finding process

189 It is necessary to say something about the primary judge's process of fact finding. Her Honour found that AA was sexually abused by Father Pickin as he alleged because the primary judge was satisfied of that fact on the balance of probabilities,[205] taking into account the gravity of the allegations,[206] recognising that the allegations concerned events more than 50 years ago that raised obvious problems given the results of the passage of time, that reasonable satisfaction should not be produced by "inexact proofs, indefinite testimony, or indirect inferences"[207] and that, instead, the Court must, if possible, "place primary emphasis on the objective factual surrounding material and the inherent ... probabilities together with the documentation tendered in evidence".[208] When deciding issues of fact on the balance of probabilities in a case of allegations of sexual abuse which occurred many decades earlier, her Honour was

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205 *Evidence Act*, s 140(1).

206 *Evidence Act*, s 140(2)(c). See also *Briginshaw v Briginshaw* (1938) 60 CLR 336 at 362; *M v M* (1988) 166 CLR 69 at 76-77; *GLJ v Trustees of the Roman Catholic Church for the Diocese of Lismore* (2023) 280 CLR 442 at 471 [57].

207 *Briginshaw* (1938) 60 CLR 336 at 362.

208 *Effem Foods Pty Ltd v Lake Cumbeline Pty Ltd* (1999) 161 ALR 599 at 605 [30].

"concerned not just with the question 'what are the probabilities on the limited material which the court has, but also whether that limited material is an appropriate basis on which to reach a reasonable decision'".[209]

190 It was against that background that the primary judge's detailed analysis led her Honour "to have the required actual persuasion that [AA] was assaulted by Father Pickin as he claims", namely that Father Pickin forced him to suck Father Pickin's penis. In conducting that analysis, the primary judge took into account the fact that AA was cross-examined and that the credibility and reliability of AA's evidence was in issue (as was that of Mr Perry). As Ball JA noted in the Court of Appeal, it was not suggested that AA had lied in giving evidence concerning the abuse – either the abuse happened or AA was mistaken about it.

C. AA sexually abused by Father Pickin

191 AA was born in 1955. It was an agreed fact that in 1969, when AA was a student in Second Form, now Year 8, at Wallsend High School, AA attended a class in which Father Pickin gave students instruction in the Catholic faith. AA was a practising Catholic. The scripture classes were also attended by students who were not practising Catholics, which included Mr Perry. As the primary judge recorded, AA had been raised to respect adults, particularly priests and teachers.

192 There was no issue that on Friday nights Father Pickin invited AA and his very close friend, Mr Perry, to the presbytery, where Father Pickin lived alone. It was not in dispute (at least in the Court of Appeal) that AA went with Mr Perry to the presbytery on ten to 12 occasions after dinner on a Friday night. Nor was it disputed that Mr Perry attended the presbytery with AA on each relevant occasion when the alleged abuse of AA occurred. The primary judge found that there were on some occasions other boys at the presbytery.

193 It was an agreed fact that, during those visits, AA and Mr Perry were given beer and cigarettes by Father Pickin and Father Pickin had a poker machine which he made available for the boys to play. The poker machine was kept in a dressing room adjacent to Father Pickin's bedroom. The bedroom was off the main living area of the presbytery where the boys drank beer and smoked. Father Pickin gave AA coins to play the poker machine and he was allowed to keep his winnings. The primary judge accepted the expert evidence of Father Dillon that supplying or even consuming alcohol and cigarettes in the presence of children was totally foolhardy and irresponsible and out of order for a priest, reprehensible and to be condemned.

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209 *GLJ* (2023) 280 CLR 442 at 472 [58], quoting *Cross on Evidence*, 13th Aust ed (2021) at 47 [1215], in turn quoting *Ho v Powell* (2001) 51 NSWLR 572 at 576 [14].

194 It was agreed that there were no other adults present during these gatherings at the presbytery. It was also an agreed fact that Father Pickin invited boys to go on holidays with him around the time of the alleged assaults on AA.

195 The primary judge found that there was no suggestion that Father Pickin invited the boys to the presbytery for religious instruction despite Mr Perry referring to his visits to the presbytery as "lessons" and AA's evidence that, when he was asked by Father Pickin to go to the presbytery, he thought it was to further his religious instruction that Father Pickin had been giving him at school.

196 The primary judge appeared to accept the respondent's submission that the Friday night gatherings arranged by Father Pickin were not "Church events". The phrase "Church events" was not defined or explained. The respondent's submission that the gatherings at the presbytery were not "Church events" was said to arise from Mr Perry's evidence that he was not a practising Catholic at the time he first started going to the presbytery, nor did he become one, and that he did not regularly go to church, together with AA's evidence that Father Pickin supplied them with alcohol and cigarettes and that they were not supervised by their parents or other adults. In this Court, senior counsel for AA described the term as "rather imprecise" but said that it was to be taken to refer to "religious events or events authorised by someone other than the priest". He submitted that "having social functions at the presbytery with people the parish priest chose to invite was something that was part of what he was authorised to do by the Diocese", so that the notion of saying that the Friday night gatherings were not "Church events" "rather conceal[ed] a degree of factual information relevant to the question of the duty of care". Senior counsel for the respondent, on the other hand, described "Church events" as "matters that would involve an element of religious instruction, spiritual guidance, gathering of a community as the church community". It will be necessary to return to this aspect of the analysis, as well as the unchallenged evidence of Father Dillon, when addressing AA's appeal grounds in this Court.[210]

197 AA provided two statements. In his first statement, dated 15 March 2024, AA explained how the abuse occurred:

> "I started seventh grade at Wallsend High School (**the School**)[.] The classes were graded academically and I was placed in 7A, the top stream.
>
> [Father Pickin] attended the school to teach Christian Studies.

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210 See Section F(2)(a) below.

> In the first week of Year 7, during the course of teaching, [Pickin] invited me and a classmate, [Alan Perry], to attend St Patrick's Church Presbytery (**the Presbytery**) on Friday night.
>
> The first time I visited [Pickin] I went to the Presbytery with [Alan Perry] after dinner at home, when it was already dark.
>
> When [Alan Perry] and I got to the Presbytery, [Pickin] had bottles of Hunter Old Ale black beer and Peter Stuyversant [sic] cigarettes which he shared with us.
>
> [Pickin] invited me and [Alan Perry] to the Presbytery every [Friday] night for the first 10-12 weeks of year 7, and I went pretty much every week.
>
> Myself, [Alan Perry] and [Pickin] drank alcohol and smoked until I was paralytic drunk, which was after consuming around 6 or 7 beers.
>
> [Pickin] made up excuses to send either myself or [Alan Perry] to the shops to buy cigarettes. The shop was around a 20-minute walk away, so this meant that one of us was alone with [Pickin] for at least 40 minutes.
>
> Of the 10-12 times I went to the Presbytery with [Alan Perry], he was sent to the shops 6 or so times and I was sent to the shops 4 or so times.
>
> On around 6 occasions when I was alone with [Pickin], he forced me to perform oral sex on him.
>
> Despite the fact that I was so drunk when it was happening after a few occasions I realised how wrong it was that [Pickin] was doing this to me, and I stopped going to the Presbytery on Friday nights."

AA said that, after the abuse, he went from being a straight-A student in primary school and Year 7 to not doing well academically. AA said that each year he dropped a class stream at school – 8B, then 9C, then 10C and D.

198 AA made a second statement on 31 May 2024, around a fortnight before his evidence was taken on commission. In that statement, AA described his Catholic Italian father having had traditional values and having taught him to respect adults, particularly those in positions of authority such as priests and teachers. He was taught to believe that priests were representatives of God and were holy men who lived good lives and who could be trusted and should be respected and obeyed without question. AA stated that Father Pickin was no different before the abuse and before that he would never have dared to question or disobey a priest. He also said:

> "When Father Pickin asked me to go to his residence at St Patrick[']s, I thought that it was to further my religious instruction that he had been giving me at school.
>
> When I was first with Father Pickin at this residence, he was friendly and kind. When he gave me cigarettes and beer, I thought that Father Pickin was able to do that and that that was okay.
>
> On the first occasion when [Alan Perry] left and Father Pickin started to sexually abuse me, his attitude towards me changed. He insisted that I suck his penis. I didn't want to do that but I just did it because he told [me] to do it.
>
> After the first time that Father Pickin made me suck his penis, I felt confused, ashamed and very much alone. I had a lot on my mind at that time. ..."

199 In that statement AA also corrected his account of the timing of the abuse. He said that Father Pickin came to Wallsend High School towards the end of Year 7 but started teaching him scripture at the start of Year 8 and it was in that year, 1969, that AA was abused.

200 AA's evidence was taken on commission.[211] AA was cross-examined about the change in his account as to the timing of the alleged abuse, about how long it would take him to drink six or seven glasses of beer so as to be paralytically drunk, about whether it appeared to him that anyone else was living in the presbytery (to which he answered "no"), about either himself or Mr Perry being sent away to the shops on each occasion, about being woken up with Father Pickin's penis in his mouth, and, on the times when he was sent away, about returning and seeing Father Pickin and Mr Perry in the living room of the presbytery. When the cross-examiner returned to AA's correction of the year of the alleged abuse, AA denied being told anything about when Father Pickin was transferred to Wallsend and said that he was thinking about it one night and knew that there was an error. AA said he did not recall telling a forensic psychiatrist retained by the respondent that (a) sometimes there was a third or fourth boy at the presbytery, (b) the abuse occurred only in Year 7 and mostly in the middle of the year, and (c) he had lost interest in school in the second half of Year 7. As Leeming JA stated, there was no reason to doubt that the psychiatrist correctly recorded what AA had told him about the timing of the abuse, especially since the report goes on to express views by reference to school reports about a decline in performance in the second half of Year 7.

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211 A video recording and transcript of AA's evidence on commission were tendered in the trial before the primary judge.

201 During the cross-examination, AA's evidence was that he told his stepmother and father that he was "going up with the meeting with Pickin". AA's evidence was that he did not tell them that he was going to the youth club at the church; he told them that he was "going to meet Pickin up at the church". AA said that his stepmother and father did not ask AA why he was going to meet Father Pickin because "[h]e was a priest" and that they did not really ask anything about what he had been doing up at the presbytery.

202 Mr Perry was called to give evidence by the respondent. In his statement he confirmed that he and AA attended the presbytery as high school friends. He said:

> "I attended the presbytery (attached to the St Patrick's Church, Wallsend) on occasions. I recall this was in my third and fourth year of high school in around 1970 or 1971, when I was aged 15/16 years. I attended the presbytery at Wallsend in the evenings but cannot recall on how many occasions I attended, as it was not a regular thing. On reflection, [Father] Pickin was a very approachable person and good natured and I enjoyed jovial banter with him during these lessons. Subsequently, my belief is that he became a friend to all the students.
>
> I never attended the presbytery on my own, there were always other people in attendance but the person I can recall clearly is [AA] as we were closer friends. [AA] and I attended the presbytery for social meetings and get together [sic] with other students and friends.
>
> I observed there to be a poker machine in the presbytery, which [Father] Pickin allowed us to play with coins he provided. These same coins were continually recycled through the machine.
>
> When at the presbytery, [Father] Pickin gave [AA] and I beer and we may also have been given cigarettes.
>
> While at the presbytery, I never observed [AA] to be paralytically drunk.
>
> On the occasions that I attended the presbytery with [AA], [Father] Pickin never told [AA] or I to go to the shops. I never left the presbytery on my own and I never left [AA] alone with [Father] Pickin. I never saw [AA] leave the presbytery to go to the shops.
>
> Whilst at the presbytery with [AA], I never noticed anything unusual about [AA] nor [Father] Pickin. By this I mean [AA] to have been highly intoxicated, distressed, fearful, anxious or angry.
>
> I never saw [Father] Pickin touch [AA] or exhibit behaviours consistent with grooming conduct. By this I mean giving [AA] special attention, favouring him or giving him gifts.

I am shocked and bewildered that [AA] has made allegations of sexual assault against [Father] Pickin. [AA] has, 'never' said anything to me about this alleged matter.

Holidays with [Father] Pickin

I did go on holidays with [Father] Pickin to Queensland as did other boys, on occasions. [AA] was never invited to my knowledge. During these holidays, I never observed any boys being inappropriately touched or groomed by [Father] Pickin. I was never touched or groomed by [Father] Pickin.

I have recently caught up with other boys who went on holidays with [Father] Pickin and none of them mentioned or have ever mentioned any inappropriate conduct, contact or grooming by [Father] Pickin. Our discussions included the well-publicised sexual abuse within the Catholic Church.

I believe [Father] Pickin to have been a very good man.

Visit to [Father] Pickin

I recall inviting [AA] to accompany myself to visit [Father] Pickin in his aged care facility at Dudley. We stayed with him for approximately half to three-quarters of an hour. At no stage prior to, during or after this visit did [AA] make any reference to me about any sexual abuse. This visit was quite convivial, all parties happily reminisced about 'the old days'."

203 In response, AA made a third statement, dated 16 July 2024, which disputed the last paragraph of Mr Perry's statement and also referred to Mr Perry's denial that he was sent to the shops:

"I understand that Alan Perry claims that he and I went to see [Father Pickin] when he was in aged care.

I never visited Pickin at any place at any time since leaving school.

I do recall an incident where I was with Alan Perry when he visited Pickin.

Sometime after my wife Lesley died, Alan Perry came to take me out for a drive. Alan said come for a drive, Lesley had died not long before that, I was down and out, so I agreed to go for a drive with him. I believe that Alan was being kind to me to try and get me out of the house and to give us a chance to have a chat.

> After driving for around 30 minutes, Alan pulled up the car in Whitebridge on the main road and said 'I'll be back in a minute'. I told Alan that I would wait in the car.
>
> Alan went into a brick building for a while. He came back to the car and said sorry to me for having to wait. After he started driving again, Alan said 'Ronnie Pickin is in there and I talked to him'. I was filthy and said 'so friggin what'.
>
> He said 'They are saying Pickin is a paedophile'. I told him 'I just want to go home'.
>
> Alan then drove me home.
>
> I understand that Alan says that he was never sent to the shops by Pickin.
>
> I believed Alan was sent to the shops because whenever I came out of the bedroom in the presbytery, after Pickin had had his way with me, Perry was gone. On one occasion I asked Pickin where Perry was. Pickin said to me 'He's gone down to the shops to get some things'.
>
> I never waited for Perry to return before leaving the presbytery so I was not able to ask him if that was correct, but I never had any reason to think Pickin had lied about that."

204 During the trial, AA's third statement was admitted without objection and AA was further cross-examined before the primary judge. AA said that on some occasions he had been told by Father Pickin that Mr Perry either had been sent to the shops or had gone home. At the conclusion of AA's cross-examination, it was squarely put to him that his account of Mr Perry leaving him while he was in the presbytery was untrue, which he denied. In response to the last question in cross-examination, that AA's evidence asserting that he was the victim of sexual abuse at the hands of Father Pickin was not true, AA responded, "I'm saying it is true, and I was the one that suffered. No one else. Not you or him, it was me."

205 A majority of the Court of Appeal (Leeming JA, Bell CJ agreeing) identified fact-finding errors by the primary judge but did not set aside the finding of the primary judge that Father Pickin assaulted AA at the presbytery or make a finding as to whether the alleged abuse occurred.

206 The primary judge's finding that AA was sexually abused by Father Pickin on several occasions in the presbytery in the way that AA alleged, namely, by Father Pickin forcing AA to suck Father Pickin's penis, should be upheld.

207 Their Honours misapplied the appellate task.[212] It was wrong for them to conclude that Father Pickin was the assistant priest and not the parish priest where the respondent had admitted in its defence that Father Pickin was the parish priest. That was not an issue between the parties at any stage of the trial. The trial was conducted on that basis. Leeming JA was wrong to go behind that admission. In the Court of Appeal, the respondent's senior counsel was correct to concede, "we're stuck with the admission we made". And, in any event, there was no evidence before the primary judge of there being someone else resident at the presbytery. Leeming JA was wrong to impugn the primary judge's findings on the basis that that was, or "would have" been, the case.

208 Leeming JA referred to the primary judge describing AA's account as "vivid" and said that he had "seen [AA's evidence on commission], and [he had] *seen it in precisely the same form that it was available to the primary judge*" (emphasis added). That may have been so. But Leeming JA's conclusion that he was in a "materially equivalent position" to the primary judge depended on his statement that AA was not cross-examined when he was recalled before the primary judge on the occurrence of the assaults. That was wrong. As has just been noted, during the cross-examination which in fact occurred, AA strongly denied questions to the effect that he was lying about the alleged abuse. Leeming JA overlooked that evidence and, of course, Leeming JA was at a disadvantage as compared to the primary judge in assessing AA's evidence, to which he failed to refer and which he failed to take into account.

209 The unreliability of AA's evidence in certain respects to which Leeming JA referred did not preclude a finding that Father Pickin assaulted AA as alleged. The primary judge was aware of the "difficulties" with AA's evidence as well as inconsistencies between the evidence of AA and Mr Perry. Indeed, it may be accepted, as Leeming JA identified, that certain aspects of AA's evidence were unreliable.

210 First, AA identified three separate time periods in which the alleged abuse was said to have occurred and the primary judge found that it in fact occurred in a fourth time period, without referring (at least in terms) to the fact that AA's evidence on this point was unreliable. Leeming JA considered that was problematic because AA sought to establish that his decline in academic performance from Year 8 onwards was attributable to the abuse he suffered at the beginning of Year 7. The imprecision of AA's evidence as to when the alleged abuse occurred bore to some extent on the reliability of AA's evidence. But this is not a case where the evidence as to the timing of the alleged abuse made it improbable or unlikely that the alleged abuse in fact occurred. The undisputed facts were that AA visited Father Pickin at the presbytery with Mr Perry, during which

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212 *Robinson Helicopter Co Inc v McDermott* (2016) 90 ALJR 679 at 687 [43]; 331 ALR 550 at 558-559, quoting *Fox v Percy* (2003) 214 CLR 118 at 128 [28]-[29].

time they were given beer and cigarettes, those being the circumstances in which the abuse was alleged to have occurred.

211 As Ball JA observed, pinpointing the time when events occurred, especially when they occurred more than 50 years ago, is notoriously difficult, and it could be inferred that AA tried to do so by a process of reconstruction by reference to objective facts, being when he commenced high school and when his marks began to decline. Even if it is accepted that the alleged abuse was not the sole cause of the decline in AA's marks, and that the decline might have begun before the alleged abuse occurred, AA's attribution of the decline in his marks to the abuse he suffered added verisimilitude to his account and helped to establish a causal connection between the abuse and the later events of his life.

212 Second, Leeming JA observed that the primary judge did not identify in terms that AA was wrong to recall that Mr Perry left the presbytery to buy alcohol or cigarettes and that there was never anyone other than himself, Mr Perry and Father Pickin at the presbytery. The primary judge correctly concluded that neither of these matters necessarily cast doubt on AA's recollection of the alleged abuse.

213 As to the presence of other boys (than AA and Mr Perry) during at least some of their visits to the presbytery, that fact accords with AA's earlier account to the forensic psychiatrist called by the respondent but not his evidence given during cross-examination. It may be accepted that the inconsistency in AA's account reduces the reliability of AA's evidence generally. However, as the primary judge observed, the presence of other boys did not necessarily make the alleged assaults unlikely. Indeed, the presence of other boys at the presbytery provided a potential explanation as to how Father Pickin was able to be alone in the bedroom with AA on the hypothesis that Mr Perry remained with the other boys in the living area of the presbytery.

214 As to Mr Perry's whereabouts during the alleged abuse, Mr Perry accepted in cross-examination that it was possible that he was not always in the same room as AA while they were at the presbytery. That evidence left open the possibility that AA was sexually abused in the bedroom of the presbytery while Mr Perry was in the next room of the presbytery with the other boys. Further, while the primary judge appeared to accept Mr Perry's evidence that he was not sent to the shops to buy alcohol or cigarettes and that he did not go home before AA, nothing in the evidence contradicted the account that AA ultimately gave that Father Pickin *told* him that Mr Perry had done so.

215 As Ball JA concluded, the primary judge's findings were not inconsistent with the central tenet of AA's evidence that the abuse occurred in Father Pickin's bedroom when AA was drunk and had been playing with the poker machine alone. Although the evidence would mean the offending involved a greater level of risk on the part of Father Pickin, there is nothing to suggest that the abuse could not have occurred without the other boys finding out and, further, Father Pickin

demonstrated a willingness to engage in risky behaviour by supplying the boys with alcohol and cigarettes in the first place. As to whether the inconsistencies affected the reliability of AA's evidence of the abuse, it is sometimes necessary to distinguish between recollections of sexual abuse (or other traumatic events) and the circumstances surrounding them, especially when the relevant events occurred so long ago. AA gave consistent evidence concerning the abuse he suffered, and his evidence concerning the abuse itself was not contradicted by other evidence.

216 Third, Leeming JA referred to the fact that the primary judge did not expressly consider the possibility that AA's account was a sincerely held but unreliable belief, instead appearing to place significant weight on the "vividness" of AA's account. As has been noted, Leeming JA erroneously proceeded on the basis that AA was not cross-examined when he was recalled before the primary judge on the occurrence of the assaults. Moreover, as Ball JA explained, AA gave consistent evidence concerning the nature of the abuse he suffered. That evidence was plausible having regard to the facts not in dispute and it was not contradicted by other evidence. This was not a case where AA could have been mistaken about the identity of his abuser.

217 Fourth, Leeming JA referred to the fact that the reliability of AA's evidence more broadly was undermined by his account that it could have been ten years since he had last seen Mr Perry when they had in fact met in the last year. That inconsistency affects the assessment of the reliability of AA's evidence but does not require the conclusion that his recollection of the alleged abuse was incorrect.

218 By contrast, Ball JA accepted that there were some difficulties in the way the primary judge conducted the fact-finding process but considered that the primary judge had not erred in concluding that AA was sexually abused. In particular, Ball JA noted the following:

(1) The tendency evidence established that Father Pickin had a sexual interest in boys and given the opportunity he would sexually abuse them.

(2) Father Pickin sought to create that opportunity by inviting AA and Mr Perry to the presbytery and supplying them with alcohol and cigarettes.

(3) The fact of the abuse explains why AA stopped going to the presbytery and had nothing further to do with Father Pickin.

(4) AA's subsequent conduct was, in the joint opinion of the psychiatrists who gave evidence, consistent with the abuse that he suffered.

219 It must be accepted that AA's recollection of the events was imperfect. The events were recalled more than 50 years after they allegedly occurred. Neither that fact, nor the fact that the proceeding was not time-barred, excused AA

from meeting the evidentiary burden imposed by s 140 of the *Evidence Act* and the *Briginshaw* standard.[213] But the unreliability of AA's evidence in certain respects did not preclude a finding that Father Pickin assaulted AA as alleged.

220 For those reasons, the primary judge was correct to accept AA's evidence on the critical question of whether the alleged abuse occurred. Grounds 1 and 2(a) of the respondent's notice of contention must be rejected.

D. Bases of liability

(1) Common law

221 In the present appeal, two areas of the common law were raised – the duty to take reasonable care to avoid causing harm to others, including of the kind first recognised in *Donoghue v Stevenson*,[214] in the tort of negligence; and the separate area of the common law where liability is imposed on a defendant for the breach of a non-delegable duty, as was most recently explained by this Court in *Bird*.[215]

222 At common law, a person owes no duty to prevent injury inflicted by a third party on a child absent that person doing some positive act justifying the imposition of a duty or that person assuming a duty.[216] Absent some basis for attributing liability for the wrongful acts of the third party to the person alleged to owe a duty (the defendant), the defendant has not taken any action that may attract liability. So, for example, a person who becomes aware of a child being assaulted has no duty to prevent injury to that child[217] unless it can be shown that (1) the person has done some positive act that gave rise to the imposition of a duty for that person to take reasonable care to prevent foreseeable injury to the child; (2) the person has voluntarily assumed a duty to take reasonable care to prevent injury to the child;

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213 *Briginshaw* (1938) 60 CLR 336.

214 [1932] AC 562.

215 (2024) 98 ALJR 1349 at 1359-1360 [36]; 419 ALR 552 at 561-562.

216 See, eg, *Smith v Leurs* (1945) 70 CLR 256 at 262; *Sutherland Shire Council v Heyman* (1985) 157 CLR 424 at 502. See also *Electricity Networks Corporation v Herridge Parties* (2022) 276 CLR 271 at 283-284 [22]-[25] in relation to public authorities.

217 Putting to one side any relevant statutory obligations.

or (3) the person has assumed a non-delegable duty to ensure that care is taken to prevent injury to the child.[218]

223 Two aspects of the relationship between those duties are important. First, the non-delegable duty is unlike the first two duties insofar as it requires that the duty-holder *ensure* that reasonable care is taken. That is, when assessing breach of a non-delegable duty, the focus is not on what the defendant did or did not do to prevent the injury. By contrast, assessing whether a defendant breached the first two duties requires examination of what the defendant did or did not do to prevent the injury. Second, a person will have assumed either a duty to take reasonable care or a duty to ensure that reasonable care is taken, but not both. Of course, a failure to take reasonable care by the duty-holder will breach an assumed duty to ensure that reasonable care is taken.

(2) CL Act

224 AA's common law claim must be considered in accordance with the applicable requirements of the CL Act.

225 The CL Act was passed in two stages. The *Civil Liability Bill 2002* (NSW) was passed in June 2002 and dealt with civil actions for damages. The *Civil Liability Amendment (Personal Responsibility) Bill 2002* (NSW) was passed in November 2002, broadly adopting the recommendations of the *Review of the Law of Negligence* ("the Ipp Report"), which sought to reform the circumstances in which people injured through negligence could recover compensation.[219] It is necessary to refer to several aspects of the CL Act.

226 Within Pt 1, s 3B(1), headed "Civil liability excluded from Act", relevantly provides that "[t]he provisions of this Act do not apply to or in respect of civil liability (and awards of damages in those proceedings)" of specified kinds. One of the specified kinds of proceeding is set out in s 3B(1)(a), being "civil liability of a person in respect of an intentional act that is done by the person with intent to cause injury or death or that is sexual assault or other sexual misconduct committed by the person". Section 3B(1)(a) also sets out certain parts of the CL Act which do apply to proceedings of that kind, including Pt 1B of the CL Act.

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218 See Nolan, "Assumption of Responsibility: Four Questions" (2019) 72 *Current Legal Problems* 123 at 140. See also Beale, "Gratuitous Undertakings" (1891) 5 *Harvard Law Review* 222 at 223-224, 226-227, 231.

219 Australia, *Review of the Law of Negligence: Final Report* (2002). See also New South Wales, Legislative Assembly, *Parliamentary Debates* (Hansard), 23 October 2002 at 5765.

227 Part 1A of the CL Act is headed "Negligence". "Negligence" is defined in s 5 to mean "failure to exercise reasonable care and skill". Part 1A applies to any claim for damages for harm resulting from negligence, regardless of whether the claim is brought in tort, in contract, under statute or otherwise.[220] The relevant provisions of Pt 1A apply retrospectively to civil liability arising before their commencement, except where proceedings had already been commenced before the provisions commenced.[221] Part 1A contains separate divisions setting out general and other principles concerned with, among others, "Duty of care" as well as "Causation", "Assumption of risk", "Non-delegable duties and vicarious liability" and "Contributory negligence".

228 Within Div 2 ("Duty of care") (which, despite its name, is self-evidently directed to questions of breach of duty),[222] s 5B(1) provides that a person is not negligent in failing to take precautions against a risk of harm unless the risk was foreseeable (that is, it is a risk of which the person knew or ought to have known), the risk was not insignificant and, in the circumstances, a reasonable person in the person's position would have taken those precautions. Within Div 3 ("Causation"), s 5D provides that a determination that negligence caused particular harm comprises the elements of factual causation and scope of liability. Section 5E provides that the plaintiff always bears the onus of proving any fact relevant to the issue of causation.

229 Section 5Q is in Div 7 of Pt 1A under the heading "Liability based on non-delegable duty". Section 5Q(1) provides that "[t]he extent of liability in tort of a person [('the defendant')] for breach of a non-delegable duty to ensure that reasonable care is taken by a person in the carrying out of any work or task delegated or otherwise entrusted to the person by the defendant is to be determined as if the liability were the vicarious liability of the defendant for the negligence of the person in connection with the performance of the work or task".

230 Part 1B of the CL Act is headed "Child abuse – liability of organisations". Section 6F, in Div 2, is headed "Liability of organisation for child abuse by associated individuals". Section 6F(1) provides that the section "imposes a duty of care that forms part of a cause of action in negligence". Section 6F(2) then provides that "[a]n organisation that has responsibility for a child must take reasonable precautions to prevent an individual associated with the organisation from perpetrating child abuse of the child in connection with the organisation's responsibility for the child". Under s 6F(3), the organisation is "presumed to have breached its duty if the plaintiff establishes that an individual associated with

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220 CL Act, s 5A(1).

221 CL Act, Sch 1, cl 6(1).

222 *Adeels Palace* (2009) 239 CLR 420 at 432 [13].

the organisation perpetrated the child abuse in connection with the organisation's responsibility for the child, unless the organisation establishes that it took reasonable precautions to prevent the child abuse". Section 6F only applies in respect of child abuse perpetrated after its commencement.[223]

231 Part 2, headed "Personal injury damages", imposes limits on a plaintiff's recovery of damages in proceedings for the recovery of damages that relate to the death of or injury to a person, except where the award of damages is excluded from the operation of Pt 2 by s 3B of the CL Act.[224] Part 2 applies retrospectively to an award of personal injury damages relating to an injury or death which occurred before the commencement of the CL Act, except where the proceedings were commenced before or the damages were awarded before the date of assent to the CL Act.[225] There are different limits on the recovery of economic loss (Div 2), non-economic loss (Div 3) and interest on damages (Div 4).

232 Within that statutory context, it is necessary to address each form of liability (negligence and non-delegable duty) in turn. The formulation of and principles underpinning each form of liability are different.

E. Negligence

(1) Principles

233 As was said in *Prince Alfred College Inc v ADC*, principles that make liability "depend upon a primary judge's assessment of what is fair and just ... do not reflect the current state of the law in Australia".[226] The "orthodox route" is to consider whether established principles applied in decided cases provide a solution to later cases, as and when they arise.[227] Where a novel duty of care in negligence is alleged, it is necessary to take "an incremental and analogical approach, paying close attention to relevant precedents and any risk of incoherence in the principles they establish".[228]

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223 CL Act, Sch 1, cl 43.

224 CL Act, s 11A(1), read with s 11 definition of "personal injury damages".

225 CL Act, Sch 1, cl 2.

226 (2016) 258 CLR 134 at 150 [45].

227 *Prince Alfred College* (2016) 258 CLR 134 at 150 [46].

228 *Mallonland Pty Ltd v Advanta Seeds Pty Ltd* (2024) 98 ALJR 956 at 967 [37]; 418 ALR 639 at 649 (footnote omitted).

234 Because it was alleged that the Diocese owed AA, as a child in the care of one of its priests, a duty to take reasonable care to avoid AA suffering harm from the deliberate criminal conduct of the priest, it is convenient to begin by noticing some aspects of the way in which Gleeson CJ analysed issues of a generally similar kind in *Modbury Triangle Shopping Centre Pty Ltd v Anzil*.[229]

235 First, where, as here, there are issues as to the existence and measure of legal responsibility, it is useful to begin by identifying the harm suffered by a plaintiff for which the defendant is said to be liable.[230] In the present case, AA suffered personal injury, the direct and immediate cause of which was the deliberate wrongdoing of Father Pickin.

236 Second, it is necessary to identify why the Diocese owed AA a duty to take reasonable care to avoid AA suffering harm from the deliberate criminal conduct of Father Pickin. As Gleeson CJ explained in *Modbury*, absent assumption of responsibility, the general principle in negligence is a duty to take reasonable care to avoid doing what might cause injury to another, not a duty to act to prevent injury being done to another by a third person, or by circumstances for which nobody is responsible.[231] Gleeson CJ observed in *Modbury* that "[t]here may be circumstances in which, not only is there a foreseeable risk of harm from criminal conduct by a third party, but, in addition, the criminal conduct is attended by such a high degree of foreseeability, and predictability, that it is possible to argue that the case would be taken out of the operation of the general principle and the law may impose a duty to take reasonable steps to prevent it".[232] His Honour then adverted to "[t]he possibility that knowledge of previous, preventable, criminal conduct" could give rise to an exceptional duty.[233]

237 By contrast, the common law may impose a duty to act to prevent foreseeable injury to another where a person does an act that creates or increases the risk of that injury occurring. As Brennan J explained in *Sutherland Shire Council v Heyman*, the person would bring themselves "into such a relationship

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229 (2000) 205 CLR 254 at 265-266 [26].

230 *Modbury* (2000) 205 CLR 254 at 262 [14].

231 (2000) 205 CLR 254 at 266 [28], citing *Heyman* (1985) 157 CLR 424 at 478. See also *Agar v Hyde* (2000) 201 CLR 552 at 578 [68].

232 (2000) 205 CLR 254 at 267 [30].

233 *Modbury* (2000) 205 CLR 254 at 267 [30].

with the other that [they are] bound to do what is reasonable to prevent the occurrence of that injury unless statute excludes the duty".[234]

238 Consistent with that position, in an appropriate case there may be a claim in negligence where a diocese by a positive act created, without reasonable care, a foreseeable risk of injury to a plaintiff. Historically, there have been reports that, with the knowledge, belief or suspicion that a particular member of the clergy might physically injure a class of persons, that member of the clergy was "moved" from parish to parish.[235] Where a diocese had the care and control of Catholic churches in the diocese; the bishop of the diocese had powers of direction and control over incardinated priests; a particular priest was an incardinated priest in the diocese having been appointed by the bishop as the parish priest within the diocese; and the bishop had exercised control in a variety of ways over the priest, then, in those circumstances, *if* it was reasonably foreseeable to the diocese that, by appointing the particular priest as the parish priest, there was a risk of him causing personal injury to children of the parish, then the diocese would owe a duty of care to take reasonable steps to prevent the harm.[236] The diocese would have done an act – appointing the particular priest as the parish priest – when it was reasonably foreseeable (in the sense that the risk was real and not far-fetched or fanciful[237]) to the diocese that, by appointing him as the parish priest, there was a risk of him causing personal injury to children of the parish. By its actions in those circumstances, the diocese would have created the foreseeable risk. What reasonable steps (if any) the diocese should then have taken to avoid the foreseeable risk of sexual abuse to a class of persons of which the plaintiff would be one, namely child parishioners, would be a separate question. A careful reader of that form of claim will notice that such a claim is framed as one where the diocese had reasonable foresight of the risk of harm and yet appointed the priest to the parish. That claim might arise if the diocese has appointed the priest to a parish or if the diocese has failed to remove a priest from a parish in circumstances where the risk of harm was reasonably foreseeable.

239 That then leaves the possibility of a defendant assuming a duty to take reasonable care to prevent injury to the child by a third party.[238] A plaintiff would

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234 (1985) 157 CLR 424 at 479.

235 See, eg, Australia, Royal Commission into Institutional Responses to Child Sexual Abuse, *Final Report: Volume 16, Religious institutions* (2017), bk 2 at 246-257.

236 See *Perre v Apand Pty Ltd* (1999) 198 CLR 180 at 202 [42].

237 See *Wyong Shire Council v Shirt* (1980) 146 CLR 40 at 46-47; *Sullivan v Moody* (2001) 207 CLR 562 at 576 [42].

238 See [222] above.

need to plead and prove the basis for attributing liability for the wrongful acts of the third party to the defendant – that is, the acts, facts, matters and circumstances giving rise to the defendant assuming such an obligation. Then, if those acts, facts, matters and circumstances were sufficient to establish that the defendant had assumed such an obligation, the other elements which would need to be pleaded and proved are what steps a reasonable person in the position of the defendant would have taken to prevent that risk of harm and whether the defendant's breach of duty caused the harm to the plaintiff. As will be self-evident, in some cases the pleaded claim in relation to a positive act may be the same as, or co-exist with, a defendant assuming a duty to take reasonable care to prevent injury to the child by a third party. Foreseeability, for the purposes of identifying a breach of an assumed duty, or of a duty imposed based on a positive act, would require that the defendant knew or ought to have known of the risk of harm.[239]

240 There is a separate question whether the defendant assumed an obligation to ensure that reasonable care is taken for the plaintiff. That duty is addressed in Section F below.

241 It is against that background that it is necessary to consider AA's pleaded claim in negligence.

(2) AA's claim in negligence against the Diocese

(a) AA's pleaded claim

242 AA's pleaded claim in negligence was that "the Diocese owed [AA], as a child in the care of one of its priests, a duty of care to take reasonable care to avoid [AA] suffering foreseeable and not insignificant harm" ("the Duty of Care").

243 The Duty of Care was said to have arisen because the "risk of [AA] being sexually abused by a priest, such as Pickin [('the Risk of Harm')] was foreseeable". AA's pleaded particulars of why the Risk of Harm was allegedly foreseeable are important. They included, relevantly:

> "a. At the time of the Abuse, the Diocese, by virtue of the Bishop and members of the clergy in the Diocese, interactions with other Bishops through the Australian Bishop's Conference and knowledge of the worldwide community of the Catholic Church, *was aware, or ought to have been aware*, of the general risk of sexual abuse of children by priests.
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> b. As the functioning body with responsibility for the churches in the Diocese, including St Patrick's Church and the wider

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239 CL Act, s 5B(1)(a).

dissemination of Catholic instruction through schools in the Diocese, the Diocese, by virtue of the Bishop and members of the clergy in the Diocese, interactions with other Bishops through the Australian Bishop's Conference and knowledge of the worldwide community of the Catholic Church, *knew, or ought to have known*, that children entering into the care of its servants and agents are vulnerable to harm and injury caused by the acts of other persons, whether intentional or accidental.

c. The Diocese *knew, or ought to have known* that:

i. there was a general risk of harm from assault or misadventure to a child placed in the control of an adult;

ii. there was a specific risk of harm to a child from sexual abuse by an adult with responsibility for, and control over, that child;

iii. the risk of sexual abuse of a child by an adult was heightened by the ability of the adult to isolate the child in a private setting;

iv. the specific risk of sexual abuse of a child by an adult was heightened when the adult was a priest who sought and achieved private contact with a child given the deference and obedience which the laity in the Church were expected to show to a priest;

...

e. By 1967, the Diocese *knew, or ought to have known*, that members of Catholic authorities, including Catholic clergy and religious brothers had been sexually abused children [sic].

f. By 1967, the Diocese *knew, or ought to have known*, that senior clerics in dioceses and clerical orders in Australia had ignored information that Catholic clergy and religious brothers had sexually abused children and/or facilitated perpetrators to remain members of the clergy and/or religious orders.

g. By 1967 the Diocese *knew, or ought to have known*, that in light of the fact that *some* Catholic clerics and religious brothers in Australia had sexually abused children, that measures should be adopted to address the risk of that occurring in Catholic communion between child members of the laity and priests.

> h. By 1967, the Diocese *knew, or ought to have known* from as early as the 1950's another priest in the Diocese, Father Denis McAlinden, had been sexually abusing children with impunity as there was a failure to investigate his crimes and a possibility that systemic failures in that regard gave opportunity for child sexual abuse to be perpetrated by other priests, such as Pickin.
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> ..." (emphasis added)

244 Next, AA pleaded that "[t]he content of the Duty of Care required the Diocese to ensure that, while [AA] was under the care and control of one of its priests, [AA] was adequately secured, supervised and protected so as to prevent [AA] suffering harm, including sexual assault" as well as being required "to maintain systems of care for [AA], to protect him from sexual or serious physical abuse by its priests and to maintain oversight and control of those systems". The reasonable precautions that AA alleged should have been taken by "[a] reasonable person in the position of the Diocese" were then listed. The listed "precautions" included, among others, "[i]nforming Catholic families, including children, of the existence of child sexual abuse as a fact and of the potential risk that any adult could perpetrate child sexual abuse", and "[f]orbidding any priest to have access to a child in his residence".

245 It is by no means clear whether the pleaded duty – that the Diocese owed AA, as a child in the care of one of its priests, a duty of care to take reasonable care to avoid AA suffering foreseeable and not insignificant harm – was said to arise because (1) the Diocese owed a duty to *prevent* a risk of injury to AA by a third party; (2) the Diocese had done some positive act which *created* or *increased* a reasonably foreseeable risk of harm; or (3) by reason of the acts, facts, matters and circumstances set out in the pleading, the Diocese had *assumed* a duty to take reasonable care to prevent injury to AA.

246 First, a claim that the Diocese had failed to *prevent* a risk of injury to AA that it had not created or increased must fail because, assuming that such an exceptional duty could arise, it would at least require "such a high degree of foreseeability, and predictability, that it is possible to argue that the case would be taken out of the operation of the general principle and the law may impose a duty to take reasonable steps to prevent it".[240] As will be explained, AA failed to establish that the relevant risk of harm was of that nature. As the Court of Appeal concluded, AA failed to establish that the Bishop knew, believed or suspected that Father Pickin or priests generally posed a risk to children.

247 Second, a duty might be said to arise because, by appointing Father Pickin as a priest of the parish and requiring him to engage with children as part of his

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240 *Modbury* (2000) 205 CLR 254 at 267 [30].

ministry, the Diocese *created* a reasonably foreseeable risk of harm. But AA did not run any case at trial that the Diocese owed a duty of this kind, which is unsurprising given that AA failed to establish that the Diocese knew or ought to have known of the risk posed by Father Pickin to children. That AA did not run such a case at trial is evident from the content of the duty pleaded. Each of the reasonable precautions identified reflects an alleged duty to prevent harm to AA from a third party,[241] rather than a duty to take reasonable care in the course of a positive act.

248 In any event, the proper assessment of the Diocese's alleged breach of any duty of care would depend on "the correct identification of the relevant risk of injury".[242] That is because, to establish breach of the duty, it would be necessary for AA to prove that a reasonable person in the position of the Diocese would have taken identified precautions against the risk of harm.[243] Such precautions must be identified "with some precision".[244] It is sometimes the case that "unless the relevant risk is identified with sufficient precision one cannot determine what, if any, reasonable precautions ought to have been taken in order to avert it".[245]

249 This is such a case. AA failed to prove that a reasonable person in the position of the Diocese in the late 1960s would have taken the steps that he pleaded that a reasonable person in the position of the Diocese would have taken in light of what the Diocese knew, or ought to have known, of the risk of sexual abuse by a priest. For example, if a reasonable person in the Diocese's position did not know or ought not to have known of the risk of sexual abuse to a child, they would not have implemented a program of community education about sexual abuse, required priests not to be alone with children, or instituted a system of mandatory reporting of child abuse. Put another way, a reasonable person in the position of the Diocese could only respond to the risk of sexual abuse if they were aware, or ought to have been aware, of that risk. On the other hand, precautions that a reasonable person would have taken against the more generalised risk of personal injury would not have been sufficiently targeted to the risk of harm that materialised.

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241 See [244] above.

242 *Roads and Traffic Authority (NSW) v Dederer* (2007) 234 CLR 330 at 338 [18]; see also 351 [59].

243 CL Act, s 5B(1)(c); see also s 5B(2).

244 *Graham Barclay Oysters Pty Ltd v Ryan* (2002) 211 CLR 540 at 611-612 [192].

245 *Perisher Blue Pty Ltd v Nair-Smith* (2015) 90 NSWLR 1 at 24 [106].

250 Third, as will be explained, the Diocese assumed a duty to ensure that reasonable care was taken.[246] In those circumstances, it will not have assumed a lesser duty to take reasonable care. In any event, the difficulty of establishing the precautions that a reasonable person would have taken based on what the Diocese knew or ought to have known would also confront a claim that the Diocese had assumed a duty to take reasonable care to prevent injury to AA.

(b) Knowledge of risk of sexual abuse

251 To establish each of those propositions, it is necessary to address the findings made by the primary judge as to the knowledge of the risk of sexual abuse by priests generally, including arising from allegations against Father McAlinden, and of the risk of sexual abuse by Father Pickin specifically.

(i) Priests generally

252 The primary judge made two relevant findings. First, her Honour found that "[t]he now well catalogued, tragic offending by priests, religious brothers and sisters was virtually unknown [in the late 1960s], apart from those in positions of high authority in the Church such as Bishops, Religious Superiors and Provincials, who were aware of complaints made". Second, her Honour found that "[o]n Father Dillon's evidence it must be accepted that at the time AA was assaulted, while there was not a widespread appreciation in the community of the existence of the risk which priests such as Father Pickin posed as there is now, the existence of such risks was known to Bishops and other senior members of the Church. That evidence not being challenged, it must be accepted that it was foreseeable that such a risk could materialise in Father Pickin's case, it not being possible to foresee beforehand, which priest would actually pursue child abuse."

253 Leeming JA rightly criticised those findings. As Leeming JA observed, Father Dillon did not give evidence concerning the actual or likely knowledge of Bishop Toohey or other senior clergy in the Diocese in 1969 of complaints made concerning priests in the Diocese. Reading the uncontested evidence given by Father Dillon,[247] the primary judge elevated Father Dillon's "likely" exception to a finding of actual knowledge by the Bishop. That "likely" exception was expressed in the following terms:

> "That said, a likely exception to this overall lack of awareness would be the knowledge of *some* people in positions of high authority in the Church, such as Bishops, Religious Superiors and Provincials etc who would have

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246 See Section F(2) below.

247 See [168] above.

> been aware of complaints and allegations made against other priests, brothers and nuns." (emphasis added)

The primary judge's finding was not available on the evidence. Generalised evidence to the effect that "*some* people in positions of high authority in the Church ... would have been aware of complaints and allegations against other priests, brothers and nuns" is not evidence that *all* knew or that this bishop knew. The fact that some bishops knew, that Bishop Toohey was a bishop, and therefore that Bishop Toohey knew is not an available form of reasoning.[248]

254 And, even if Father Dillon's opinion could be cast as relating to actual knowledge, it can be given "very little weight" since he was ordained on 1 June 1969, in Victoria, did not purport to have expertise about the level of knowledge of the Bishop in 1969 and did not provide any reasons for any such opinion.

255 The primary judge's further finding that the existence of the claimed duty of care "accords with the Cunneen Report, where reference was made to the then Bishop of the Diocese having to deal with the risks which priests posed in the 1950's" also cannot stand. The reference to the Cunneen Report, which was not in evidence, appears to be an error. All that was tendered before the primary judge was a letter from a consultant psychiatrist, Dr Derek Johns, dated 5 November 1987, to the then Bishop of Maitland, Bishop Clarke. In the letter, Dr Johns reported to Bishop Clarke on his consultation with Father McAlinden in relation to allegations of sexual activity involving children which were denied by Father McAlinden. Dr Johns referred in the letter to a statement by Father McAlinden that "there had been previous similar allegations, the first one occurring in 1954, when the late Bishop Toohey had cause to discuss the issue with Father McAlinden at that time".

256 As Leeming JA observed, AA's submission that the Bishop "knew in 1954 of the sexual abuse of the notorious paedophile priest, [Father McAlinden]", overstated the evidence. The context for the report from the psychiatrist "appears to have been allegations of sexual abuse of children, but the detail of those allegations is unspecified". Leeming JA noted that "[w]hat was alleged and what was said between [the Bishop and Father McAlinden] is not known" and that "what was known or believed or suspected by Bishop Toohey prior to 1969 in relation to [Father] McAlinden was otherwise not disclosed by the evidence". Leeming JA then observed, "The paragraph of the 1987 report does not establish that Bishop Toohey knew or believed or suspected in 1969 that one of the priests in his Diocese was abusing children."

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248 Lind, "Basic categories of argumentation in legal reasoning" (2014) 11 *The Judicial Review* 429 at 446, also in Judicial Commission of New South Wales, *Handbook for Judicial Officers* (2021) 417 at 431.

257 Taken at its highest, the evidence establishes that Bishop Toohey had a discussion with Father McAlinden in 1954 about "similar allegations" where, when read in context, the letter is referring to allegations about "sexual activity involving children". That Father McAlinden denied the allegations is not to the point. What is relevant is whether the evidence supports an inference that Bishop Toohey was aware or ought to have been aware of the risk of priests sexually abusing children in the Diocese in 1969. One allegation of uncertain content in relation to one priest 15 years prior to 1969 is insufficient to establish actual knowledge, belief or suspicion of that risk by the Bishop in 1969. Nor is that allegation alone, or even in combination with Father Dillon's evidence, sufficient to support a finding that the Bishop ought to have been aware of that general risk in 1969.

(ii) Allegations against Father Pickin

258 AA relied upon the following three parts of the written and oral evidence given by Mr McClung to seek to establish that the risk that Father Pickin posed was in fact known by the Diocese before Father Pickin assaulted him.

259 The first was Mr McClung's statement that Father Pickin touched his genitals outside his trousers on around a dozen occasions in 1965, when Mr McClung was 16 or 17 and Father Pickin was an assistant priest at St Columba's Church in Adamstown.[249] The second was the following statement by Mr McClung: "[In early 1966], I went to speak to Father Doran at St Columba's. ... I cannot remember the words that I said, but I told Father Doran that I was being sexually touched by [Father Pickin]." The third was that, in re-examination Mr McClung was asked about [16] of his statement, where he had said that he had told Father Doran that he had been sexually touched by Father Pickin, and Mr McClung stated:

> "It wasn't in the form of going to confession to Father Doran. Doran was also a friend of my father's, as was [Father Pickin], which kind of explains a bit of the relationship in later years. [Father Pickin] was a friend of my mother's too, but she neither of her knew what would happen when I was younger [sic]. But in the case of Doran, it wasn't going into confession, which it actually was with the priest earlier. I remembered later, Father Tims, he didn't teach me anything, so I went to confession. He wouldn't have known who I was."

260 The primary judge noted that AA relied upon these complaints about Father Pickin by Mr McClung to Father Doran in 1966, as well as what he had told the other priest in confession, to establish that the risk that Father Pickin posed was in fact *known* by the Diocese *before* Father Pickin assaulted him. "Mr McClung

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249 See [174]-[175] above.

then having told Father Doran and the other priest that he had been touched sexually by Father Pickin", the primary judge noted:[250]

> "There is no suggestion that Father Doran notified the Bishop, or anyone else in the Diocese, of Mr McClung's complaint. *His evidence of the advice Father Doran gave him, suggests that while he accepted that Mr McClung had a basis for his complaint about Father Pickin's abuse, Father Doran did not consider such behaviour serious enough to warrant it being brought to the attention of his superiors*."

The primary judge then recorded that Mr McClung had also said that, while he had told another priest during confession about Father Pickin's behaviour, that priest would not have known who Mr McClung was. The reference to Father Pickin was an error. As Leeming JA observed, the subject of the confession was the earlier alleged abuse of Mr McClung by Father Hodgson.

261 As the primary judge also recorded, AA's case was that these complaints had been sufficient to put the Diocese on notice of the particular risk which Father Pickin posed. The primary judge stated that Mr McClung's evidence, which her Honour was satisfied must be accepted, plainly precluded the respondent's submission that, in 1969, none of its clergy had any knowledge of Father Pickin's propensity to commit sexual abuse being accepted. But her Honour found that that evidence did not establish that anyone other than Father Doran and the second priest became aware of what Mr McClung had disclosed to them.

262 The primary judge then referred to Father Dillon's evidence about how the Church was structured and operated its diocesan affairs, including that it established the command and control which the Church exercised over its priests, despite knowing as it did the risks which they could pose to children. But her Honour found that, on Father Dillon's evidence, the Church did not establish any formal system or expectation of communication to the Diocese, even in respect of what its priests came to know about child abuse, after complaints such as that which Mr McClung made about Father Pickin. Her Honour found that that was the result of the approach which the Church then adopted "to such known risks and their materialisation". That is, "even though its Bishops did become aware of such complaints, the Diocese took no steps to reveal the existence of those risks to the community, to prevent them materialising or put in place systems to deal with them if they did".

263 The primary judge then made a finding that she was satisfied that the evidence did establish that, even if the Diocese did not actually become aware

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250 The italicised portion of this paragraph relied upon parts of Mr McClung's statement that were not tendered in evidence.

that Father Pickin had abused Mr McClung, "that he posed such a risk was one that the Diocese ought to have known about before AA was abused".

264 Leeming JA addressed this evidence and these findings. His Honour found that Mr McClung's mere report of Father Pickin's conduct to Father Doran did not amount to the imputation of any form of knowledge to the Diocese and it was not established that Father Doran was under any obligation to report what Mr McClung told him. Leeming JA stated that "[k]nowledge on the part of [Father] Doran is not knowledge of the [respondent], whether in its own right or as the 'proper defendant'. The Roman Catholic Church was and is hierarchical. The knowledge of each and every priest is not taken to be the knowledge of the institution as a whole." Putting to one side his Honour's apparent confusion between the identity of the respondent and the Diocese and the lack of precision about what "the Roman Catholic Church" or "the institution" was, what his Honour then said was and remains the position in relation to the Diocese:

> "[Father] Doran was a parish priest. [AA's] case turned on establishing knowledge by the Bishop or senior members of the Diocese. No attempt was made by [AA] to establish who they were. Whoever they were, it was not suggested that [Father] Doran was one of them. So far as the evidence suggests, he was not."

265 His Honour did not accept that, in the absence of a duty to communicate a complaint, more senior priests within a diocese – or, it should be added, the bishop of a diocese – should have a priest's knowledge attributed to them. His Honour was right to reject any contention that the effect of s 6O(b) of the CL Act[251] was that knowledge of each and every priest in the Diocese was to be imputed to the respondent.

266 The state of knowledge of the Diocese was a question of fact to be established by evidence and the inferences to be drawn from that evidence consistent with the process of fact finding in a case. AA did not adduce any evidence that, in response to the report of the abuse described by Mr McClung, Father Doran or some other parish priest did or would take the matter further. Leeming JA found that such evidence as there was pointed in the opposite direction. In particular, the uncontested evidence adduced by AA from Father Dillon was that in the late 1960s, "[a]mong Catholic people and even among the vast majority of Priests, Religious Brothers and Sisters, the tragic catalogue of offences and crimes which have been so well documented and proven since the mid-1980's was still virtually unknown".

267 It was against that background that Leeming JA found that, "[i]n the absence of evidence of any knowledge or belief or suspicion by

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251 See [157] above.

the Bishop or senior priests in the Diocese that [Father] Pickin posed a risk to children, [it is not possible to] see how the [Diocese] ... owed a duty of care to [AA]". It should be added that the evidence did not support a finding that, in 1969, the Diocese ought to have known that Father Pickin posed a risk to children.

(c) AA's alternative formulation – positive act of granting control of Diocesan premises and permitting them to be used for invitations to children

268 During the hearing, senior counsel for AA provided this Court with a formulation of the duty of care, namely "a duty to take reasonable care to avoid reasonably foreseeable personal injury to children invited onto diocesan premises caused by the conduct of diocesan priests at those premises". The word "invited" was defined to mean "invited by a person to whom the Diocese had given control of the premises or, put another way, whom the Diocese had authorised or armed to invite the people onto the premises". Senior counsel for AA submitted that this was "the way the case was conducted and what was in issue in the case".

269 This articulation of the form of pleading was not raised in the courts below. It was not raised on the pleadings and, had it been, it might have been the subject of contrary evidence adduced by the respondent.[252] It may be accepted that an act of the Diocese is now identified – giving the priest control of Diocesan premises by authorising or arming the priest with authority to invite people onto Diocesan premises – and that there was evidence directed to that factual matrix.[253] But the respondent and the courts below were not asked to address this formulation.

270 And, even if the failure to plead and prove that formulation of the duty of care in the courts below could be overcome, and it cannot, there is a further obstacle to this formulation of the claim. As has been explained, AA failed to prove that the Diocese knew or ought to have known of that risk or that a reasonable person in the position of the Diocese in the late 1960s would have taken the steps that he pleaded that a reasonable person would have taken in light of what the Diocese knew, or ought to have known, as to the risk of sexual abuse by a priest.[254]

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252 *Bird* (2024) 98 ALJR 1349 at 1361 [40]; 419 ALR 552 at 563, citing *Suttor v Gundowda Pty Ltd* (1950) 81 CLR 418 at 438.

253 See [165] and [168] above.

254 See Section E(2)(b) above.

F. Non-delegable duty

(1) Principles

271 A "non-delegable" or "personal" duty of care is "a duty ... of a special and 'more stringent' kind".[255] It is not merely a duty to take care but a "duty to ensure that reasonable care is taken".[256] It is an assumed duty.[257] Liability for breach of a non-delegable duty is direct, not vicarious.[258] That the duty is "non-delegable" does not mean that the duty "is incapable of being the subject of delegation, but only that the [duty-holder] cannot escape liability if the duty has been delegated and then not properly performed".[259] Non-delegable duties have been recognised as arising out of relationships of employer and employee,[260] school and pupil,[261] and hospital and patient.[262] However, that list is not exhaustive.

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255 *Burnie Port Authority v General Jones Pty Ltd* (1994) 179 CLR 520 at 550, quoting *Kondis v State Transport Authority* (1984) 154 CLR 672 at 686. See also *New South Wales v Lepore* (2003) 212 CLR 511 at 530 [25], 551 [101], 598 [254]; *Leichhardt Municipal Council v Montgomery* (2007) 230 CLR 22 at 27 [6]; *Bird* (2024) 98 ALJR 1349 at 1359-1360 [36]; 419 ALR 552 at 561-562.

256 *Kondis* (1984) 154 CLR 672 at 686. See also *The Commonwealth v Introvigne* (1982) 150 CLR 258 at 270-271; *Burnie* (1994) 179 CLR 520 at 550; *Lepore* (2003) 212 CLR 511 at 530 [25], 551-552 [101], 565 [144], 598 [254]; *Bird* (2024) 98 ALJR 1349 at 1360 [36]; 419 ALR 552 at 562.

257 *Burnie* (1994) 179 CLR 520 at 551-552; *Northern Sandblasting Pty Ltd v Harris* (1997) 188 CLR 313 at 336, 339, 352-353, 363, 368-369; *Woodland v Swimming Teachers Association* [2014] AC 537 at 583 [23].

258 *Introvigne* (1982) 150 CLR 258 at 271, 275, 279; *Northern Sandblasting* (1997) 188 CLR 313 at 329-330; *Lepore* (2003) 212 CLR 511 at 562 [136]; *CCIG Investments Pty Ltd v Schokman* (2023) 278 CLR 165 at 195-196 [70]-[73]; *Bird* (2024) 98 ALJR 1349 at 1360 [36]; 419 ALR 552 at 562.

259 *McDermid v Nash Dredging & Reclamation Co Ltd* [1987] AC 906 at 910, quoted by McHugh J in *Lepore* (2003) 212 CLR 511 at 566 [145].

260 See, eg, *Kondis* (1984) 154 CLR 672.

261 See, eg, *Introvigne* (1982) 150 CLR 258.

262 See, eg, *Albrighton v Royal Prince Alfred Hospital* [1980] 2 NSWLR 542 at 561 [59]; *Ellis v Wallsend District Hospital* (1989) 17 NSWLR 553 at 601-604. See also *Introvigne* (1982) 150 CLR 258 at 270, 275.

272 A non-delegable duty will arise where a party has been entrusted with and has "undertaken the care, supervision or control of the person or property of another or is so placed in relation to that person or [their] property as to assume a particular responsibility for [their] or its safety, in circumstances where the person affected might reasonably expect that due care will be exercised".[263] It depends on the undertaking or assumption of care, supervision or control by the duty-holder and, from the perspective of the plaintiff, the entrustment of their care, supervision or control to the duty-holder.[264] The cases have emphasised that the relationship between the duty-holder and the plaintiff is marked by the "special dependence or vulnerability" of the plaintiff.[265]

(a) Scope and content of non-delegable duty

273 The "vital issue in all cases of non-delegable duties is to determine with precision what the duty is".[266] The precise scope and content of a non-delegable duty is to be inferred objectively from all of the circumstances of the case.[267] The critical circumstance for determining its scope and content is the nature of the undertaking and entrustment of care, supervision or control of the person or property in respect of whom or which the duty is assumed.[268] It is therefore necessary to ask two questions: (1) What did the duty-holder undertake to do or, from the perspective of the plaintiff, what were they entrusted to do? (2) Did the kind of harm that the plaintiff suffered fall within the scope of the duty-holder's assumed duty?

274 Where a duty-holder is liable for the breach of a non-delegable duty by reason of the conduct of a delegate, there is no requirement that the duty-holder themselves acted negligently. In that sense, the duty-holder's liability is strict. Where a plaintiff suffers harm by the conduct of a third party, the holder of

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263 *Kondis* (1984) 154 CLR 672 at 687, cited in *Lepore* (2003) 212 CLR 511 at 534 [35], 599 [255] and *Bird* (2024) 98 ALJR 1349 at 1360 [37]; 419 ALR 552 at 562.

264 *Bird* (2024) 98 ALJR 1349 at 1360 [37], 1361 [41]; 419 ALR 552 at 562, 563. See also *Woodland* [2014] AC 537 at 583 [23].

265 *Burnie* (1994) 179 CLR 520 at 551; *Lepore* (2003) 212 CLR 511 at 551 [100]. See also *Woodland* [2014] AC 537 at 552 [25], 583 [23].

266 *Lepore* (2003) 212 CLR 511 at 570 [158].

267 *Gold v Essex County Council* [1942] 2 KB 293 at 301-302; *Albrighton* [1980] 2 NSWLR 542 at 561 [56].

268 *Elliott v Bickerstaff* (1999) 48 NSWLR 214 at 243 [89].

a non-delegable duty may be liable where they failed to ensure that reasonable care was taken.

275 In *Burnie Port Authority v General Jones Pty Ltd*, a majority of this Court subsumed the rule in *Rylands v Fletcher*[269] into the law of negligence.[270] To the extent that the plurality's reasoning depended on an understanding that a claim for the breach of a non-delegable duty must be a claim in negligence (that is, a failure to take reasonable care),[271] that aspect of the Court's reasoning may be doubted. In any event, the fact that *Rylands v Fletcher* liability was subsumed into the law of negligence by the plurality in *Burnie* does not require the conclusion that the breach of a non-delegable duty always amounts to negligence. Of course, a non-delegable duty may be breached by the negligence (in the sense of a failure to exercise reasonable care) of the duty-holder as well as the duty-holder's delegate.

(b) The place of reasonable foreseeability

276 A non-delegable duty based on the undertaking of care, supervision or control generally arises "prior to and independently of the particular conduct alleged to constitute a breach of that duty"[272] and extends to the kind of harm against which the duty-holder assumes a duty to protect. That being so, reasonable foreseeability of the risk of harm is not relevant to determining the existence of the duty, which springs from the undertaking and the relationship between the duty-holder and the plaintiff.[273] Of course, reasonable foreseeability is relevant to determining whether the delegate acted negligently so as to constitute a breach of the duty-holder's duty to ensure that reasonable care was taken.[274] As will be explained, where the non-delegable duty is to ensure reasonable care for the safety of a child, the duty-holder does not escape liability when the delegate

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269 (1866) LR 1 Ex 265; (1868) LR 3 HL 330.

270 (1994) 179 CLR 520 at 555-557, cf 587-594.

271 (1994) 179 CLR 520 at 555, 557.

272 *Lepore* (2003) 212 CLR 511 at 564 [141], citing *Richards v Victoria* [1969] VR 136 at 140.

273 See *Lepore* (2003) 212 CLR 511 at 564 [141], citing *Richards* [1969] VR 136 at 139-140 and *Victoria v Bryar* (1970) 44 ALJR 174.

274 See *Lepore* (2003) 212 CLR 511 at 570-571 [158], 571-572 [161]. See also *Richards* [1969] VR 136 at 140-141.

fails to take reasonable care of the child by an intentional act in circumstances where the delegate should have foreseen the likelihood of injury to the child.[275]

(c) Non-delegable duty not dependent on finding of duty to take reasonable care

277 The respondent submitted that a non-delegable duty to ensure that reasonable care is taken depends first on the finding of an ordinary duty of care. The respondent was right that, in *Hollis v Vabu Pty Ltd*, five members of this Court, observing that the Court below had rejected a claim based upon a non-delegable duty, stated that that Court was correct to note that in order for there to be a non-delegable duty there must first be a duty of care.[276] Their Honours cited Mason J's judgment in *Kondis v State Transport Authority*, which referred to the concept of a personal duty as having been "applied to a common law duty of care".[277] Two points must be made. The observations were obiter dicta. The claim in *Hollis* was resolved on the basis that the employer was vicariously liable for the consequences of the bicycle courier's negligent performance of his work and it was unnecessary for the plurality to address any non-delegable duty.[278] Moreover, as has been explained,[279] the better view is that a non-delegable duty is not subsumed into and does not necessarily depend on the law of negligence. It is an alternative formulation of a duty that depends on establishing the necessary undertaking of care, supervision or control and the vulnerability of the plaintiff. At least in New South Wales, that position is confirmed by reference to the definition of "negligence" in s 5 of the CL Act as a "failure to exercise reasonable care and skill" and the focus on a defendant's fault in ss 5B, 5C and 5D. The respondent's submission that the existence of a non-delegable duty depends on a finding of a duty to take reasonable care should be rejected.

(d) Non-delegable duty may be breached by intentional conduct

278 A non-delegable duty may be breached by the intentional conduct of the duty-holder's delegate. In explaining that conclusion, it is necessary to consider

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275 See *Lepore* (2003) 212 CLR 511 at 572 [161], [163].

276 (2001) 207 CLR 21 at 34 [27].

277 (1984) 154 CLR 672 at 684. See also *Jones v Bartlett* (2000) 205 CLR 166 at 228 [217].

278 (2001) 207 CLR 21 at 46 [61]-[62].

279 See [275] above.

first this Court's decision in *New South Wales v Lepore*[280] before turning to consider the legislative changes made by the CL Act.

(i) *Lepore*

279 In *Lepore*, a majority of this Court decided that there can be no breach of a non-delegable duty by an intentional wrongful act of the duty-holder's delegate.[281] McHugh J, dissenting, upheld the plaintiffs' claim on the basis that the State education authority had breached its non-delegable duty,[282] while Kirby J expressly reserved his Honour's position on whether intentional wrongdoing can form the basis of a finding of a breach of a non-delegable duty.[283]

280 The four factors identified in *John v Federal Commissioner of Taxation* as relevant to this Court's assessment of whether it should reopen or depart from its earlier decisions are whether (1) the earlier decision rests upon a principle carefully worked out in a succession of cases; (2) there was a difference in the reasoning between the reasons of the judges comprising the majority; (3) the decision has achieved no useful result; and (4) the decision has been independently acted upon in a manner that militates against its reconsideration.[284] The first two factors implicitly require consideration of the force of the reasoning that supports the principle on which the decision rests.[285] Consideration of those factors favours the grant of leave to reopen.

281 The majority view did not rest on a principle carefully worked out in a succession of cases. On the contrary, it was inconsistent with the result in *Morris v C W Martin & Sons Ltd*, which, properly understood, involved a breach

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280 (2003) 212 CLR 511.

281 (2003) 212 CLR 511 at 522-523 [2]-[3], 531-532 [31], 535 [38], 601 [265], 624 [340]; cf 551-553 [99]-[105], 559-560 [123]-[126].

282 *Lepore* (2003) 212 CLR 511 at 562 [136].

283 *Lepore* (2003) 212 CLR 511 at 609 [293].

284 (1989) 166 CLR 417 at 438-439.

285 *G Global 120E T2 Pty Ltd v Commissioner of State Revenue (Qld)* (2025) 99 ALJR 1465 at 1483 [76]; 425 ALR 443 at 465.

of a personal, non-delegable duty owed by the sub-bailee to the bailor of goods by way of intentional conduct of the sub-bailee's delegate.[286]

282 The common reasoning in favour of the principle recognised by their Honours does not withstand logical scrutiny. First, the distinction drawn between negligence and intentional wrongdoing on the part of the duty-holder's delegate[287] cannot be sustained. As McHugh J recognised in dissent, a plaintiff may elect to sue in negligence for the intentional infliction of harm.[288] That is, a person may fail to take care by conduct that is intended or unintended. The majority approach would mean that a duty-holder might be liable if its delegate negligently allowed a third party to abuse a child, but not if the delegate abused the child themselves. As Lord Reed observed in *Armes v Nottinghamshire County Council*, that result "can hardly be right".[289] Properly analysed, both cases involve a failure by the duty-holder to ensure that reasonable care is taken.

283 Second, Gummow and Hayne JJ expressed concern that the concept of non-delegable duty would "give no room for any operation of orthodox doctrines of vicarious liability".[290] That concern fails to appreciate that vicarious liability and non-delegable duty are distinct forms of liability.[291] That both doctrines might be available in a particular case does not mean that the doctrines are coterminous.

284 Third, Gleeson CJ considered that the proposition that a school authority is liable for any injury, accidental or intentional, inflicted at school upon a pupil by a teacher was "too broad" and the responsibility with which it fixed school authorities was "too demanding".[292] Gummow and Hayne JJ observed that "extend[ing]" the ambit of the non-delegable duty would "remove any need to consider whether the party concerned could or should have done something to

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286 [1966] 1 QB 716 at 725, 728, 736-738, discussed in *Bird* (2024) 98 ALJR 1349 at 1364 [52]; 419 ALR 552 at 567. See also *Woodland* [2014] AC 537 at 574 [7]; *Armes v Nottinghamshire County Council* [2018] AC 355 at 375 [51].

287 *Lepore* (2003) 212 CLR 511 at 531-532 [31], 602-603 [270], 624 [340].

288 *Lepore* (2003) 212 CLR 511 at 572 [162], citing *Gray v Motor Accident Commission* (1998) 196 CLR 1.

289 [2018] AC 355 at 375 [51].

290 *Lepore* (2003) 212 CLR 511 at 602 [269]; see also 532 [32].

291 *Bird* (2024) 98 ALJR 1349 at 1359-1360 [36], 1361-1362 [44]; 419 ALR 552 at 561-562, 564.

292 *Lepore* (2003) 212 CLR 511 at 533 [34].

avoid the harm".[293] However, a delegate who by their intentional conduct injures a plaintiff is no less at fault than a delegate who allows a plaintiff to be injured by their unintended conduct. In neither case is the plaintiff required to identify what the duty-holder could or should have done to avoid the plaintiff's injury. The duty-holder is simply liable for failing to ensure that care is taken. The scope of that liability is not unconfined but is determined based on the circumstances, including the nature of the duty-holder's undertaking of care, supervision or control of the plaintiff's person or property.[294]

285 There can hardly be any injustice in recognising a duty that is limited to that which the duty-holder has, objectively by their conduct, assumed or undertaken. Of course, the duty-holder will not usually be totally helpless to address the risk of intentional wrongful conduct of a delegate.[295] However, "whether or not there are any reasonably practicable methods by which [the duty-holder] can eliminate or reduce the incidence of [injury], long established legal principle and this Court's decisions require that they carry the legal responsibility for any [injury] that occurs".[296]

286 Fourth, Gleeson CJ, Gummow and Hayne JJ considered that, if there were no need to consider whether the duty-holder could or should have done something to avoid harm to the plaintiff, any deterrent effect of the non-delegable duty would be limited.[297] That argument proceeds on a false premise. A non-delegable duty arises because of the undertaking of care, supervision or control and not because its imposition deters particular conduct. In any event, even if it were thought that deterrence were relevant, deterrence cannot be the only objective of imposing a non-delegable duty because, where the delegate's negligence is unintentional, it is also unnecessary for the plaintiff to establish what the duty-holder could or should have done to avoid the plaintiff's injury.

287 As is apparent, by distinguishing between intentional and unintentional conduct of the duty-holder's delegate, the principle from *Lepore* has achieved no useful result. Nor is it apparent that *Lepore* has been independently acted upon by the legislature. To the extent that *Lepore* held there can be no breach of a non-delegable duty by an intentional wrongful act of the duty-holder's delegate in the absence of specific fault by the duty-holder, *Lepore* should be reopened and overruled, subject to considering whether the provisions of the CL Act compel

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293 *Lepore* (2003) 212 CLR 511 at 601 [265], 602 [267].

294 See [273] above.

295 *Lepore* (2003) 212 CLR 511 at 573 [164].

296 *Lepore* (2003) 212 CLR 511 at 573 [165].

297 *Lepore* (2003) 212 CLR 511 at 534 [36], 602 [267].

a different conclusion. As will be explained, nothing in the CL Act or its legislative history precludes the possibility that a non-delegable duty may be breached by the intentional conduct of the duty-holder's delegate and, therefore, the development of the common law to that end.[298] This is not a case where it can be said that the common law is waxing and waning according to the state of the legislation[299] or that this development in the common law will fragment the state of the law across the States, the Territories and the Commonwealth.[300]

(ii) CL Act

288 The Ipp Report, the recommendations of which were broadly adopted by the CL Act, addressed non-delegable duties.[301] The Report "attempt[ed]" to understand the nature and characteristics of such duties.[302] The relevant section of the Ipp Report observed that, "[a]lthough the precise nature of a non-delegable duty is a matter of controversy and uncertainty, one thing is clear: a non-delegable duty is not a duty to take reasonable care";[303] it is a duty "to see that care is taken".[304] Much of the balance of the so-called problems posed by non-delegable duties that the Ipp Report identified (as well as the Report's explanations of the "general principles underlying the concept of non-delegable duty"[305]) must be put aside because it has been, to a significant extent, overtaken by this Court's decision in *Bird* and, now, the reasons for decision in this case.

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298 See *Tame v New South Wales* (2002) 211 CLR 317 at 394 [224], citing *Esso Australia Resources Ltd v Federal Commissioner of Taxation* (1999) 201 CLR 49 at 60-63 [19]-[28]. See also *R v Swaffield* (1998) 192 CLR 159; *PGA v The Queen* (2012) 245 CLR 355.

299 See, eg, *Construction, Forestry, Mining and Energy Union v Boral Resources (Vic) Pty Ltd* (2014) 45 VR 571 at 583 [57].

300 See, eg, *Esso* (1999) 201 CLR 49 at 61-62 [23].

301 Australia, *Review of the Law of Negligence: Final Report* (2002) at 165-169 [11.1]-[11.19].

302 Australia, *Review of the Law of Negligence: Final Report* (2002) at 167 [11.9].

303 Australia, *Review of the Law of Negligence: Final Report* (2002) at 167 [11.10], citing *Kondis* (1984) 154 CLR 672 at 687. See [271] above.

304 Australia, *Review of the Law of Negligence: Final Report* (2002) at 167 [11.11]. See [271] above.

305 Australia, *Review of the Law of Negligence: Final Report* (2002) at 169 [11.17].

289 A second point made in the Ipp Report concerns the principle that came to be embodied in s 5Q of the CL Act: that "[l]iability for breach of a non-delegable duty shall be treated as equivalent in all respects to vicarious liability for the negligence of the person to whom the doing of the relevant work was entrusted".[306] The "only purpose" of what became s 5Q was expressly "to prevent non-delegable duties (both those that currently exist and any new duties that may be recognised in the future) being used as a way of evading the provisions" of the CL Act.[307]

290 Third, the Panel responded to a suggestion that it "should make proposals intended to rationalise the current law and to limit or stop the future recognition of new non-delegable duties by specifying a list of situations in which a non-delegable duty will arise".[308] The Panel stated that "this would be undesirable" and that "[t]he incidence of non-delegable duties and the scope of vicarious liability is a matter best left for development by the courts".[309] Thus, as was said in *Pafburn Pty Ltd v The Owners – Strata Plan No 84674*, the CL Act does not define "non-delegable duty"; it takes its common law meaning in the CL Act.[310]

291 Against that background, the question which then arises is: how does the CL Act address non-delegable duties? Or, to put the question in terms of the issue raised by this appeal: is the CL Act an impediment to recognising that a diocese might owe a non-delegable duty to ensure that reasonable care is taken which is capable of being breached by an intentional act of a parish priest?

292 Contrary to the submissions of the respondent, the CL Act is not an impediment. The respondent relied on particular provisions – ss 5Q and 3B(1)(a) and s 6F – which it said supported its submission that the CL Act was an impediment to recognising that a diocese might owe a non-delegable duty to ensure that reasonable care is taken which is capable of being breached by an intentional act of a parish priest. Those provisions will be addressed in turn.

293 First, as noted, s 5Q of the CL Act provides that the extent of liability in tort of a defendant for breach of a non-delegable duty is to be determined as if the liability were the vicarious liability of the defendant for the negligence of the delegate. The application of s 5Q is not excluded by s 3B(1)(a) of the CL Act,

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306 Australia, *Review of the Law of Negligence: Final Report* (2002) at 169.

307 Australia, *Review of the Law of Negligence: Final Report* (2002) at 169 [11.18].

308 Australia, *Review of the Law of Negligence: Final Report* (2002) at 169 [11.19].

309 Australia, *Review of the Law of Negligence: Final Report* (2002) at 169 [11.19].

310 (2024) 99 ALJR 148 at 154 [20]; 421 ALR 133 at 138.

which only applies to civil liability of a person in respect of an intentional act that is done, or sexual assault or misconduct committed, by *that* person.[311] Put in different terms, the exclusion of the operation of the CL Act effected by s 3B(1)(a) extends no further than to exclude its operation in respect of the civil liability of the person who did the intentional act that amounted to sexual assault: here, Father Pickin.

294 The application of s 5Q depends on characterising the delegate's conduct as "negligence". The term "negligence" is defined to mean "failure to exercise reasonable care and skill".[312] Given that an intentional infliction of harm is actionable in negligence,[313] there is no difficulty in reading the term "negligence" in s 5Q as including the intentional conduct of the delegate. The respondent sought to contend that the term "negligence" as defined in s 5 does not include intentional conduct, including by reference to the operation of s 3B(1)(a). It is true that s 3B(1)(a) is not concerned with "the way in which the relevant cause of action is framed".[314] However, s 3B(1)(a) addresses the circumstances in which certain provisions of the CL Act will not apply to or in respect of the civil liability of a person. It does not follow that s 3B(1)(a) otherwise confines the meaning of "negligence" in s 5 to exclude intentional conduct.

295 Section 5Q simply requires that the duty-holder's liability for the breach of a non-delegable duty be treated as if the defendant were vicariously liable for the delegate's negligence.[315] The provision applies in that manner whether the delegate's negligence consists of intentional or unintentional conduct.

296 Second, s 6F of the CL Act imposes a novel statutory duty on organisations for child abuse by associated individuals that "forms part of a cause of action in negligence",[316] only applies prospectively,[317] and only applies to organisations that are responsible for a child.[318] Section 6F(3) establishes a presumption that

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311 See *New South Wales v Bujdoso* (2007) 69 NSWLR 302 at 314 [54], 317 [66]. See [327] below.

312 CL Act, s 5 definition of "negligence".

313 See [282] above.

314 *New South Wales v Ouhammi* (2019) 101 NSWLR 160 at 172 [51].

315 *Pafburn* (2024) 99 ALJR 148 at 155 [29]; 421 ALR 133 at 140.

316 CL Act, s 6F(1).

317 CL Act, Sch 1, cl 43.

318 See CL Act, s 6D.

the organisation breached its duty unless the organisation establishes that it took reasonable precautions to prevent the child abuse. Section 6F(3) speaks to the novel statutory duty and says nothing about the common law. The novel duty s 6F of the CL Act imposes is distinct from, and not exclusive of, a non-delegable duty that may be breached by the intentional conduct of the duty-holder's delegate.

(2) AA's non-delegable duty claim against the Diocese

(a) Duty

297 The primary judge did not consider AA's claim of non-delegable duty. The Court of Appeal dismissed AA's non-delegable duty claim on the basis that it was not available as a matter of law. It is necessary to address the nature of that pleaded claim in light of the agreed facts, the evidence and the findings.

298 AA pleaded that the "Duty of Care was non-delegable". In light of the applicable law,[319] AA pleaded that the Diocese owed AA, as a child in the care of one of its priests, a duty to ensure that reasonable care was taken to avoid AA suffering foreseeable and not insignificant harm. AA relied upon the following particulars: that AA "was a child in the care of a priest of the Diocese", AA "was vulnerable and entirely reliant upon the Diocese to protect him from sexual, and/or serious physical, abuse" and "[t]he high degree of control over [AA] exercised by the Diocese, through one of its priests who was invested with the authority and status proclaimed in canon law and Catholic teachings, together with [AA's] vulnerability, gave rise to a special relationship such as to sustain and support the Duty of Care".

299 In determining whether a non-delegable duty arose in the particular circumstances of this case, it is necessary to ask: (1) Was AA, as a child parishioner, specially vulnerable or dependent, in the sense that child parishioners were a class of persons who the Diocese was aware were highly likely to place a high degree of trust in a priest? (2) Did the Diocese undertake the care of AA, as a child parishioner; or, from the perspective of AA, did AA's parents entrust the Diocese with the care of AA? Then, in determining the scope and content of any non-delegable duty, it is necessary to ask: (3) What, if anything, did the Diocese undertake to do or, from the perspective of AA, what was it entrusted to do? (4) Did the Diocese undertake to and was it entrusted to ensure that reasonable care was taken to avoid AA suffering the kind of harm that he suffered?

300 As will be seen, the facts and circumstances of the case as pleaded and proved gave rise to the Diocese owing a non-delegable duty to ensure that reasonable care was taken to avoid the risk of personal injury to child parishioners

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319 See Section F(1) above.

such as AA in the care of a priest of the Diocese at the presbytery. Consistent with the incremental and analogical approach of the common law,[320] the scope of the duty is framed to reflect the facts in issue in this proceeding. Whether the duty extended beyond the presbytery or to children other than parishioners is unnecessary to decide in the circumstances of this case. The non-delegable duty existed because: (1) AA, as a child parishioner who was taught to respect and obey priests, was specially vulnerable; and (2) the Diocese undertook the care of child parishioners such as AA in circumstances where it appointed priests to a parish and expected and required them to engage with young people as part of their ministry, the Diocese made the presbytery available to priests such as Father Pickin to perform that ministry, and AA's parents entrusted the care of AA to Father Pickin.

(i) Vulnerability of AA

301 AA pleaded that he "was vulnerable and entirely reliant upon the Diocese to protect him from sexual, and/or serious physical, abuse". The respondent did not admit that AA was vulnerable. And because the primary judge did not consider AA's claim of non-delegable duty, her Honour made no direct findings in relation to AA's vulnerability. Similarly, the Court of Appeal did not address this question because it concluded that the claim was not available as a matter of law.

302 Notwithstanding that the courts below did not address and make any direct findings about AA's vulnerability, the findings that were made in relation to other issues in the proceeding, together with the evidence on which those findings were based, provide a sufficient and compelling basis to find that the relationship between the Diocese and AA was marked by a "special dependence or vulnerability" of AA by reason of his relationship as a child parishioner with a parish priest of the Diocese, a person whom he was taught to respect and obey, consistent with Catholic teaching at the time. That is, the findings that were made and the evidence on which those findings were based established that: at the time of the abuse, AA was in Year 8, aged 13; AA was a practising Catholic, although his family did not attend Mass every Sunday; priests at that time were given an exaggerated dignity and respect; and AA was taught that priests were representatives of God and to obey them without question.

303 It is necessary to set out, in some detail, the evidence that supports those findings. AA was born on 25 November 1955. The sexual abuse by Father Pickin occurred when AA was in Year 8 when he was aged 13.[321]

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320 *Mallonland* (2024) 98 ALJR 956 at 967 [37]; 418 ALR 639 at 649.

321 See Section C above.

304 The primary judge made a number of critical findings that directly concerned AA's vulnerability and the nature of that vulnerability.

305 First, the primary judge recorded that "[i]n his second statement AA described his Catholic Italian father having traditional values and having taught him to respect adults, particularly those in positions of authority such as priests and teachers. *He was taught to believe that priests were representatives of God, holy men who lived good lives, who could be trusted, respected and obeyed without question*. He said that Father Pickin was no different before the abuse and before that he would never have dared to question or disobey a priest" (emphasis added).

306 AA also gave the following evidence which indicated his vulnerability:

> "Because I hadn't told my parents what had happened to me, I continued going to see Father Pickin at the residence on Friday nights. I couldn't think of any way that I could get out of doing that. I knew that my parents would have been very angry with me if I had refused to go because I would have been disobeying a priest and that would have been very embarrassing for them. I kept going to see Father Pickin on Friday nights because he told me to. I kept going until I just couldn't go any more. So I just stopped going. I was surprised that nothing happened."

307 Second, the primary judge found that Father Dillon's uncontested evidence established the nature of the position to which Father Pickin was appointed and the power, control and authority which he was able to exercise as a result. The primary judge then listed what that uncontested evidence established, including the following:

(1) "[I]n 1969 the parish priest was the highest local Church authority for members of the Church, answerable only to the Diocesan Bishop, parish councils, parishioner involvement and support having only begun then to come into use. That priest was then the centre and focus of parish governance."

(2) "In 1965 Pope Paul VI proclaimed the *Presbyterorum Ordinis*, which included that priests were to apply, with special diligence, attention to youth amongst others and that it was desirable to join with them in 'friendly meetings for mutual aid in leading more fully and in a Christian manner a life that is often difficult' and that Catholics should follow priests as their pastors and fathers."

(3) "This was consistent with normal and traditional Church practice and the expectations of the people of the parish, who gave priests their trust, loyalty and co-operation on many, if not all levels."

(4) "In the later 1960's priests were given an exaggerated dignity and respect, which could and did become dangerous at times."

(5) "Priests, religious brothers and sisters were the recipients of trust and respect from Catholic people and also held in high regard by the vast majority of the wider general community."

308 It was against this background that the primary judge then observed that AA's evidence about how he had been raised to regard priests accorded with Father Dillon's evidence and that AA's regard for Father Pickin was of the kind Father Dillon described and reflected what his parents had taught him, which also accorded with the tenets and teachings of the Catholic faith Father Dillon explained.

309 A finding that the relationship between the Diocese and AA was marked by a "special dependence or vulnerability" of AA by reason of his relationship as a child parishioner with a parish priest of the Diocese, a person whom he was taught to respect and obey, consistent with Catholic teaching at the time, was further supported by evidence given by AA's brother as well as evidence given by Mr McClung and BB. In a statement by AA's brother tendered in evidence, he said:

> "Our family were Catholic, although they did not attend Mass every week. ... I learned from my parents that priests were to be respected because they devote their lives to God and to doing good work. I understood from the way that my parents acted, that priests were to be shown respect. From the way that I was brought up, I would never have rejected or disobeyed the guidance or direction of a priest."

310 Mr McClung's evidence was to a similar effect: "Growing up as a Catholic I believed that priests were holier than holy. Their word was law because they were next to God." BB also gave similar evidence: "At that time my general perception of priests was that they were authority figures who I was to always respect and obey. I never questioned the authority of Priests. Priests were seen by me and my Mum as Pillars of society. My Mum always bloody worshipped the Priests."

311 In sum, the relationship between the Diocese and AA was marked by a "special dependence or vulnerability" of AA by reason of his relationship as a child parishioner with a parish priest of the Diocese, Father Pickin, a person whom he was taught to respect and obey, consistent with Catholic teaching at the time.

(ii) Undertaking and assumption of care of AA by the Diocese

312 The next step is to address the relationship between the Diocese, Father Pickin and AA. The agreed facts, the relevant findings and the uncontested evidence are set out in Sections A(1) and A(2) above. In sum, the agreed facts and findings, proved by the evidence adduced by AA, much of it uncontested, established that Father Pickin was appointed by the Bishop, who had powers of

direction and control over Father Pickin, as an incardinated parish priest of St Patrick's Church in the Diocese. That appointment was made in accordance with, and against the background of, Father Dillon's uncontested evidence that the parish priest was the highest local authority for the members of the Catholic Church and the centre and focus of local governance of the parish at its local level, answerable only to the bishop.[322]

313 As the primary judge explained it, it was the special role that the Diocese gave Father Pickin which provided Father Pickin the opportunity to abuse AA. That special role in the late 1960s, consistent with the then canon law of the Catholic Church and the *Presbyterorum Ordinis* proclaimed by Pope Paul VI in 1965,[323] required priests to "apply, with special diligence, attention to youth amongst others and that it was desirable to join with them in 'friendly meetings for mutual aid in leading more fully and in a Christian manner a life that is often difficult' and that Catholics should follow priests as their pastors and fathers".[324] Put in different terms, on appointment by the Diocese of a parish priest, "[i]n the late 1960's a standard expectation was that priests' engagement with the young people of the parish was a most important and valued part of their ministry. It involved a range of activities under the Church banner including youth groups and movie nights and provided in most cases, a positive connection with the majority of the parishioner[s'] children."

314 Father Dillon's evidence was telling:

> "It was a standard expectation of all priests that their engagement with the young people of the parish was a most important and valued part of their ministry. This would happen with youth groups, movie nights, camps, sporting teams, Choirs *and any number of other activities which would bring people together under the banner of the Church*. In addition, the involvement of priests in the Parish School provided an effective and positive (in most cases) connection with the majority of the children of parishioners – usually around 70%." (emphasis added)

315 The evidence established that a parish priest was expected and required by the Diocese, as a result of their appointment as parish priest, to engage with young people as part of their ministry and that the role delegated to priests – of bringing children under the Church banner consistent with the Church's laws and teachings

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322 See Section A(2) above, especially at [168].

323 Specific extracts of the 1917 Code of Canon Law and the *Presbyterorum Ordinis* were tendered as part of Father Dillon's report without objection: see Section A(2) above.

324 See Section A(2) above, especially at [168].

at the time – extended beyond engagement with children in scripture classes and formal Church services and included engagement in activities like youth groups, movie nights, camps, sporting teams and any number of activities that would seek to achieve what was expected and required of the parish priest.

316 In the present case, the Diocese's expectation that Father Pickin would engage with children in the parish was reflected in Father Pickin's appointment to teach the Catholic religion at Wallsend High School in classes that AA attended. But the evidence also established that, consistent with the Diocesan expectation that Father Pickin would engage with children in the parish by other activities, Father Pickin invited children to go on holidays with him and to attend the presbytery.

317 Two further aspects of that evidence are important. First, Father Pickin was conferred authority by the Bishop to control the use of the presbytery and it was common in the 1960s and the 1970s for presbyteries to be used for purposes other than being solely the priest's residence, including social gatherings which formed part of the priest's pastoral responsibilities.[325] That evidence supports the finding that Father Pickin in hosting the Friday nights at the presbytery was, at least ostensibly, performing an aspect of the pastoral role in respect of child parishioners expected and required of him by the Diocese. Second, that the use of the presbytery in that manner was common in the 1960s and 1970s also supports the inference not only that the Diocese expected the parish priest to use the presbytery in that manner but also that the members of the parish expected social events and gatherings to be held at the presbytery, including events as part of a parish priest's ministry involving pastoral care in relation to young people.

318 In Section C,[326] the findings by the primary judge that the Friday night gatherings were not "Church events" and that there was no suggestion that Father Pickin invited AA and Mr Perry to the presbytery for religious instruction are addressed. It is not entirely clear what her Honour meant by referring to the Friday nights at the presbytery not being "Church events". If this was intended to convey that the Friday nights were not, in fact, an event involving spiritual instruction or a formal event such as a youth group, then that much may be accepted and is consistent with the evidence, particularly that the boys were supplied with alcohol and cigarettes and allowed to use a poker machine in the dressing room adjacent to Father Pickin's bedroom. However, that finding does not require rejecting AA's evidence that he thought he was invited to the presbytery to further his religious instruction.[327] And, in any event, the evidence indicates that

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325 See Section A(2) above, especially at [168].

326 See especially at [192]-[196] above.

327 See [195] above.

parish priests also performed their pastoral responsibilities in less formal contexts, such as movie nights and holidays.

319 What is important is that the Diocese delegated to Father Pickin and required him to perform a function of providing pastoral care to child parishioners. The Diocese also conferred control of the presbytery on Father Pickin, and Father Pickin arranged events at the presbytery at least ostensibly in discharge of the delegated function and with the benefit of that control. Father Pickin had the care of AA on account of and in accordance with the Church's teachings. And, as will be seen, it may be inferred that AA's parents entrusted the care of AA to Father Pickin on the basis that Father Pickin's invitation related to an event at the presbytery in the discharge of Father Pickin's pastoral function.

(iii) Entrustment of AA's care to the Diocese

320 The evidence and findings on the role and standing of a parish priest at the relevant time, which have been considered in the context of discussing the vulnerability of AA as well as the undertaking of care by the Diocese for AA, also form part of the basis of the primary judge's findings about AA's stepmother's and father's relationship with and view of priests. Those findings support a further finding that AA's parents entrusted AA's care to Father Pickin and, through him, to the Diocese.

321 AA did not tell his parents the reason *why* he was going to meet with Father Pickin but he did tell them that he was meeting Father Pickin. As AA said in evidence, he told his parents, "we were going up with the meeting with Pickin" or "we were going to meet Pickin up at the church". And his evidence was that his parents did not ask why he was going to meet Father Pickin, nor did they ask what AA had been doing at the presbytery. In the circumstances, that was unsurprising. Given the uncontested evidence that priests' ministry extended to "youth groups [and] movie nights" and "any number of other activities which would bring people together under the banner of the Church", it may be inferred that AA's parents understood the event to be a part of Father Pickin's ministry involving young people and that they entrusted AA's care to Father Pickin and, through him, to the Diocese.

322 As the primary judge found, "that [AA's and Mr Perry's] parents held Father Pickin in similar high regard, may sensibly be inferred, given that they allowed [AA and Mr Perry] to accept [Father Pickin's] invitations". That finding must be understood in the context of, and is reinforced by, the interrelated, uncontested findings and evidence about the role and standing of a parish priest from the viewpoint not only of AA and his family but also of the Diocese.

(iv) Scope and content of duty

323 It may be inferred from the facts and circumstances that child parishioners were taught to trust and obey priests; that the Diocese expected and required priests to engage with young people as part of their ministry, including through activities at the church; and that the Diocese conferred control over the presbytery on priests such as Father Pickin, permitting its use for the purposes of that engagement. Those facts and circumstances provide an ample basis to conclude that the Diocese came under a duty not just to take reasonable care, but to ensure that reasonable care was taken, to avoid the risk of personal injury to child parishioners such as AA while they remained in the care of a priest of the Diocese at the presbytery.

(b) Breach

324 Adapting the language of McHugh J in *Lepore*,[328] not only did Father Pickin's assault of AA constitute a battery, but Father Pickin's battery also constituted a breach of the Diocese's non-delegable duty to ensure that reasonable care was taken to avoid the risk of personal injury to AA as a child parishioner in the care of a priest of the Diocese at the presbytery. The Diocese is liable for the manner in which a priest "cares" for a child, even if the priest misunderstood what taking reasonable care of the child entailed. Where the Diocese owed a non-delegable duty to AA, the Diocese did not escape liability when Father Pickin failed to take reasonable care of AA by his intentional act in circumstances where Father Pickin should have foreseen the likelihood of injury to AA.

(c) Causation

325 The Diocese's breach of its non-delegable duty caused the loss suffered by AA. As the primary judge found, the psychiatric experts agreed that the abuse committed by Father Pickin, if it occurred, was consistent with causing or contributing to various of AA's injuries and disabilities. Ground 2(b) of the respondent's notice of contention must be rejected.

(d) Loss

326 The primary judge assessed damages in the sum of $636,480 on the basis that the Diocese was vicariously liable for Father Pickin's sexual abuse of AA – that is, at common law and not subject to the caps on damages set by Pt 2 of the CL Act. The primary judge accepted that, if liability and damages had to be assessed under the CL Act on the basis that the Diocese had breached an ordinary duty of care, the damages would necessarily be lower, including as to interest. Had s 16 of the CL Act applied, the primary judge would have awarded $245,480

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328 (2003) 212 CLR 511 at 572 [163].

for non-economic loss, being 34 per cent of the maximum amount that may be awarded. Her Honour also observed that the application of Pt 2 of the CL Act would affect the calculation of interest.

327 AA conceded on the appeal in the Court of Appeal that the primary judge's finding of vicarious liability must be set aside following *Bird*. However, AA contended that s 3B(1)(a) of the CL Act applies to the claim for breach of a non-delegable duty by the Diocese involving the intentional conduct of Father Pickin so that the caps on damages set by Pt 2 of the CL Act do not apply. The immediate obstacle to that contention is that, as has been explained, the civil liability of the Diocese is not in respect of an intentional act that is sexual assault committed by the Diocese.[329] The Diocese is liable for failing to ensure that reasonable care was taken. Its liability is not simply derivative of the liability of Father Pickin.[330] AA sought to overcome that obstacle by relying on the following two propositions: (1) In *Zorom Enterprises v Zabow*, the Court of Appeal held that s 3B(1)(a) operates in relation to the vicarious liability of an employer for intentional wrongdoing of an employee because the act and intent of the employee are taken to be those of the employer;[331] (2) Applying s 5Q, so that the claim against the duty-holder is treated as if it were one of vicarious liability, s 3B(1)(a) is engaged against the duty-holder in a claim for breach of a non-delegable duty caused by the intentional conduct of the delegate.

328 AA's submission subverts the proper order of the analysis. Section 3B(1)(a) determines whether "[t]he provisions of this Act" (including s 5Q) apply. Section 5A(2) confirms that Pt 1A (within which s 5Q falls) "does not apply to civil liability that is excluded from the operation of this Part by" s 3B. Section 5Q cannot then determine whether s 3B(1)(a) applies. Put another way, if, as AA contends, s 5Q meant that s 3B(1)(a) applied in this case, then s 3B(1)(a) would require that s 5Q not apply. The operation of s 3B(1)(a) removes the premise by which it is said to apply. The argument is self-contradictory.

329 A claim for breach of a non-delegable duty by the delegate's intentional act therefore results in an award of "personal injury damages" to which Pt 2 of the CL Act applies.[332] That outcome reflects and is consistent with the fact that the duty-holder did not engage in and is not liable for having itself committed intentional wrongdoing. AA accepts that, if Pt 2 of the CL Act applied to AA's claim, then the judgment sum awarded by the primary judge would have to be

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329 See [293] above.

330 cf *Zorom Enterprises v Zabow* (2007) 71 NSWLR 354 at 359 [13].

331 (2007) 71 NSWLR 354 at 358-359 [13].

332 CL Act, s 11A(1) read with s 11 definition of "personal injury damages".

reduced to $335,960 (comprising damages for economic loss of $90,480 and for non-economic loss of $245,480, with the agreed amount of interest on non-economic loss precluded by s 18(1)(a) of the CL Act).

G. Orders

330 For those reasons, the appeal must be allowed. I agree with the orders proposed by Gageler CJ, Jagot and Beech-Jones JJ.

EDELMAN J.

Sexual abuse and tortious duties to ensure that reasonable care is taken

331 AA is 70 years old. He grew up in a poor family. His parents were practising Catholics. Their local parish was the Wallsend parish within what is now the Diocese of Maitland-Newcastle, controlled by an association of persons ("the Diocese")[333] in that geographic area. Their local priest was Father Pickin. Like many others in the congregation, AA's parents placed great trust in priests and taught AA to do so.

332 Fr Pickin was accommodated by the Diocese in the presbytery of St Patrick's Catholic Church. On numerous occasions, Fr Pickin enticed AA into the presbytery, where AA was given alcohol, cigarettes, and access to a poker machine. Although the Diocese did not authorise or encourage any of these activities, in accordance with canon law the Diocese did expect priests to engage with children in a wide range of activities, some of which occurred in the presbyteries of the churches.

333 In 1969, when AA was 13, AA was sexually abused by Fr Pickin on numerous occasions in the presbytery. The central issue on this appeal is whether the Diocese is responsible for that abuse. The trial judge in the Supreme Court of New South Wales held that the Diocese was responsible but the Court of Appeal of the Supreme Court of New South Wales held that the Diocese was not.

334 For the reasons below: (i) in the circumstances of this case, the only duty of care that could be owed by the Diocese was one based upon an assumption of responsibility; (ii) the Diocese objectively undertook, and assumed responsibility, not merely that the Diocese would take reasonable care to avoid personal injury to child parishioners (including AA) who were invited onto Diocesan premises and in the care of the priest in control of that parish, but to ensure that reasonable care to avoid personal injury would be taken by priests for child parishioners in those circumstances; and (iii) the decision in *New South Wales v Lepore*,[334] which would deny liability of the Diocese in these circumstances where a child is intentionally abused rather than carelessly injured, is a decision that is clearly unjustifiable as a matter of both precedent and principle and must be re-opened and overruled. The appeal must be allowed.

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333 Required to be treated for child abuse proceedings as though it were a legal entity: *Civil Liability Act 2002* (NSW), s 6K(1).

334 (2003) 212 CLR 511.

335 These reasons commence with consideration of the decision in *Lepore*, since that decision, if correct, would be a complete answer to this appeal.

The erroneous turn in the common law and a partly unnecessary legislative fix

336 In the 1960s and 1970s, three young children, aged between seven and ten, were sexually assaulted by teachers at their State primary schools. Many years later, in cases which reached this Court in *Lepore*,[335] they brought claims against the States of New South Wales and Queensland respectively, amongst others, for breach of a non-delegable duty of care. A school authority assumes responsibility to its students to ensure that reasonable care is taken in the supervision of the students:[336] a necessary inference of fact is that "the school authority undertakes not only to employ proper staff but to give the child reasonable care".[337] Where a non-delegable duty requires a person to ensure that reasonable care is taken in the possession of *goods* then the duty is breached if the goods are lost or damaged by intentional conduct.[338] The issue for this Court in *Lepore* was whether a non-delegable duty could be breached where the intentional injury was to *children*.

337 A majority of this Court in *Lepore* held that the school authority's non-delegable duty did not extend to such injuries.[339] At the heart of this appeal is the correctness of that decision. The respondent to this appeal—an incorporated trustee[340] which stands in this case as the statutory representative of an unincorporated organisation, the Diocese[341]—submitted that the decision in

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335 (2003) 212 CLR 511.

336 *The Commonwealth v Introvigne* (1982) 150 CLR 258 at 269, 271, 279.

337 *Ramsay v Larsen* (1964) 111 CLR 16 at 28.

338 *New South Wales v Lepore* (2003) 212 CLR 511 at 555-556 [112]-[113], 566-567 [147], 593 [236]; *Sweeney v Boylan Nominees Pty Ltd* (2006) 226 CLR 161 at 171 [25]; *CCIG Investments Pty Ltd v Schokman* (2023) 278 CLR 165 at 197-198 [74]-[77]; *Bird v DP (a pseudonym)* (2024) 98 ALJR 1349 at 1364 [52]; 419 ALR 552 at 567, discussing *Morris v C W Martin & Sons Ltd* [1966] 1 QB 716. See also Beuermann, "Conferred Authority Strict Liability and Institutional Child Sexual Abuse" (2015) 37 *Sydney Law Review* 113 at 132.

339 *New South Wales v Lepore* (2003) 212 CLR 511 at 522-523 [2]-[3], 531-532 [31], 535 [38] (Gleeson CJ); 601 [265] (Gummow and Hayne JJ); 624 [340] (Callinan J).

340 *Roman Catholic Church Trust Property Act 1936* (NSW), ss 3, 4(1), 4(2)(f).

341 See *Civil Liability Act 2002* (NSW), ss 6K, 6L, 6M, 6O read with s 6J definitions of "child abuse proceedings" and "entity".

Lepore should not be re-opened because it is longstanding and clear, and because overruling it would have significant consequences since the decision has been closely entwined with the statutory and common law development of vicarious liability.[342] Further, the respondent submitted that to overrule *Lepore* would be contrary to principle and incoherent with statutory amendments.

338 Any suggestion that there would be significant consequences of overruling *Lepore* might be doubted, especially because it is now recognised that liability for breach of a non-delegable duty is fundamentally distinct and different from vicarious liability.[343] Some of the past reasoning in this Court must be understood in this light. For instance, objective factors relevant to a non-delegable duty, although previously described as part of an enquiry into "vicarious liability",[344] should be understood as concerned with a non-delegable duty rather than (true) vicarious liability.[345]

339 In any event, the consequences of upsetting any settled understandings by overruling *Lepore* cannot withstand the extreme incoherence of the majority reasoning in that case in two respects.[346] First, the effect of *Lepore* is that although a school authority with the care of children can assume responsibility for intentional damage by any agent or delegate to *goods* entrusted by the children to the school, the authority does not assume responsibility for intentional injury by an agent or delegate to the *children* themselves. Secondly, the effect of *Lepore* is that although a school authority generally assumes responsibility to ensure that children are not injured by *careless* conduct by an agent or delegate, the school authority does not assume responsibility for *intentional* conduct.[347] Whatever might have been the position before the procedural reforms of the 19th century, part of the reasoning in *Lepore* is based upon a procedural absurdity that cannot be justified in a modern system that prioritises the substance of an action over the formal procedure by which it is initiated. It must be accepted today that a duty to

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342 See *John v Federal Commissioner of Taxation* (1989) 166 CLR 417.

343 *CCIG Investments Pty Ltd v Schokman* (2023) 278 CLR 165 at 195-196 [70]-[73]; *Bird v DP (a pseudonym)* (2024) 98 ALJR 1349 at 1359-1360 [36]-[37]; 419 ALR 552 at 561-562.

344 *Prince Alfred College Inc v ADC* (2016) 258 CLR 134 at 159-160 [81]-[82]. Compare *CCIG Investments Pty Ltd v Schokman* (2023) 278 CLR 165 at 199-200 [80]-[81].

345 *Bird v DP (a pseudonym)* (2024) 98 ALJR 1349 at 1361 [44]; 419 ALR 552 at 564.

346 See *Vunilagi v The Queen* (2023) 279 CLR 259 at 310-311 [161]-[164].

347 *New South Wales v Lepore* (2003) 212 CLR 511 at 533 [34], 535 [38], 601 [265], 624 [340].

take reasonable care can be breached by conduct involving the intentional infliction of harm.[348] The treatment in *Lepore* of the school authority's undertaking has thus rightly been described as "indefensible": "[i]t is as if a seller of canned soup could escape liability for its defective quality if it could be shown that it had been deliberately poisoned by the manufacturer".[349]

340 The overruling of *Lepore* does, however, create the irony that a legislative "fix" to expand vicarious liability, by amendments to the *Civil Liability Act 2002* (NSW),[350] fell short of the broader liability established by the common law, as properly understood, in respect of non-delegable duties. Nevertheless, the legislative amendments were intended to supplement the common law of non-delegable duties, as it might develop, by expanding what was understood to be vicarious liability in the particular area of child abuse.[351] Neither the original form of the *Civil Liability Act*, nor these amendments, were intended by Parliament to stultify the development of non-delegable duties assumed by a person in relation to children, still less to stultify the principles of non-delegable duties generally.[352] *Lepore* must be re-opened and overruled.

341 The overruling of *Lepore* will have a significant effect upon the common law in this country, including upon proceedings concerning historic sexual abuse, such as this case. Any legal entity—including any unincorporated organisation like the Diocese that is required to be treated as a legal entity—which assumes responsibility to ensure that reasonable care is taken of another's person or property (goods or land) will be liable if a third party intentionally causes injury to that other person or their property within the scope of the responsibility assumed. As will be explained in these reasons, the consequence of this is that this appeal must be allowed.

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348 See *Wilson v Horne* (1999) 8 Tas R 363; *New South Wales v Lepore* (2003) 212 CLR 511 at 572 [162], citing *Gray v Motor Accident Commission* (1998) 196 CLR 1; *Australian Securities and Investments Commission v Cassimatis [No 8]* (2016) 336 ALR 209 at 306 [504].

349 Stevens, *Torts and Rights* (2007) at 271.

350 *Civil Liability Amendment (Organisational Child Abuse Liability) Act 2018* (NSW).

351 New South Wales, Legislative Assembly, *Parliamentary Debates* (Hansard), 26 September 2018 at 21-22.

352 See Commonwealth of Australia, *Review of the Law of Negligence: Final Report* (2002) at 169 [11.19]. See also *Pafburn Pty Ltd v The Owners – Strata Plan No 84674* (2024) 99 ALJR 148 at 154 [20]; 421 ALR 133 at 138.

Fundamental propositions

Assumed duties and imposed duties

342 Like Janus, the common law of torts has two faces. One face is concerned with duties that the common law imposes on people, without more, in order to protect the rights of others, generally the rights of others to "person or property".[353] The most famous instance in English law where such a duty was recognised was in *Donoghue v Stevenson*,[354] where a majority of the House of Lords recognised liability for careless infringement of the plaintiff's right to her person. Although that duty concerned a liability based upon fault, namely carelessness, many torts, including those where intention is an element,[355] impose duties upon people independently of fault. There is nothing unusual or anomalous about the imposition of strict liability (ie liability in the absence of fault) in the law of torts for infringement of the rights of others.

343 The other face of the law of torts concerns separate and additional (although potentially overlapping) duties that arise when a person, by their words or conduct or the position in which they are placed, objectively assumes responsibility such as by an undertaking concerning the safety of another person or their property. An undertaking in the law of torts might arise from a promise or assurance given without consideration to a person or persons (a private undertaking)[356] or to the public at large (a public undertaking)[357] or by embarking upon a course of conduct or task.[358] In each case, the duty arises because the circumstances of the undertaking involve the inference that the person objectively assumed responsibility to take reasonable care or to ensure that reasonable care will be

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353 *Mallonland Pty Ltd v Advanta Seeds Pty Ltd* (2024) 98 ALJR 956 at 978 [90]; 418 ALR 639 at 664, citing Blackstone, *Commentaries on the Laws of England* (1765), bk 1, ch 1 at 125.

354 [1932] AC 562.

355 *Fairfax Media Publications Pty Ltd v Voller* (2021) 273 CLR 346 at 381 [115].

356 *Hedley Byrne & Co Ltd v Heller & Partners Ltd* [1964] AC 465 at 526-527, referring to *Wilkinson v Coverdale* (1793) 1 Esp 75 [170 ER 284].

357 Below at [355].

358 Nolan, "Assumption of Responsibility: Four Questions" (2019) 72 *Current Legal Problems* 123 at 133.

taken. This principle is centuries old. As Cardozo J said a century ago in *Glanzer v Shepard*:[359]

> "There is nothing new here in principle ... The surgeon who unskillfully sets the wounded arm of a child is liable for his negligence, though the father pays the bill ... The bailee who is careless in the keeping of the goods which he receives as those of A does not escape liability though the deposit may have been made by B. It is ancient learning that one who assumes to act, even though gratuitously, may thereby become subject to the duty of acting carefully, if he acts at all ... The most common examples of such a duty are cases where action is directed toward the person of another or his property."

344 The duties assumed, by undertakings, were historically forms of *assumpsit* (a person "assumed" or "undertook")[360] with roots common to what are now seen as contractual undertakings.[361] Although it might be said that all legal duties are ultimately "imposed" by law in the sense that they are legally recognised by courts, the foundation of these "assumpsit duties"[362] is the construction of an undertaking given by a person rather than such duties being imposed independently of anything that the person has said or done or any position that they have assumed. In this sense, these assumpsit duties can be described as "assumed" rather than imposed exclusively by law.

345 Although there is no limit to the subject matter of duties that can be assumed by undertakings, and although, as Cardozo J recognised, these undertakings most commonly arose historically in relation to person or property, the dominant recognition of assumed duties today is in the area of claims for "pure" economic loss (that is, losses that are independent of any damage to a person or to their property[363]). These claims for "pure" economic loss are epitomised by the

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359 (1922) 135 NE 275 at 276.

360 See Ibbetson, *A Historical Introduction to the Law of Obligations* (1999) at 131; Simpson, *A History of the Common Law of Contract: The Rise of the Action of Assumpsit* (1975) at 215.

361 *Swick Nominees Pty Ltd v LeRoi International Inc [No 2]* (2015) 48 WAR 376 at 443 [370], discussing *Elsee v Gatward* (1793) 5 Term Rep 143 at 150 [101 ER 82 at 86].

362 *General Accident Fire and Life Assurance Corporation v Tanter (The "Zephyr")* [1984] 1 Lloyd's Rep 58 at 85; *General Accident Fire and Life Assurance Corporation v Tanter (The "Zephyr")* [1985] 2 Lloyd's Rep 529 at 534, 538.

363 *Mallonland Pty Ltd v Advanta Seeds Pty Ltd* (2024) 98 ALJR 956 at 965 [30], 978 [89]-[90]; 418 ALR 639 at 647, 664-665.

reasoning in *Hedley Byrne & Co Ltd v Heller & Partners Ltd*,[364] as endorsed in this Court,[365] particularly that of Lord Devlin, who analogised from the liability of a bailee for responsibility assumed in relation to goods[366] to liability for carelessly given advice for which there had been an assumption of responsibility.

346 Perhaps due to a lack of appreciation of legal history, some scholars have had trouble understanding this second face of tortious duties.[367] Others, with a keener understanding of legal history, have seen these duties as based upon a separate foundation from imposed duties and more closely associated with the law of contract than with duties imposed purely by law.[368] As Beever has observed, the idea that the liability in a case like *Hedley Byrne* was a species of the liability in a case like *Donoghue v Stevenson* "has done considerable, perhaps irreparable, damage to both areas of the law".[369] More than a century ago, Beale observed that:[370]

> "the violation of an undertaking is not a tort, properly so called. It is a careful and exact use of legal language to call an undertaking a consensual obligation; it is a burden into which the obligor must voluntarily enter. One has only to be born or to immigrate into a society, in order to undergo the duty of respecting the persons and property of his neighbo[u]rs; but in order to be required to exercise the active care required of an undertaker, the obligor must 'take the trust upon himself.'"

347 Beale's reference to an assumption of responsibility by a person taking the trust upon themself was an unattributed quotation from Holt CJ in *Coggs v*

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364 [1964] AC 465.

365 See *Brookfield Multiplex Ltd v Owners Corporation Strata Plan 61288* (2014) 254 CLR 185 at 226 [122].

366 *Hedley Byrne & Co Ltd v Heller & Partners Ltd* [1964] AC 465 at 526, referring to *Coggs v Bernard* (1703) 2 Ld Raym 909 [92 ER 107].

367 Weir, "Liability for Syntax" [1963] *Cambridge Law Journal* 216; Weir, "Errare Humanum Est", in Birks (ed), *The Frontiers of Liability* (1994), vol 2, 103.

368 See the thorough treatment in Mitchell, "*Hedley Byrne & Co Ltd v Heller & Partners Ltd* (1963)", in Mitchell and Mitchell (eds), *Landmark Cases in the Law of Tort* (2010) 171.

369 Beever, "The Basis of the *Hedley Byrne* Action", in Barker, Grantham and Swain (eds), *The Law of Misstatements: 50 Years on from Hedley Byrne v Heller* (2015) 83 at 110.

370 Beale, "Gratuitous Undertakings" (1891) 5 *Harvard Law Review* 222 at 224.

Bernard,[371] who had concluded that "a breach of a trust undertaken voluntarily will be a good ground for an action". As with cases of bailment, in cases of an undertaking where responsibility is assumed, the extent of the assumption of responsibility can vary. In some cases, the assumption might be merely that reasonable skill and care will be taken. In other cases, the undertaking might be "to see that reasonable skill and care were exercised", with the effect that a defendant "could not get rid of responsibility by delegating the performance of [the task] to a third person".[372]

348 The duty that arises from an assumption of responsibility to ensure that reasonable care is taken is commonly described as a non-delegable duty. The only difference between: (i) the assumption of responsibility that supports a non-delegable duty, and (ii) the assumption of responsibility that supports a (delegable) duty of care which is assumed and not imposed, is the scope of the responsibility assumed. That scope is derived from objective interpretation of the undertaking. As Mason J (with whom Deane and Dawson JJ agreed) said in *Kondis v State Transport Authority*,[373] in a passage later quoted with approval by Lord Sumption (with whom the other members of the court agreed) in the Supreme Court of the United Kingdom:[374]

> "In these situations the special duty arises because the person on whom it is imposed has undertaken the care, supervision or control of the person or property of another or is so placed in relation to that person or his property as to assume a particular responsibility for his or its safety, in circumstances where the person affected might reasonably expect that due care will be exercised."

349 The concept of a "non-delegable duty" is easily misunderstood and easily the subject of confusion of thought. Two factors significantly contribute to this misunderstanding and confusion. First, the label "non-delegable duty" is a misnomer. All duties recognised by the law of torts to be owed by a person are non-delegable.[375] It is nonsense to refer to a person who "delegates ... some duty

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371 (1703) 2 Ld Raym 909 at 919 [92 ER 107 at 113].

372 *Hughes v Percival* (1883) 8 App Cas 443 at 446.

373 (1984) 154 CLR 672 at 687.

374 *Woodland v Swimming Teachers Association* [2014] AC 537 at 581 [19].

375 Goudkamp and Nolan, *Winfield and Jolowicz on Tort*, 21st ed (2025) at 776 [24-042].

which [they are] under [an] obligation to discharge".[376] But the label "non-delegable duty" does at least emphasise that personal liability for an outcome can arise if the outcome was caused by a carefully chosen delegate and not merely by a carefully chosen agent.

350 An agent is a person who acts on behalf of another. When a principal objectively undertakes a task and assumes responsibility to take reasonable care, the principal cannot avoid liability if the lack of care occurred by an agent whose actions are attributed to the principal. By contrast, a delegate acts for themself and generally in their own name.[377] Their actions are not attributed to the delegator so that a delegator is not generally liable for the careless performance of acts by a carefully chosen delegate. The label "non-delegable duty" makes clear that the personal duty of the principal who assumes responsibility to ensure that reasonable care is taken cannot be avoided if the carelessness arose from the acts of a carefully chosen delegate.

351 The second source of misunderstanding and confusion concerning non-delegable duties arises from the conflation of imposed duties and assumed duties. These separate categories are addressed below. Without a separation of those two fundamentally different categories of duty, non-delegable duties might be thought to involve no more than a random collection of relationships which in other circumstances might not give rise to non-delegable duties, and which share little in common. And an immediate question would be: why confine non-delegable duties to these relationships? As Kirby J said of the collection of most well-recognised instances where non-delegable duties arise, "it would be surprising if this odd collection of particular instances represented the entire class of relationships in which a non-delegable duty existed at common law".[378] Non-delegable duties can only be understood by appreciating the difference between a duty that is imposed on a person by law independently of any assumption of responsibility by the person and a duty that is assumed by a person.

Fundamental differences between imposed duties and assumed duties

352 There are, relevantly to this appeal, two closely related respects in which tortious duties arising from an assumption of responsibility extend further than those duties which are, without more, imposed by law to protect "person or

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376 *The Central Motors (Glasgow) Ltd v The Cessnock Garage and Motor Co* 1925 SC 796 at 802.

377 *Northern Land Council v Quall* (2020) 271 CLR 394 at 428 [77], 430-431 [81]-[83]. See also *Minister for Immigration, Citizenship and Multicultural Affairs v McQueen* (2024) 98 ALJR 594 at 600 [17]; 418 ALR 133 at 140.

378 *Leichhardt Municipal Council v Montgomery* (2007) 230 CLR 22 at 62 [111].

property". First, duties of care that are "imposed" on a defendant by the common law (in the sense discussed above[379]) do not generally require a defendant to take action to improve the plaintiff's circumstances where those circumstances were not created, or contributed to, by the defendant.[380] Although there can be difficult questions concerning whether a defendant's action is "unconnected" to the circumstances of harm,[381] once that conclusion of a lack of connection is reached the common law does not generally impose liability for such omissions to act. One instance of this principle, recognised in this Court, is that the common law does not generally impose a duty on a defendant to take action to protect a plaintiff from injury by third parties where the circumstances giving rise to the risk of that injury were not created or contributed to by the defendant.[382]

353 This distinction between acts and omissions to act (where a defendant has not created or contributed to the circumstances of a plaintiff) has been understood for more than a century as "fundamental to the common law".[383] It has been said that "[t]here is no distinction more deeply rooted in the common law and more fundamental".[384] In effect, although the common law and equity contain many rules of responsibility "to avoid causing harm to others",[385] neither the common law nor equity imposes upon a person, without more, a general duty to "extend a benefit to another".[386] The distinction has thus been described as a difference

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379 At [342].

380 *Hargrave v Goldman* (1963) 110 CLR 40 at 65-66; *Sutherland Shire Council v Heyman* (1985) 157 CLR 424 at 443-444, 502; *Pyrenees Shire Council v Day* (1998) 192 CLR 330 at 368-369 [101]-[102]; *Graham Barclay Oysters Pty Ltd v Ryan* (2002) 211 CLR 540 at 580 [91].

381 *Gorringe v The Transport Commission (Tas)* (1950) 80 CLR 357 at 371.

382 *Smith v Leurs* (1945) 70 CLR 256 at 262; *Stuart v Kirkland-Veenstra* (2009) 237 CLR 215 at 248 [88]. And see especially *Modbury Triangle Shopping Centre Pty Ltd v Anzil* (2000) 205 CLR 254.

383 Weinrib, "The Case for a Duty to Rescue" (1980) 90 *Yale Law Journal* 247 at 247.

384 Bohlen, "The Moral Duty to Aid Others as a Basis of Tort Liability" (1908) 56 *University of Pennsylvania Law Review* 217 at 219.

385 Pollock, *The Law of Torts: A Treatise on the Principles of Obligations Arising from Civil Wrongs in the Common Law* (1887) at 22.

386 Weinrib, "Legal Formalism: On the Immanent Rationality of Law" (1988) 97 *Yale Law Journal* 949 at 978.

between "making things worse and failing to make things better"[387] or "doing an act which causes harm to someone and failing to take steps to prevent harm".[388]

354 It is unnecessary to address further the basal reasons for the common law's reluctance to impose such duties to act, which have been said to be "social, political or economic" or "political, moral or economic".[389] It is enough to note that: (i) as McHugh J has said, the distinction is one that the common law has maintained since the time of the Year Books;[390] and (ii) the position is different where the duty arises from an assumption of responsibility by an undertaking.

355 Once an undertaking to take action is expressly or impliedly made by a defendant to a plaintiff, the defendant is under a positive duty to the plaintiff to fulfil the undertaking even if the action undertaken is to "make things better" for another. This positive duty might therefore include protecting the plaintiff from injury by third parties where the defendant has not created the risk of that injury. Such positive duties might arise where an undertaking is made to the public at large. For instance, a defendant who expressly or impliedly undertakes a service as a common calling is under a positive duty to perform the service, if available, for any person. Blackstone wrote that "if an inn-keeper ... hangs out a sign and opens his house for travellers, it is an implied engagement to entertain all persons who travel that way; and upon this universal *assumpsit* an action on the case will lie against him for damages".[391] And as Dixon J said of the common carrier: "[t]he holding out or profession of the character of common carrier may be expressed, or it may be, and usually is, implied by a course of business or other conduct".[392]

356 An undertaking to take positive action might also be made privately between persons rather than to the public at large. An undertaking that is made to a particular person or group of people for consideration might give rise to a contract. Where the undertaking is gratuitous it will not give rise to a contract but if responsibility is assumed by a defendant, and the undertaking is breached, the

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387 Reed, "Foreword", in Steel, *Omissions in Tort Law* (2024) at v. See also Steel, *Omissions in Tort Law* (2024) at xxii; Jaffey, "Contract in tort's clothing" (1985) 5 *Legal Studies* 77 at 77.

388 *Brodie v Singleton Shire Council* (2001) 206 CLR 512 at 528 [16].

389 *Stovin v Wise* [1996] AC 923 at 939, 943-944.

390 *Pyrenees Shire Council v Day* (1998) 192 CLR 330 at 368 [101].

391 Blackstone, *Commentaries on the Laws of England* (1768), bk 3, ch 9 at 164. See also Winfield, "The History of Negligence in the Law of Torts" (1926) 42 *Law Quarterly Review* 184 at 188.

392 *James v The Commonwealth* (1939) 62 CLR 339 at 368.

law of torts holds the defendant liable, within the scope of the undertaking,[393] to compensate the plaintiff for losses caused by the breach of the undertaking.

357 A private undertaking commonly arises as an implied incident of a relationship formed by a person or an office or role accepted by the person.[394] In those cases, the duty can comfortably be described as arising from the person being so placed in relation to another person or their property as to assume a particular responsibility for the person or property. Hence, Lord Toulson described typical "relationships in which [there is] a duty to take positive action" under the "*Hedley Byrne* principle" as including "contract, fiduciary relationships, employer and employee, school and pupil, health professional and patient".[395] A private undertaking might also be inferred, as a matter of social convention based on reasonable expectations, from all the circumstances. For instance, an undertaking giving rise to an assumption of responsibility can be inferred in some circumstances, including control of property.[396] Or it might simply be inferred from the circumstances of a particular task commenced by the person:[397]

> "A falls senseless in the street; B, a passing physician, undertakes to cure him. B might have passed by and left A to his fate; but having undertaken the work, he is liable for any negligence, either of commission or of omission."

As Holmes expressed the same point: "[a] carpenter need not go to work upon another man's house at all, but if he accepts the other's confidence and intermeddles, he cannot stop at will and leave the roof open to the weather".[398]

358 Unlike the duties not to interfere with the bodily integrity, liberty, or property of another, an undertaking by which responsibility is assumed can

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393 *The Commonwealth v Sanofi* (2024) 99 ALJR 213 at 247-248 [164]-[168]; 421 ALR 1 at 42-43.

394 See Cooley, *A Treatise on the Law of Torts or the Wrongs which Arise Independent of Contract* (1879) at 628-648. See also *Naaman v Jaken Properties Australia Pty Ltd* (2025) 281 CLR 635 at 661-665 [76]-[82].

395 *Michael v Chief Constable of South Wales Police* [2015] AC 1732 at 1761 [100].

396 Holdsworth, *A History of English Law*, 3rd ed (1923), vol 3 at 385-386 (innkeepers). See also *Northern Sandblasting Pty Ltd v Harris* (1997) 188 CLR 313.

397 Beale, "Gratuitous Undertakings" (1891) 5 *Harvard Law Review* 222 at 223. See also *Watson v British Boxing Board of Control Ltd* [2001] QB 1134 at 1152-1153 [57].

398 Holmes, *The Common Law* (1882) at 278.

therefore easily extend to positive action to benefit another. Whether the undertaking is public or private, and whether it arises from "a specific voluntary commitment" or as "part of the duties of a role, function or position which one has voluntarily assumed", an obligation derived from that undertaking "to take positive action" needs "no justification in terms of the limitation ... on the freedom of action of individuals".[399]

359 These principles do not differ when the task is one to take reasonable care for, or ensure that reasonable care is taken of, children rather than any other person or another's property. The principles also do not differ according to whether the failure to take reasonable care, or to ensure that reasonable care is taken, happens to involve a breach of some criminal law. Thus, in *HXA v Surrey County Council*,[400] Lord Burrows and Lord Stephens (with whom the other members of the Supreme Court of the United Kingdom agreed), referring to abuse of a child, gave an example where a common law duty of care would arise from an assumption of responsibility:

> "if a private individual was requested by a parent to, then agreed to and did, accommodate the parent's child. The assumption of responsibility flows from the fact that the private individual was entrusted by the parent with the child's safety and accepted that responsibility."

Ascertaining the existence and scope of assumed duties

360 Just as disputes arise about the existence and scope of expressly assumed contractual duties, so too can disputes arise about the existence and scope of duties that are said to arise from an undertaking that is inferred from a defendant's words or conduct. The scope of any assumed duty from an undertaking in the law of torts is derived in the same way as the scope of any assumed duty is derived from an undertaking in the law of contract. In either case, an inference is drawn of "the nature of liability that, in light of the parties' agreement, the parties might fairly be regarded as having contemplated and been 'willing to accept'".[401] That inference must be drawn from all the relevant circumstances.

361 In many cases, including this case, the relevant undertaking is characterised as one to take reasonable care to avoid reasonably foreseeable injury or to ensure that reasonable care is taken to avoid reasonably foreseeable injury. The repetition of "reasonableness" collapses the question of the breach of duty into the question

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399 Smith and Burns, "Donoghue v Stevenson—The Not So Golden Anniversary" (1983) 46 *Modern Law Review* 147 at 157.

400 [2024] 1 WLR 335 at 363 [107]; [2024] 3 All ER 341 at 368.

401 *Elisha v Vision Australia Ltd* (2024) 99 ALJR 171 at 184 [48]; 421 ALR 184 at 198.

of the existence of the duty. The latter should be expressed at a higher level of generality.[402] As part of the enquiry into breach of duty, an undertaking to take reasonable care to avoid injury, or to ensure that reasonable care is taken to avoid injury, will not be breached if the injury is not reasonably foreseeable. Reasonable care does not require a person to take steps to prevent events that could not reasonably have been foreseen. In short, foreseeability is relevant to breach of the undertaken duty rather than to the existence of the duty.[403] It "adds nothing" (but confusion) to an attempt to understand the duty.[404]

362 One circumstance of great importance in ascertaining the existence and scope of an undertaking is whether (and the extent to which) the defendant has control over the person or property of another. This circumstance is of particular importance where the defendant has exclusive control. A natural inference from the existence of exclusive control can sometimes be that the person with the power of control undertakes to exercise that control with reasonable care or to ensure that reasonable care is taken within the scope of that control. Hence, in *Burnie Port Authority v General Jones Pty Ltd*,[405] a majority of this Court held that an occupier of land had assumed responsibility to ensure that reasonable care was taken in the course of welding activities conducted by an independent contractor on the land. After expressing the usual "common element" in cases of non-delegable duties as being an assumption of responsibility for the safety of a person or property, the majority said that "[i]t will be convenient to refer to that common element as 'the central element of control'".[406] Their Honours considered that a defendant who allows another to undertake a dangerous activity on premises which the defendant controls is "so placed in relation to [the other] person or his property as to assume a particular responsibility for his or its safety".[407]

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402 *Dovuro Pty Ltd v Wilkins* (2003) 215 CLR 317 at 367 [157].

403 *New South Wales v Lepore* (2003) 212 CLR 511 at 564 [141].

404 Stevens, *Torts and Rights* (2007) at 1.

405 (1994) 179 CLR 520 at 551-552.

406 *Burnie Port Authority v General Jones Pty Ltd* (1994) 179 CLR 520 at 551.

407 *Burnie Port Authority v General Jones Pty Ltd* (1994) 179 CLR 520 at 551-552, quoting *Kondis v State Transport Authority* (1984) 154 CLR 672 at 687.

363 Again, in *Northern Sandblasting Pty Ltd v Harris*,[408] the element of control was central to the reasoning of Brennan CJ[409] and Gaudron J,[410] who concluded that the landlord in that case had assumed a duty to take reasonable care, described by Brennan CJ as having the content of a contractual duty, at least to safeguard the occupant against injury or loss from defects in the property at the time it is let. Control was also central to the reasoning of Toohey J[411] and McHugh J,[412] who concluded that the landlord had assumed a (non-delegable) duty to ensure that reasonable care was taken in respect of repairs to the premises that the landlord had undertaken to have completed. Although the content of the duty differed between the judges in *Northern Sandblasting*, the ratio decidendi, at the appropriate level of generality,[413] that emerges is that a duty had been assumed by the undertaking of the landlord.

364 The important element of control by a defendant is sometimes assessed from the perspective of a plaintiff by reference to notions of "vulnerability". But the concept of vulnerability can be slippery and certainly should not be treated as necessarily determinative of, or a substitute for, an assumption of responsibility.[414] In the context of this appeal, where an issue is whether an assumption of responsibility arises from an implied undertaking to ensure that reasonable care is taken of a class of people (child parishioners), references to the concept of "vulnerability" should be understood as concerned with the trust that child parishioners place in parish priests and, correspondingly therefore, the control that the priest has over the child. For instance, a stranger does not undertake any positive duty to a child crossing a road, no matter how vulnerable the child might be. But if the stranger knowing themself to be trusted by a very young child, and thus with some control over the actions of the child, calls to the child from the

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408 (1997) 188 CLR 313.

409 *Northern Sandblasting Pty Ltd v Harris* (1997) 188 CLR 313 at 336, 339.

410 *Northern Sandblasting Pty Ltd v Harris* (1997) 188 CLR 313 at 360.

411 *Northern Sandblasting Pty Ltd v Harris* (1997) 188 CLR 313 at 352-353.

412 *Northern Sandblasting Pty Ltd v Harris* (1997) 188 CLR 313 at 363, 368-369.

413 *Jones v Bartlett* (2000) 205 CLR 166 at 224 [205]. See also *Garlett v Western Australia* (2022) 277 CLR 1 at 87 [239]-[240]; *MJZP v Director-General of Security* (2025) 99 ALJR 1108 at 1116-1118 [36]-[41]; 423 ALR 378 at 388-390.

414 *Mallonland Pty Ltd v Advanta Seeds Pty Ltd* (2024) 98 ALJR 956 at 980-982 [96]-[103]; 418 ALR 639 at 666-669.

other side of the road, then an undertaking that the call is made with care can readily be inferred.[415]

365 Although the power of control over a person, property, or circumstance is an important element in inferring the existence and scope of an undertaking, the concept should not be unduly stretched. For instance, a landlord who has done no more than acquire a tenanted property will not have any more control, nor assume any more responsibility, than that provided for by the terms of a novated tenancy agreement.[416] Further, as this Court observed in *Electricity Networks Corporation v Herridge Parties*,[417] an exclusive focus upon the existence of control can sometimes distract attention from the broader question of whether responsibility has been assumed. A case to which this Court referred as a possible example of such distraction was *Brodie v Singleton Shire Council*,[418] where a majority of this Court treated a highway authority as though it had assumed responsibility for repair by its control over the situation with a statutory power, but not a statutory duty, to repair: the focus ought not to have been upon the power of control but whether the exercise of the power, which had "created a superficial appearance of safety",[419] amounted to an assumption of responsibility. In the minority in that case, Callinan J held that the authority had not "undertake[n] active measures of repair to safeguard the applicants".[420]

366 The element of control is also limited in the extent to which it can inform the scope of an undertaking by which responsibility is assumed. An example is the duty that a school authority assumes to its pupils to ensure that reasonable care will be taken of them. In *Ramsay v Larsen*,[421] Kitto J spoke of "the necessary inference of fact from the acceptance of a child as a pupil by a school authority ... that the school authority undertakes not only to employ proper staff but to give the child reasonable care". The school authority will be personally liable for any failure to take reasonable care by its employees or delegates within the scope of the

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415 *Hahn v Conley* (1971) 126 CLR 276 at 288, 294.

416 *Jones v Bartlett* (2000) 205 CLR 166 at 214 [170].

417 (2022) 276 CLR 271 at 283 [24].

418 *Electricity Networks Corporation v Herridge Parties* (2022) 276 CLR 271 at 283 [24], citing *Brodie v Singleton Shire Council* (2001) 206 CLR 512.

419 *Brodie v Singleton Shire Council* (2001) 206 CLR 512 at 584 [177]. See also at 605 [243].

420 *Brodie v Singleton Shire Council* (2001) 206 CLR 512 at 648 [380].

421 (1964) 111 CLR 16 at 28. See also *The Commonwealth v Introvigne* (1982) 150 CLR 258 at 271.

undertaking even if, for example, it "does not control and cannot direct the teaching staff in the performance of its duties".[422] The ultimate question is the scope of the school authority's undertaking. Thus, in a case now understood in this country to be a case of a non-delegable duty,[423] a company that ran a school for children, and which therefore impliedly undertook to ensure that reasonable care would be taken of those children, was liable for the sexual abuse of a child by the warden of a boarding house who was delegated the task of caring for the children.[424] But the company would not have been liable if, for instance, the assault had occurred because of an opportunity taken by a person employed or contracted to perform gardening duties.[425]

AA's formulations of the Diocese's duties

367 The formulations by AA of the duty of care which he asserted was owed to him by the Diocese evolved over the course of these proceedings. It suffices for the purposes of this appeal to focus upon the two ways in which AA expressed the duty in this Court. Unfortunately, it was not always clear whether those asserted duties were said to be: (i) assumed; or (ii) imposed by law independently of any assumption of responsibility.

368 In this Court, the first formulation by AA of the Diocese's duty was as "[a] duty to take reasonable care to avoid reasonably [sic] foreseeable [sic] personal injury to children invited [by a person to whom the Diocese had given control of the premises] onto Diocesan premises caused by the conduct of Diocesan priests at those premises".

369 That duty could not be the common law duty, imposed as a matter of law, not to act in a way that might injure another.[426] AA did not, and could not, suggest that the criminal actions of Fr Pickin were authorised, actually or ostensibly, by the then Bishop of the Diocese, Bishop Toohey, or any other person whose authorisation could be that of the Diocese. Hence, the acts of Fr Pickin could not be attributed to the Diocese. The only positive action by the Diocese within AA's

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422 *The Commonwealth v Introvigne* (1982) 150 CLR 258 at 272.

423 See *CCIG Investments Pty Ltd v Schokman* (2023) 278 CLR 165 at 197 [74]; *Bird v DP (a pseudonym)* (2024) 98 ALJR 1349 at 1364 [52]; 419 ALR 552 at 567.

424 *Lister v Hesley Hall Ltd* [2002] 1 AC 215.

425 *Maga v Archbishop of Birmingham* [2010] 1 WLR 1441 at 1461 [74]; *E v English Province of Our Lady of Charity* [2013] QB 722 at 728 [13].

426 *Donoghue v Stevenson* [1932] AC 562.

formulation of the duty was therefore the Diocese's grant of control to Fr Pickin over Diocesan premises.

370 To the extent that AA could be taken to suggest that the duty of care of the Diocese was breached by giving a priest unconstrained control of a presbytery or other Diocesan premises, AA failed to point to any evidence led at trial that could have supported a conclusion that merely giving control of Diocesan premises to a priest, by itself, was something that could give rise to any risk of reasonably foreseeable injury by the Diocese. Even if the knowledge of priests (such as that which was the subject of Fr Dillon's evidence) of the (approximately) 55 parishes could be attributed to the Diocese (which it cannot for reasons explained below), the trial judge found that "[o]n Father Dillon's evidence it must be accepted that at the time AA was assaulted, while there was not a widespread appreciation in the community of the existence of the risk which priests such as Father Pickin posed as there is now, the existence of such risks was known to Bishops and other senior members of the Church".[427] As Gordon J expresses the point, the highest that the evidence rises is that Bishop Toohey might have been aware of one allegation of uncertain content in relation to a different priest (Fr McAlinden) 15 years prior to 1969. Further, as Leeming JA rightly concluded, "even if Bishop Toohey knew or believed or suspected that Fr McAlinden preyed upon children, in 1969 he was no longer in the Diocese".[428]

371 At trial, the content of AA's pleaded duty of care was explicitly expressed as a duty for the Diocese to take positive action. AA pleaded that the Diocese had a duty "to maintain systems of care for the plaintiff, to protect him from sexual or serious physical abuse by its priests and to maintain oversight and control of those systems". In other words, the pleaded case of a duty of care was a duty to protect AA from third parties. For the reasons explained earlier, even if it were thought desirable to do so, it is far too late in the development of the common law for a radical change to be made to the common law to impose such a generalised positive duty to protect others. Duties to take positive action at common law generally must be assumed by an undertaking.

372 For these reasons, there is only one basis to recognise a duty, as asserted by AA in this Court, for the Diocese to take reasonable care to avoid personal injury to children invited onto Diocesan premises. That duty could only arise from an undertaking by which the Diocese assumed such responsibility. As explained later in these reasons, the formulation of the duty by AA was too broad in extending to children in general. The circumstances of this case, and the evidence from which

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427 *AA v Trustees, Roman Catholic Church, Diocese of Maitland-Newcastle* (2024) 334 IR 70 at 107 [239].

428 *Trustees of the Roman Catholic Church for the Diocese of Maitland-Newcastle v AA* (2025) 117 NSWLR 253 at 303 [216].

an undertaking can be inferred, are concerned with those children who are parishioners of the relevant parish.

373 The second formulation of a duty by AA in this Court was that the Diocese assumed "a duty to *ensure* that reasonable care was taken to avoid reasonably [sic] foreseeable [sic] physical injury to children invited [by a person to whom the Diocese had given control of the premises] onto Diocesan premises caused by the conduct of Diocesan priests [at] those premises" (emphasis added). This second duty was accepted to be a non-delegable duty based on an assumption of responsibility.

374 The two duties asserted by AA cannot co-exist. Either: (i) the Diocese assumed a duty of positive action that *the Diocese itself* (or its agents whose actions are attributed to it) would take reasonable care to avoid personal injury to child parishioners in the relevant circumstances; or (ii) the Diocese assumed a duty of positive action to ensure that the Diocese or its agents *or delegates* would take such reasonable care. There was only one undertaking by which responsibility was assumed. The content of that assumed duty depends on objective inferences to be drawn from all the circumstances, particularly the control over, by the entrustment and dependence of, the person with respect to whom the duty is said to be assumed.

375 Confusion is only heaped on confusion by suggestions that the existence of a non-delegable duty of care based upon an assumption of responsibility is dependent upon a duty of care imposed by the common law or that the existence of a duty of care is a "hurdle" to surmount before establishing the existence of a non-delegable duty. This case reduces to a simple question: What, if anything, did the Diocese undertake—for what did it assume responsibility—by the words or conduct of the Bishop?

Applying principle to establish the duty of the Diocese

Attribution

376 The Diocese is an unincorporated association of people. The *Civil Liability Act* permits certain civil proceedings to be brought against the Diocese "as if the organisation had legal personality".[429] It was not controversial that the conduct and knowledge of the Bishop could be attributed to the Diocese. But, contrary to the submissions of AA, the same is not true of parish priests. Hence, even if the trial had not been conducted on the basis that Fr Pickin was a parish priest, it would make no difference to issues of attribution whether Fr Pickin was a parish priest or an assistant priest or whether Fr Pickin had an immediate supervisor in Fr O'Dwyer.

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429 *Civil Liability Act 2002* (NSW), s 6K(1).

377 The Diocese contained around 55 different parishes across more than 12,000 square miles and including the entirety of one of Australia's largest cities, each with parish priests. While a parish priest might have been the highest "local" authority subject to the Bishop, there was no evidence that the relevant parish priests had authority beyond their local parishes. As senior counsel for the respondent said in oral submissions, in the hierarchy of the entire Diocese, those dozens of parish priests effectively ranked below the Diocesan Consultors, the Diocesan Chancellor, and the members of a large number of committees. AA's curious attribution submission sought to treat those local parish priests as "an embodiment"[430] of the entire Diocese "so that their state of mind can be treated as being the state of mind of the [Diocese]".[431] Leeming JA did not consider that such a submission was (or could have been) made.[432] That submission should be given no more credibility in this Court.

378 The questions on this appeal thus reduce to the content of any undertaking by which the Diocese, by words and documents issued on its behalf, and by conduct of the Bishop, manifested an assumption of responsibility for AA. The facts are addressed in the reasons of Gageler CJ, Jagot and Beech-Jones JJ and the reasons of Gordon J. It suffices merely to highlight the most salient matters.

The existence and scope of the undertaking and assumption of responsibility by the Diocese

379 The trial in this case was conducted on the basis that, at the time of the abuse around 1968-1970, Fr Pickin was a parish priest over whom the Bishop exercised control, including over aspects of his appointment, duties, responsibilities, and priorities in the parish. As the trial judge described the evidence: "[t]he authority and direction of the Diocesan Bishop was paramount in determining a priest's duties, responsibilities and priorities. They had to go where sent and do what a Bishop told them."[433]

380 The trial was also conducted on the basis that the Diocese provided Fr Pickin with accommodation in a presbytery where he was required to live alone

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430 *Hamilton v Whitehead* (1988) 166 CLR 121 at 127, quoting *Tesco Supermarkets Ltd v Nattrass* [1972] AC 153 at 170.

431 *Krakowski v Eurolynx Properties Ltd* (1995) 183 CLR 563 at 582-583, quoting *Brambles Holdings Ltd v Carey* (1976) 15 SASR 270 at 279.

432 *Trustees of the Roman Catholic Church for the Diocese of Maitland-Newcastle v AA* (2025) 117 NSWLR 253 at 306 [232].

433 *AA v Trustees, Roman Catholic Church, Diocese of Maitland-Newcastle* (2024) 334 IR 70 at 102 [204].

but with the power to decide whom he would invite there. Presbyteries of churches were often used for a range of activities. The uncontradicted evidence on this point included that:

> "many parishes, particularly smaller parishes, did not have extensive social facilities so if there was ... a large dining room or lounge room facility ... in the Presbytery, often that was used if the priest permitted, and wished it to be".

There was also uncontradicted evidence that:

> "Meeting rooms, kitchen facilities etc were used for committee meetings, social gatherings, religious instruction of individuals and groups etc when and as required."

381 As the trial judge also found, "[t]he Diocese did not require [the priest] to have other adults present if he invited children to the presbytery". This finding was supported by the evidence that adults were usually present at the time of children's activities but that this was not "for the sort of reason that we might put these days because of the scandals that have emerged, but more from the perspective of just dealing with young kids, it's going to be a bit of a handful". The presence of adults was not "an unwritten rule" but just "common sense and practicality". There was no evidence of any practice or requirement that parish priests should not invite young people to the presbyteries, even when they lived there alone. Such decisions were left to the individual priests, who were under the control of the Bishop.

382 There was evidence at trial that, at the relevant time, the *Presbyterorum Ordinis* proclaimed by Pope Paul VI required priests to "apply, with special diligence, attention to youth" and emphasised the desirability of "friendly meetings for mutual aid in leading more fully and in a Christian manner a life that is often difficult". The "standard expectation", fulfilled by the Diocese through the priests, of engagement with children included "a range of activities under the Church banner including youth groups and movie nights". Some of those activities occurred in the presbyteries of the churches, including underage and unsupervised events. The Diocese treated "priests' engagement with the young people of the parish [as] a most important and valued part of their ministry".

383 As the Bishop, and thus the Diocese, must have been aware, and as the evidence at trial established, congregants such as AA's parents held priests such as Fr Pickin in high regard with "an exaggerated dignity and respect". The trust in priests extended to a willingness to allow priests such as Fr Pickin to supervise their children, even to the extent of taking some children, including child parishioners, on holidays. In Fr Pickin's case, that parental trust could only have been enhanced by Fr Pickin's position, arranged with the authority of the Diocese, to teach Christian Studies to the year eight class at Wallsend High School, a class which included AA.

384 As the Bishop, and thus the Diocese, must also have been aware, the trust of parents was naturally reflected in the trust that their children placed in the priests. In other words, the trust that child parishioners placed in priests was not only held by those children who were aware of the position and authority of priests. The child parishioners' trust was also derivative of the trust that the child parishioners' parents placed in priests. Even a very young child parishioner who might not know what a priest is would be capable of understanding an instruction by their parents that they should trust such a person. The trial judge referred to AA's evidence that he was taught to respect adults in positions of authority such as priests and teachers, and that priests were representatives of God who could be trusted, respected, and obeyed without question.

385 In summary then, the objective circumstances from which any undertaking and assumption of responsibility by the Diocese might be inferred include: (i) the Diocese delegating the control of the presbytery to a priest over whom the Diocese exercised extreme control, including over aspects of his appointment, duties, responsibilities, and priorities; (ii) the Diocese inviting the heightened trust placed by child parishioners in priests, with corresponding degrees of substantial control by priests over those children; (iii) the Diocese encouraging and expecting priests to engage with children in the community; and (iv) the Diocese permitting the presbytery to be used by a priest for that engagement. These circumstances irresistibly invite the inference that the Diocese objectively undertook to ensure that reasonable care for child parishioners would be taken, at least where those children entrusted themselves to the care and control of a priest—a delegate of the Diocese's mission to engage with youth—with delegated control over the presbytery and power to invite child parishioners into the presbytery and to exercise control over them in that place.

386 This non-delegable duty, in terms similar to those expressed by AA and as supported by these facts, arose from an undertaking by the Diocese to ensure that reasonable care would be taken of child parishioners to avoid personal injury to them at least in the presbytery when invited by, and under the control of, a priest. It was an undertaking, and an assumption of responsibility, at least to the youth in that section of the community who would engage with the Catholic faith and might be invited into the presbytery. The objective circumstances were equivalent to an organisation that advertised to the parent members of the organisation inviting their children onto the organisation's premises: "Trust us: we have highly trusted people who will ensure that reasonable care is taken of children in our control."

387 The undertaking by the Diocese must be construed at a level of generality consistent with the reasonable understanding that it would have generated. For instance, the focus is upon the type of injury—violation of the person—rather than

the extent of the injury or the manner of its occurrence.[434] And, as an undertaking expressed to a section of the community at large rather than to a particular individual,[435] the undertaking arose prior to Fr Pickin actually inviting any child parishioner into the presbytery and independently of the precise circumstances in which any such invitation was given.

388 The scope of this non-delegable duty is therefore unaffected by the manner in which Fr Pickin used the presbytery in relation to child parishioners, such as AA, who were part of the religious community and who had an established trust in Fr Pickin as a priest. The non-delegable duty is anterior to the circumstances of its breach. But the duty is not one of unlimited scope. If, for example, Fr Pickin had used the presbytery merely as the location for a random act of sexual assault against a child to whom he was a stranger then such an act would have been beyond the scope of the non-delegable duty. By contrast, Fr Pickin's sexual assaults on AA, a child parishioner with a relationship with Fr Pickin as one of his scripture students, were within the scope of the non-delegable duty.

389 For the same reason, although relevant to the credibility of AA's evidence, the conduct of Fr Pickin remained within the scope of the Diocese's duty whether or not other boys might have been invited into the presbytery at the same time as AA. So too, the conduct of Fr Pickin remained within the scope of the Diocese's duty: whether or not AA was legally required to attend the presbytery; whether or not AA had some subjective understanding about a religious reason for his invitation to the presbytery; and whether or not the invitation to AA to the presbytery was expressed as being for a "Church event". Likewise, Fr Pickin's conduct within the presbytery remained within the scope of the Diocese's duty whatever the particular manner in which the presbytery was misused, including whether it was practical for "dealing with young kids" for a priest to be alone there with children without assistance or (what Fr Dillon described in polite terms as) the "foolhardy and irresponsible" supply of alcohol and cigarettes to children in the presbytery.

390 The sexual abuse by Fr Pickin of AA, as found by the trial judge to have occurred, therefore fell within the scope of the Diocese's non-delegable duty of care.

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434 See *Mount Isa Mines Ltd v Pusey* (1970) 125 CLR 383 at 402, 413-414; *Elisha v Vision Australia Ltd* (2024) 99 ALJR 171 at 188 [66]; 421 ALR 184 at 204.

435 See above at [343].

Breach, causation, and damages

Breach and causation

391 Once the existence and scope of the non-delegable duty owed by the Diocese is understood, issues of breach and causation can easily be resolved. AA's sexual abuse by a priest, in the presbytery where AA had been invited by the priest, plainly amounted to a failure to ensure that reasonable care was taken of AA, who had entrusted himself to the care of a priest with delegated control over the presbytery. The sexual abuse of AA caused by the failure of the Diocese to take reasonable care was also plainly the cause of consequential losses, encompassed within general damages (including aggravated damages), consequent upon the physical injury to (violation of) AA. Those losses, the consequential nature of which was the subject of expert psychiatric evidence, included psychiatric conditions and substance abuse that adversely affected AA's health, employment, and relationships.

392 In the Court of Appeal, however, Leeming JA rejected a number of the factual strands that supported this conclusion about breach and causation. Some of the factual strands rejected by Leeming JA were peripheral to the questions of breach and causation. In particular, his Honour concluded that: (i) Fr Pickin was not the priest of the parish but the assistant priest; the parish priest was Fr O'Dwyer; and (ii) Fr Pickin and Fr O'Dwyer shared the presbytery accommodation. Although there appears to be considerable evidence in support of each of these conclusions, the trial was run on the basis that Fr Pickin was the parish priest and lived alone in the presbytery and it is unclear the extent to which, in the Court of Appeal, AA was given the opportunity to defend these assumptions made at trial. Nevertheless, neither of these alternative factual conclusions could negate a conclusion of breach and causation, particularly since even as an assistant priest Fr Pickin would have been subject, directly or indirectly, to a high level of control by the Bishop and would have had the same decision-making capacity about invitees to the presbytery where he lived.

393 More fundamentally, however, Leeming JA concluded that the evidence did not support an acceptance of AA's account that he was sexually abused by Fr Pickin. If that conclusion were upheld in this Court, as the respondent submitted that it should be, then no breach of the non-delegable duty of the Diocese would be established. But, despite the detailed, thorough, and typically learned reasons given by his Honour including as to other respects in which AA's evidence was unreliable, his Honour's conclusion should not be accepted for four reasons.

394 First, the conclusion depended in part upon Leeming JA's assumption that AA had not been cross-examined at trial about the sexual assault, thus mitigating

the advantages of the trial judge.[436] That assumption was incorrect. AA was cross-examined in considerable detail. The trial judge retained significant advantages, including the assessment of credibility and the feel of the whole case based upon the entirety of the evidence.[437]

395 Secondly, the conclusion also depended upon Leeming JA's reasoning that "the tendency evidence was not especially probative", essentially because the tendency evidence of Fr Pickin abusing young boys was at a level of generality much higher than "accounts of making 13-year-old boys drunk and then performing penile–oral sexual intercourse upon them".[438] That description of the tendency did not correspond with the tendency notices of AA at trial. The tendency evidence admitted at trial, consistently with the tendency notices, established that: Fr Pickin was a person who had a sexual interest in boys; Fr Pickin sought out opportunities to achieve intimacy with boys, including by using Church premises for that purpose; Fr Pickin had a tendency to sexually abuse boys who were in his care when he was able to do so; and Fr Pickin exploited his position as a priest by asserting his authority to enable him to act on his sexual interest in boys. At trial, the Diocese did not dispute the tendency evidence of those complainants upon which the tendency notices were based. It was therefore undisputed at trial that Fr Pickin had sexually abused other teenage boys in his care, after seeking opportunities to achieve intimacy with the boys and exploiting his position and authority as a priest to do so. Although Leeming JA was correct to assume that the higher the level of generality of a tendency the less probative the tendency evidence will be,[439] the tendency evidence was significantly probative.

396 Thirdly, some of the agreed and undisputed facts provided further support for AA's evidence. In particular, it was an agreed fact at trial that AA and his friend Mr Perry were given beer and cigarettes by Fr Pickin in the presbytery with no other adults present and that, as AA had described, Fr Pickin had a poker machine in the presbytery which he allowed boys to play.

397 Fourthly, as Ball JA explained, there was no suggestion that AA had lied about the abuse. The only possibilities were that the sexual abuse occurred, even

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436 *Trustees of the Roman Catholic Church for the Diocese of Maitland-Newcastle v AA* (2025) 117 NSWLR 253 at 286 [137].

437 *Fox v Percy* (2003) 214 CLR 118 at 125-126 [23].

438 *Trustees of the Roman Catholic Church for the Diocese of Maitland-Newcastle v AA* (2025) 117 NSWLR 253 at 284 [130].

439 *McPhillamy v The Queen* (2018) 92 ALJR 1045 at 1052 [36]-[38]; 361 ALR 13 at 21; *TL v The King* (2022) 275 CLR 83 at 96-97 [31]-[32].

if not in precisely the manner described by AA, or that AA was mistaken.[440] Even accepting Leeming JA's correct reasoning that memory is plastic, fluid and malleable,[441] the gravity of AA making such a mistake combined with the three matters already mentioned meant that it was not open to disturb the trial judge's finding of fact that AA had not been mistaken about such a grave and consequential matter. Breach and causation were established.

Damages and the Civil Liability Act

398 The trial judge assessed general and aggravated damages for non-economic loss at $260,000 and, apparently by agreement of the parties, quantified damages for economic loss at $90,480. The trial judge did not apply the limits on damages for non-economic loss in s 16 of the *Civil Liability Act*, nor did she apply the prohibition on interest on damages awarded for non-economic loss in s 18(1). The trial judge ultimately assessed the total damages and interest at $636,480. If the limits on non-economic loss and the prohibition on interest had been applied, the award would have been $335,960.

399 AA submitted that the trial judge was correct to disregard the *Civil Liability Act* caps on damages and the prohibition on interest on non-economic loss in Pt 2, Divs 3 and 4. The trial judge's finding had been one of vicarious liability of the Diocese, a finding which is inconsistent with the decision of this Court in *Bird v DP (a pseudonym)*,[442] which reiterated that vicarious liability is confined to relationships of employment. But the *Civil Liability Act* applies in the same way to breach of a non-delegable duty as it does to vicarious liability; the *Civil Liability Act* caps on damages and the prohibition on interest apply both to liability which is based upon a non-delegable duty and to liability which is vicarious.

400 The starting point is s 3B of the *Civil Liability Act*, which limits the application of the Act in some circumstances. One such circumstance, where the limits in Pt 2, Divs 3 and 4 do not apply, is referred to in s 3B(1)(a):

> "civil liability (and awards of damages in those proceedings) ... in respect of ... sexual assault or other sexual misconduct committed by the person".

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440 *Trustees of the Roman Catholic Church for the Diocese of Maitland-Newcastle v AA* (2025) 117 NSWLR 253 at 311 [255]-[256].

441 *Trustees of the Roman Catholic Church for the Diocese of Maitland-Newcastle v AA* (2025) 117 NSWLR 253 at 284-286 [133]-[135]. See also *Fennell v The Queen* (2019) 93 ALJR 1219 at 1233 [81]; 373 ALR 433 at 452.

442 (2024) 98 ALJR 1349; 419 ALR 552.

401 This provision does not exclude civil liability based upon a failure by a person to take reasonable care to ensure that *another person* does not engage in sexual assault or other sexual misconduct. It precludes the reliance by a perpetrator of sexual assault or other sexual misconduct on provisions including limits on damages and interest. It might be arguable that this provision also excludes reliance by those to whom a perpetrator's conduct is attributed by the rules of agency, erroneously treated in *Zorom Enterprises v Zabow*[443] as equivalent in the Act to true "vicarious liability".[444] But whether or not s 3B(1)(a) extends to such cases of agency, it does not preclude reliance upon those provisions by a person whose liability is truly vicarious, and based on the *liability* of another and not the acts of that other. Nor does it preclude reliance upon those provisions by a person such as the Diocese which does not commit, or have attributed to it, the sexual misconduct but is liable for breach of a non-delegable duty.

402 Section 11A provides that where s 3B is not engaged, the limits in Pt 2, Divs 3 and 4 apply, "in respect of an award of personal injury damages",[445] including where the claim is one "brought in tort".[446] The awards of personal injury damages "in tort" include claims that are addressed in Pt 1A ("Negligence"). Again, in Pt 1A, s 5A confirms that the premise of the operation of that Part is that s 3B is not engaged. And, in Pt 1A, s 5Q puts beyond doubt that liability for a non-delegable duty falls within the claims "brought in tort" with which s 11A is concerned. Section 5Q provides that "[t]he extent of liability in tort of a person [('the defendant')] for breach of a non-delegable duty to ensure that reasonable care is taken by a person in the carrying out of any work or task delegated or otherwise entrusted to the person by the defendant is to be determined as if the liability were the vicarious liability of the defendant for the negligence of the person in connection with the performance of the work or task". The "only purpose" of s 5Q was "to prevent non-delegable duties (both those that currently exist and any new duties that may be recognised in the future) being used as a way of evading the provisions of the [*Civil Liability Act*]".[447]

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443 (2007) 71 NSWLR 354 at 358-359 [13]-[14].

444 Compare *CCIG Investments Pty Ltd v Schokman* (2023) 278 CLR 165 at 187-189 [55]-[58]; *Bird v DP (a pseudonym)* (2024) 98 ALJR 1349 at 1358 [31], 1365 [56]; 419 ALR 552 at 560, 568.

445 *Civil Liability Act 2002* (NSW), s 11A(1).

446 *Civil Liability Act 2002* (NSW), s 11A(2).

447 Commonwealth of Australia, *Review of the Law of Negligence: Final Report* (2002) at 169 [11.18].

403 The effect of the reasoning above is that the trial judge should have applied the caps on damages and the prohibition on ordering the payment of interest on damages awarded for non-economic loss in Pt 2, Divs 3 and 4.

Conclusion

404 The appeal should be allowed and orders made as proposed by Gageler CJ, Jagot and Beech-Jones JJ.

405 STEWARD J. The appellant claims that when he was a schoolboy in about the year 1969, he was sexually abused by a Catholic priest (Fr Pickin, who was at all material times an assistant priest of what is now the Diocese of Maitland-Newcastle). Over 50 years later, the appellant sued the respondent in negligence and alternatively for breach of a non-delegable duty said to have been owed to him. There is no dispute that the respondent is the proper defendant for the purposes of the *Civil Liability Act 2002* (NSW) ("the CL Act"), even though, for the reasons given below, it was and is a corporation. The appellant succeeded at first instance,[448] but on appeal a majority of the Court of Appeal of the Supreme Court of New South Wales did not accept that the appellant had proven that he had been abused.[449] Moreover, and in any event, all members of the Court of Appeal found that the respondent did not owe a duty of care to prevent the appellant from suffering foreseeable and not insignificant harm, nor that it owed a non-delegable duty to ensure that abuse, of the kind said to have been inflicted, did not take place.

406 Before this Court the appellant refined the scope of the duty of care alleged to consist of "a duty to take reasonable care to avoid reasonably foreseeable personal injury to children invited onto diocesan premises caused by the conduct of diocesan priests at those premises". The appellant also refined the scope of the non-delegable duty that the respondent was said to have owed in largely the same terms, but instead of a duty to "take reasonable care" it was a duty to "ensure that reasonable care was taken".

407 For the reasons which follow, a majority of the Court of Appeal erred in setting aside the finding of the trial judge that the appellant had been abused. That finding was correctly made. But the Court of Appeal did not err in finding that no applicable duty of care or non-delegable duty was owed to the appellant. This appeal should be dismissed with costs.

408 I gratefully adopt the description of the facts set out in the reasons of Gordon J, which I need not repeat. Although I ultimately disagree with her Honour about the outcome of this appeal, I agree with her Honour's description of the legal principles concerning a non-delegable duty of care, as well as the additional observations in the reasons of Edelman J, these having recently been set out by this Court in *Bird v DP (a pseudonym)*.[450] As explained below, I otherwise do not need

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448 *AA v Trustees, Roman Catholic Church, Diocese of Maitland-Newcastle* (2024) 334 IR 70.

449 *Trustees of the Roman Catholic Church for the Diocese of Maitland-Newcastle v AA* (2025) 117 NSWLR 253.

450 (2024) 98 ALJR 1349; 419 ALR 552.

to consider the correctness of the decision of this Court in *New South Wales v Lepore*.[451]

Was the appellant abused?

409 Most of the appellant's evidence was taken on commission and recorded on video. The video was viewed both by the trial judge and in the Court of Appeal, at least by Leeming JA. The appellant gave further evidence at trial and was cross-examined before the trial judge. The Court of Appeal referred to a transcript of that evidence.

410 Without rehearsing all of the reasoning of the trial judge, her Honour's acceptance of the appellant's evidence about the abuse which had occurred was based on broadly two findings. The first was a finding that the appellant's memory of the abuse was "vivid". That was a finding based upon an assessment of the video evidence, and also upon an appraisal of the evidence given directly by the appellant before her Honour. It was a finding as to the creditworthiness of the appellant's testimony before the trial judge. The second was a finding, based on the testimony of two witnesses, that the priest had a tendency to have a sexual interest in boys and sought out opportunities to establish intimacy with boys, including by using Church premises for that purpose, and had a tendency to sexually abuse boys who were in his care when he was able to do so. As Leeming JA pointed out, it is possible that the trial judge placed only little weight on this tendency evidence because it was based on abuse in different circumstances. Notwithstanding the extent of the reliance, the tendency evidence did form part of the trial judge's reasoning.

411 In accordance with s 75A of the *Supreme Court Act 1970* (NSW) ("the SC Act"), Leeming JA reviewed all of the evidence and concluded that the appellant had not proven that the abuse had taken place. In summary form, Leeming JA reasoned as follows:[452]

> "In the present case, my conclusion that the fact-finding process has miscarried is based on (a) the suggestion by the primary judge that the removal of limitation periods affected the evaluation of evidence, (b) the failure explicitly to have regard to all of the inconsistencies in the plaintiff's account, including those introduced by the findings made by her Honour, (c) the reliance on the plaintiff's account as 'vivid', which, although I have seen the same recording as did her Honour, I am unable to perceive, and (d) the seeming acceptance that a 'vivid' recollection is sufficient to exclude the possibility that the plaintiff was recounting a sincerely held but

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451 (2003) 212 CLR 511.

452 (2025) 117 NSWLR 253 at 290 [152].

> erroneous belief, the errors having come about through the effluxion of more than half a century coupled with the plaintiff's unwellness and sustained abuse of licit and illicit drugs."

412 Leeming JA's conclusion that he did not "perceive" the appellant's account of events to be "vivid" was said by his Honour to be a matter where the Court of Appeal was "in a materially equivalent position" to that of the trial judge.[453] That was said to be because the evidence described as "vivid" was confined to what the appellant said on commission and which was received by the court as a video recording and, according to Leeming JA, because the appellant "was not cross-examined on the sexual assaults when he was recalled at trial".[454] Thus, according to Leeming JA, his Honour had seen the relevant evidence "in *precisely the same form* that it was available to the primary judge".[455] With very great respect, that is not so.

413 When the appellant was cross-examined before the trial judge, the following exchange took place:

> "Q. What Mr Perry says in his statement about you and he visiting Father Picken at Dudley is accurate, isn't it?
>
> A. No, it's not true.
>
> Q. Your version of events, which involved Mr Perry leaving you while you were at the Presbytery, is not truthful, is it?
>
> A. No, that's what I was told.
>
> Q. Your version of events alleging the very serious abuse that you say you suffered at the hands of Father Picken is not true, is it?
>
> A. Pardon?
>
> Q. I'll be clear about it. Your evidence asserting that you were the victim of sexual abuse at the hands of Father Picken is not true. That's what I'm putting to you?
>
> A. I'm saying it is true, and I was the one that suffered. No one else. Not you or him, it was me."

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453 (2025) 117 NSWLR 253 at 286 [137].

454 (2025) 117 NSWLR 253 at 286 [137].

455 (2025) 117 NSWLR 253 at 286 [137] (emphasis added).

414 Contrary to the conclusion of Leeming JA, and with respect, the foregoing did constitute cross-examination about the alleged sexual assault. It was an orthodox and very proper application of the rule in *Browne v Dunn*[456] by senior counsel. As the trial judge observed, "[the appellant] was cross examined on the basis that his evidence about the assaults was not true".[457] Unlike Leeming JA, the trial judge thus had the benefit of observing the appellant's reaction to the key propositions put to him that Mr Perry's evidence was, contrary to his own evidence, accurate, and that the appellant had never been abused. It was open to the trial judge to be persuaded, on the balance of probabilities, and having regard to *Briginshaw v Briginshaw*,[458] that the answers given by the appellant were both truthful and accurate in their context. In that respect, in a case where the creditworthiness of the appellant was fundamental, it is noteworthy that Leeming JA only considered the appellant's evidence to be "demonstrably unreliable" in certain minor respects[459] and did not go so far as to conclude that the acceptance of his evidence, and the finding that followed from it, was wrong by "incontrovertible facts or uncontested testimony", or that it was "glaringly improbable" or "contrary to compelling inferences".[460]

415 Moreover, there was undisputed, objective evidence about the circumstances of the abuse that had taken place which, in itself, was sufficient to contradict any suggestion that the trial judge's findings were "glaringly improbable". In that respect, the reasons of Ball JA in dissent on this issue are instructive. His Honour reasoned:[461]

> "It is not in dispute that the plaintiff went to the presbytery with Mr Perry on 10 to 12 occasions on Friday evenings after dinner. The plaintiff says and it seems likely that they went at Fr Pickin's invitation. Fr Pickin had met the boys while teaching Christian studies at their school. While the boys were at the presbytery, Fr Pickin supplied them with cigarettes and alcohol. He also had a poker machine that was kept in a dressing area off Fr Pickin's bedroom. The plaintiff, but not Mr Perry, spent

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456 (1893) 6 R 67 at 70-71.

457 (2024) 334 IR 70 at 89 [92].

458 (1938) 60 CLR 336.

459 (2025) 117 NSWLR 253 at 286-287 [138].

460 *Fox v Percy* (2003) 214 CLR 118 at 128 [28]-[29]; *Robinson Helicopter Co Inc v McDermott* (2016) 90 ALJR 679 at 686-687 [43]; 331 ALR 550 at 558-559; *Aldi Foods Pty Ltd v Moroccanoil Israel Ltd* (2018) 261 FCR 301 at 306-307 [3].

461 (2025) 117 NSWLR 253 at 311 [255].

> time in the bedroom playing with the machine. The plaintiff was 13 at the time."

416 Given these objective circumstances, and given the lapse in time, the inconsistencies in the appellant's evidence, referred to by Leeming JA, are of no moment. These discrepancies are what one would expect when a person tries to recall the very distant incidents of childhood. In that respect, I very respectfully agree with Ball JA's observation that a distinction should be drawn between recollections of traumatic events, such as sexual abuse, and the circumstances surrounding them. As Ball JA said:[462]

> "it is necessary to draw a distinction between recollections of sexual abuse (or other traumatic events) and the circumstances surrounding them, particularly when the relevant events occurred so long ago. It is not surprising that with the passage of time the memory of many details fades or becomes confused. As Leeming JA points out, courts have often remarked on that phenomenon; and the unreliability of memory is part of everyday experience. So, frequently people cannot recall when events occurred or who was present or, for example, what was said. And there is a natural tendency for people subconsciously to reconstruct those events in a way that is favourable to them. However, the processing of traumatic events, such as childhood sexual abuse, is not necessarily the same. It is certainly not part of everyday life to which courts can reliably apply their own experiences."

417 Those "surrounding" circumstances may nonetheless be critical to a finding that a duty of care was or was not owed or that a non-delegable duty existed or did not exist; they may bear upon issues of reasonable foreseeability, in the case of a duty of care, and the scope of any assumed responsibility, in the case of a non-delegable duty. But those circumstances may be difficult to prove when those events are but a distant memory. I very respectfully agree with the following observations made below by Bell CJ:[463]

> "The degree of assurance that *Briginshaw v Briginshaw* ... and s 140(2) of the *Evidence Act 1995* (NSW) ... requires in cases involving serious allegations of what would amount to criminal or gravely immoral conduct is not qualified or modified in cases of historical sexual assault by the abolition of the limitation period for common law claims based upon such conduct ... As a matter of practicality, *Briginshaw* and s 140(2) of the

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462 (2025) 117 NSWLR 253 at 313 [267].

463 (2025) 117 NSWLR 253 at 257 [3]-[5].

> *Evidence Act* present a forensic challenge to those who seek to establish serious allegations, decades after the event.
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> ...
>
> Great care must also be taken to avoid the temptation to analyse both factual and legal issues with the benefit of hindsight."

418 In these circumstances, the findings by Leeming JA as to sexual abuse should be rejected, and those of the trial judge should be restored.

Assistant priest

419 It was an agreed fact between the parties that the abusing priest, Fr Pickin, was the parish priest of St Patrick's Church, Wallsend, New South Wales. However, Leeming JA discovered on appeal that the evidence plainly demonstrated that Fr Pickin was not the parish priest; he was the assistant priest. The merits of Leeming JA's conclusion were not challenged by the appellant. He did not contend that Leeming JA was wrong. Instead, he insisted that the Court of Appeal was bound by the agreement of the parties. Alternatively, the appellant contended that Leeming JA's finding was a breach of procedural fairness. Neither proposition should be accepted.

420 First, s 75A of the SC Act confers authority on the Court of Appeal to make its own findings of fact – regardless of any agreement of the parties. Thus, s 75A(6) provides that the Court of Appeal has the same "powers and duties" as the court from which the appeal is brought concerning the finding of facts. And s 75A(10) provides that the Court of Appeal "may make any finding or assessment ... which ought to have been given or made or which the nature of the case requires". This power authorises the Court of Appeal both to accept an agreed fact and to reject an agreed fact. Where the evidence before the Court of Appeal establishes that an agreed fact is wrong, its duty is to apply the law to that which is found, rather than to that which is not. The respondent may have been "stuck" with its admission at trial, but the Court of Appeal was not so bound.

421 The foregoing is supported by authority. In, for example, *Minister for Environment, Heritage and the Arts v PGP Developments Pty Ltd*,[464] Stone J said that when parties agree upon certain facts it is still the duty of the court to determine if they are true. Her Honour said:[465]

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464 (2010) 183 FCR 10.

465 (2010) 183 FCR 10 at 20 [35].

> "It still remains for the Court to determine whether the facts are to be accepted as true and to determine what weight to attribute to that evidence. Whether the Court accepts the agreed facts, in whole or in part, may depend, among other things, on the coherence of the narrative created by the facts or their inherent credibility. If, for example, a statement contained mutually inconsistent facts the Court would be obliged to take account of the inconsistency."

422 The foregoing reasoning was recently approved by the Full Court of the Federal Court of Australia.[466] Given that both decisions concerned the federal equivalent of s 191 of the *Evidence Act 1995* (NSW),[467] the reasoning is applicable in New South Wales.

423 Second, and concerning the procedural fairness contention, as senior counsel for the respondent observed, Leeming JA raised the possibility that Fr Pickin was only an assistant priest four times during the hearing before the Court of Appeal, and, as such, the appellant had ample opportunity to respond on this point. This contention has no force.

424 The foregoing reasoning does not diminish my conclusion that the appellant had shown he had been abused by Fr Pickin.

Duty of care: attribution of knowledge and the evidence of Fr Dillon

425 It was a foundational plank of the appellant's negligence case that the risk of him being abused or otherwise harmed by a priest, such as by Fr Pickin, was reasonably foreseeable to the respondent when the abuse took place. This was not a risk which was necessarily confined to Fr Pickin; it extended to all priests in the Diocese. To make good this contention, knowledge of two events needed to be attributed to all priests in the Diocese and/or to the Bishop of Maitland-Newcastle. It was contended that such broadly held knowledge would in turn support the attribution of knowledge to the respondent of the general risk of abuse by priests within the Diocese in the late 1960s. The appellant also relied on a sentence (described below) contained in a report prepared by Fr Dillon, a Victorian priest who was ordained in 1969.

426 The two events were:

(a) a discussion between Bishop Toohey (who was the Bishop of Maitland-Newcastle in 1969) and a Fr McAlinden in 1954 about an "issue",

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466 *Australian Securities and Investments Commission v BHF Solutions Pty Ltd* (2022) 293 FCR 330 at 336 [24].

467 *Evidence Act 1995* (Cth), s 191.

the "issue" being Fr McAlinden's "sexual activity involving children". During that discussion Fr McAlinden denied that any such activity had taken place. The discussion was evidenced by it being referred to in a letter written by a psychiatrist in 1987 to the then-Bishop of the Diocese. It is not clear how this evidence was admitted before the trial judge, given that it appears to offend the rule against hearsay. However, that may be put to one side; and

(b) a complaint by another victim of Fr Pickin. That witness said that he disclosed his abuse to a Fr Doran before 1969. Importantly, the appellant led no evidence that Fr Doran was under an obligation, or otherwise subject to some duty, to report the matter to the Bishop or to anybody else in order to take the matter further in some way.

427 The unchallenged "expert" evidence of Fr Dillon was that whilst child sex abuse by priests was in 1969 "virtually unknown", a "likely exception" to this would have been "the knowledge of some people in positions of high authority in the Church, such as Bishops, Religious Superiors and Provincials etc who would have been aware of complaints and allegations made against other priests, brothers and nuns". It is difficult to accept that Fr Dillon's evidence took the form of an expert opinion for the purposes of s 79 of the *Evidence Act 1995* (NSW). It appeared to be instead lay evidence concerning Fr Dillon's personal experiences as a priest. Nonetheless, it was admitted into evidence in the face of an objection to it by the respondent, and no complaint was made about its admission into evidence on appeal.

428 The foregoing is, at best, a thin basis for attributing the type of knowledge to the respondent that would ground a proposition that in 1969 it was reasonably foreseeable that Diocesan priests generally posed a risk of causing personal injury to children on Diocesan properties.

429 The appellant submitted that knowledge of the two events should be attributed to the Bishop and all the parish priests in the Diocese. This was a consequence either of an application of the general principles of attribution, discussed by Lord Hoffmann in *Meridian Global Funds Management Asia Ltd v Securities Commission*,[468] or, alternatively, of s 6O(b) of the CL Act. The latter submission had not been put below, either before the trial judge or in the Court of Appeal.

430 As to the former, it is well established that the knowledge of every employee of a company does not always become the knowledge of the company

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468 [1995] 2 AC 500 at 506.

itself.[469] Whether the knowledge of an employee is attributable to the company depends upon the function and duties of the employee (including reporting duties), his or her authority to bind the company, the material context, and, where relevant, any applicable statute.[470] The people whose knowledge may be attributed to a company are not confined to those who comprise the controlling mind of the company. As Callaway JA observed in *Director of Public Prosecutions Reference No 1 of 1996*:[471]

> "Sometimes only the board of directors acting as such or a person at or near the top of a corporation's organisation will be identified with the corporation itself. On other occasions someone lower, and perhaps much lower, in the hierarchy will suffice."

431 As to the latter, s 6O of the CL Act addresses the effect of the appointment of a proper defendant for an unincorporated organisation. Section 6O relevantly provides:

> "On the appointment of a proper defendant for an unincorporated organisation—
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> ...
>
> (b) anything done by the unincorporated organisation is taken to have been done by the proper defendant and a duty or obligation of the unincorporated organisation in relation to the proceedings is a duty or obligation owed by the proper defendant ..."

432 The term "unincorporated organisation" is defined in s 6J to mean "an organisation that is not incorporated". Division 4 of Pt 1B of the CL Act, which includes s 6O, "extends to child abuse proceedings in respect of abuse perpetrated before the commencement of that Division".[472] It was contended that the respondent comprised all of the parish priests and the Bishop of the Diocese. It followed, the appellant submitted, that all of the parish priests and the Bishop of the Diocese had knowledge of the two events, being the conversation Bishop Toohey had with Fr McAlinden and the complaint made to Fr Doran.

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469 See, eg, *South Sydney Junior Rugby League Club Ltd v Gazis* [2016] NSWCA 8 at [112].

470 *Nationwide News Pty Ltd v Naidu* (2007) 71 NSWLR 471 at 480-481 [40]-[41].

471 [1998] 3 VR 352 at 355.

472 *Civil Liability Act 2002* (NSW), Sch 1, cl 45.

433 Both contentions must be rejected.

434 Putting aside the fact that no members of the clergy were employees, and applying the ordinary rules of attribution, no evidence was led concerning the function and authority of Bishop Toohey to attribute his knowledge to the respondent. And what would be attributed in respect of the discussion between Bishop Toohey and Fr McAlinden? It could be no more than that an unspecified conversation took place in 1954 about suggestions of child abuse by Fr McAlinden, which Fr McAlinden denied ever taking place. Such isolated and vague information could not possibly support the proposition that it was reasonably foreseeable that Diocesan priests generally in the late 1960s posed a risk of causing personal injury to children on Diocesan properties.

435 The same observation must be made in respect of the disclosures about Fr Pickin to Fr Doran. No evidence was led about Fr Doran's function and authority in the late 1960s that would attribute his knowledge – about what was abuse in different circumstances said to have been committed by Fr Pickin – to the Bishop or to anyone else. Nothing in the report of Fr Dillon suggests otherwise.

436 In that respect, the case may be distinguished from the decision in *O'Connor v Comensoli*.[473] This authority was heavily relied upon by the appellant. But the evidence led in it differed significantly from the evidence here. That evidence included a report prepared by an expert in Canon Law. Keogh J (the trial judge) recorded that the report contained the following opinion about relevant Canon Law:[474]

> "[The expert] said sexual abuse of a child by a priest is a canonical crime. The Canon Law required that abuse be reported to the Archbishop, who had ultimate responsibility to ensure that priests fulfilled their obligations. A parish priest who received a report of sexual abuse of a minor had no discretion to decide he did not believe the report, or that nothing should be done about it, but was obliged to refer the matter to the Archbishop. Canon Law required that the Archbishop, or the Vicar-General on his behalf, conduct a special investigation into a report that a child had been abused by a priest."

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473 [2022] VSC 313.

474 [2022] VSC 313 at [235].

437 The foregoing evidence was pivotal to Keogh J's conclusion that knowledge of a complaint made to a parish priest should be attributed to the Archbishop and the Archdiocese of Melbourne. Keogh J thus reasoned:[475]

> "At the time of the ... complaint, Father Connellan was clearly acting in the role of parish priest, filling a relatively senior position within the structure of the Archdiocese. The rules by which the Archdiocese operated required that Father Connellan report an allegation of abuse of a child to the Archbishop. That obligation is to be understood in the context that there was a degree of supervision of assistant priests in the Archdiocese by parish priests, and a requirement for an annual report to be made to the Archbishop. In other words, the Archdiocese had a structure and a system of rules in place to supervise the performance of assistant priests, who represented and conducted the work of the Archdiocese. In this important respect, the Archdiocese gave authority to and acted through the parish priest. The parish priest was the primary co-worker of the Archbishop and was given considerable authority in relation to the operation and management of the parish, and the wellbeing of its parishioners. He had authority to receive a complaint of abuse by an assistant priest from a parishioner, and responsibility on behalf of the Archdiocese to report that complaint to the Archbishop. Applying the usual rules of attribution and agency, Father Connellan's knowledge of the complaint ... is the knowledge of the Archdiocese."

438 There was no evidence of the foregoing kind before the trial judge here. To the extent it had any bearing on the issue of attribution, the Canon Law was not before the court; nor was the *Presbyterorum Ordinis: Decree on the Ministry and Life of Priests*. Any reliance upon such canonical texts would, with very great respect, require the presence of expert testimony. No such expert evidence was led in this matter, and it would otherwise be dangerous for a judge to interpret such works without such assistance.

439 This leaves for consideration the appellant's alternative contention in reliance upon s 6O of the CL Act. As set out above, anything done by the unincorporated organisation is taken to have been done by the proper defendant, here the respondent. The problem, however, is that, as Leeming JA discovered, the respondent was and is a body corporate, and not an unincorporated organisation. It became incorporated in 1936 with the passing of the *Roman Catholic Church Trust Property Act 1936* (NSW). Section 4 of that Act relevantly provides:[476]

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475 [2022] VSC 313 at [289].

476 As Leeming JA observed, the entity changed its name in 1995: (2025) 117 NSWLR 253 at 261 [22].

> "(1) The trustees of Church trust property for each Diocese shall, by virtue of this Act, be a body corporate, having perpetual succession and a common seal, and being capable of acquiring, holding and disposing of any property, real or personal, and of suing and being sued in its corporate name, and of doing and suffering all such acts and things as bodies corporate may by law do or suffer ...
>
> (2) The corporate names of the trustees of Church trust property for the several dioceses existing at the commencement of this Act shall be—
>
> ...
>
> (f) for the Diocese of Maitland, the trustees of the Roman Catholic Church for the Diocese of Maitland ..."

440 It is true that the parties agreed that the respondent was a proper defendant but not that it was also, otherwise, an unincorporated organisation. It was not. One simply cannot ignore this legal reality. To pronounce judgment on a fundamental basis known to the court to be untrue is no part of the judicial function and would involve the court in giving what would merely be an advisory opinion, which this Court cannot furnish.[477] That the respondent was a body corporate makes it impossible to apply s 6O(b). It makes no sense to deem that which is done by a body corporate to be taken to be done by the same body corporate. This legal reality also renders it impossible to accept the premise of the appellant's argument – that the respondent is an unincorporated organisation comprised of all of its parish priests as well as the Bishop – as being correct.

441 But even if it were accepted that the respondent was an unincorporated organisation, it is doubtful that the word "organisation" can be stretched so far as to include everything done by every parish priest in the Diocese, relevantly, on every day in the late 1960s. The word "organisation" is more likely to refer to everything done by that organisation, as an identifiable unincorporated association, as distinct from each of its individual members. It would refer to things done that could be attributed to the respondent as a functioning institution, such as appointing new priests, acquiring land, or building a church. It would not include the private meeting between Bishop Toohey and Fr McAlinden, nor the complaint made to Fr Doran.

442 Then there is the evidence of Fr Dillon. Like Leeming JA, I consider that the assertion – that it was "likely" that some individuals in positions of high authority would have been aware of complaints and allegations made against other priests, brothers and nuns – cannot be accepted as evidence of what Bishop Toohey knew or ought to have known about complaints within his Diocese in the late

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477 *In re Judiciary and Navigation Acts* (1921) 29 CLR 257.

1960s.[478] Nor did Fr Dillon give any reasons for this "opinion". Presumably he could not do so, as his actual knowledge of what a generic Bishop may or may not have known in 1969 was based on his experience as a very recently ordained priest in the State of Victoria. As such, this aspect of his evidence is troubling. Nor was it suggested, or explained, how this Victorian experience could have given any insight into what Bishop Toohey – the Bishop of a Diocese in New South Wales – knew or ought to have known, or what a generic Bishop in Australia in the late 1960s knew or might have known. In truth, as an observation about the "likely" awareness of complaints by only "some" Bishops, and other senior clergy, in the late 1960s it is really no more than speculation about a state of knowledge – a state of knowledge that must depend upon the individual experiences and history of those individual Bishops and other senior clergy, which no doubt varied from person to person. Like Leeming JA, I consider that Fr Dillon's opinion evidence on this particular issue can be given only very little weight.[479] That evidence is insufficient to ground a finding that Fr Pickin, or Diocesan priests generally, posed a reasonably foreseeable risk of causing personal injury to children on Diocesan properties in the late 1960s.

443 Fr Dillon also referred to the "exaggerated dignity and respect" given to priests at the time, although he made no mention of the community exhibiting excessive deference to priests. With respect, there was no evidence that supported the suggestion of manifest deference; nor could a conclusion of manifest deference be inferred from what Fr Dillon said. He did, however, observe that the dignity and respect given to priests "clearly could and did become genuinely dangerous – for the priest and for others – if the priest took it seriously, which was a not uncommon occurrence". I do not see, with respect, how this generalised observation that some priests might become "dangerous" could justify a finding of reasonable foreseeability of the kind contended for. I really have no idea what type of danger Fr Dillon was referring to.

444 For the foregoing reasons, the Court of Appeal was correct to conclude that the respondent did not owe the duty of care contended for by the appellant.

Non-delegable duty

445 In *Bird*, a majority of this Court explained when a non-delegable duty to ensure that reasonable care is taken may be said to arise, and the doctrinal

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478 (2025) 117 NSWLR 253 at 302-303 [210].

479 (2025) 117 NSWLR 253 at 302-303 [210].

foundation of the duty. Gageler CJ, Gordon, Edelman and Beech-Jones JJ and I said:[480]

> "Such a duty arises where the nature of the relationship between the defendant and the other person to whom the duty is owed is one where the defendant has assumed particular responsibility to ensure that care is taken, rather than merely to take reasonable care. For example, where the defendant has 'undertaken the care, supervision or control of the person or property of another or is so placed in relation to that person or [their] property as to assume a particular responsibility for [their] or its safety, in circumstances where the person affected might reasonably expect that due care will be exercised'."

446 Recognised categories where the duty arises include: a school and its pupils; a hospital and its patients; and an employer and its employees.[481] The categories are not closed. "[T]he relationship of proximity giving rise to the non-delegable duty of care ... is marked by special dependence or vulnerability on the part" of the person to whom the duty is owed[482] and by an assumption of responsibility to ensure care is taken by the person who owes the duty.[483] Here, there was no doubt that the appellant was vulnerable given that he was only 13 years of age. But the necessary relationship of proximity must be confined to exceptional cases where there exists *both* the assumption of responsibility, and the existence of special dependence or vulnerability. As Lord Sumption has observed:[484]

> "The main problem about this area of the law is to prevent the exception from eating up the rule. Non-delegable duties of care are inconsistent with the fault-based principles on which the law of negligence is based, and are therefore exceptional."

447 The duty to ensure that reasonable care is taken is a duty to avoid those risks which fall within the responsibility assumed over those who are, by class or category, or for some other specific reason, vulnerable. Defining that responsibility measures the scope of the duty owed. That, in turn, is a fact-intensive inquiry.

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480 (2024) 98 ALJR 1349 at 1360 [37]; 419 ALR 552 at 562, quoting *Kondis v State Transport Authority* (1984) 154 CLR 672 at 687.

481 *The Commonwealth v Introvigne* (1982) 150 CLR 258; *Kondis v State Transport Authority* (1984) 154 CLR 672; *Albrighton v Royal Prince Alfred Hospital* [1980] 2 NSWLR 542.

482 *Burnie Port Authority v General Jones Pty Ltd* (1994) 179 CLR 520 at 551.

483 *Kondis v State Transport Authority* (1984) 154 CLR 672 at 687.

484 *Woodland v Swimming Teachers Association* [2014] AC 537 at 582-583 [22].

Here, the evidence demonstrated a relevant assumption of responsibility by the respondent. In that respect, it may be accepted that the respondent had a non-delegable duty to ensure that reasonable care was taken to prevent the abuse of children by priests within the Diocese. However, I differ from Gordon J and Edelman J concerning the scope of the duty. The evidence plainly supports the proposition, as described below, that the scope of that duty was confined to those occasions when contact with children was authorised, permitted or required by the Church. In other words, the duty was limited to caring for the safety of children where the Church assumed that responsibility, such as at what was described by the respondent as "Church events". But it did not extend to occasions beyond that. On the facts, what Fr Pickin did was beyond the scope of the respondent's non-delegable duty.

448 There is an analogy here with the non-delegable duty of care that a school owes to its students. Plainly the scope of that duty extends to the times when the school is open and when students are in attendance, and that is so regardless of when classes are scheduled to start and then finish.[485] Nor is the duty confined to the grounds of a school; it would extend, for example, to school camps and excursions.[486] As Stephen J observed in *Geyer v Downs*:[487]

> "The temporal ambit of the duty will, therefore, depend not at all upon the schoolmaster's ability, however derived, effectively to perform the duty but, rather, upon whether the particular circumstances of the occasion in question reveal that the relationship of schoolmaster and pupil was or was not then in existence. If it was, the duty will apply. It will be for the schoolmaster and those standing behind him to cut their coats according to the cloth, not assuming the relationship when unable to perform the duty which goes with it."

449 In contrast, a school will not owe a non-delegable duty of care outside of the relationship of school and student. It will be a question of fact to determine whether that is so. But it is unlikely to be present when, for example, a student is walking home from school; when a student is playing at a classmate's house after school; or when a student, whilst still in uniform, is at home.

450 Here, the abuse fell outside the scope of the respondent's non-delegable duty. By the evidence led, unsurprisingly thin, of events of over 50 years ago, the

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485 *The Commonwealth v Introvigne* (1982) 150 CLR 258 at 269.

486 See, eg, *Harris v Trustees of the Roman Catholic Church for the Archdiocese of Sydney* [2011] NSWDC 172.

487 (1977) 138 CLR 91 at 94. See also *The Commonwealth v Introvigne* (1982) 150 CLR 258.

appellant did not satisfy his burden of proving the scope for which he contends. And what we do know does not support the appellant's case. It was the head of the local state school or the State itself that decided to have Fr Pickin conduct scripture classes at that school, not the Church. The appellant was a pupil in that class. Fr Dillon (whose evidence about the general role of a priest in Australia in the late 1960s, including how they used presbyteries and interacted with parishioners, may be accepted with greater confidence than his "expert opinion" about the likely knowledge of "some" senior clergy) said that Church property, such as a presbytery, could not be used for a purpose in any way contrary to the wishes or direction of the Bishop and that the Bishop had ultimate authority in relation to use of Church properties. Whilst Fr Dillon accepted that the presbytery might be used for certain social occasions, it did not include private socialising with children. That is because the authority of a priest was limited to using the presbytery, to use the language of Fr Dillon, "[f]or those activities and uses that are directly part of the Church's mission".

451 In the case of children, Fr Dillon said it was expected that a priest would engage with young people using youth groups, movie nights, camps, sporting teams, choirs and any other activity "under the banner of the Church". Fr Dillon, however, said that "'one-on-one' instruction of young people was not common" and that at the time it would have been seen as "unwise" or "imprudent" for an adult, even a respected and trusted adult, such as a priest, to be alone with a child. Importantly, he said that the use of a priest's personal room or rooms for after-school classes or personal instruction was "unheard of". Instead, parishioners were seen by the priest in a front parlour which was always near the front door of the presbytery.

452 Fr Dillon was cross-examined. He explained that if there were children at the presbytery, such as with youth groups, "there would always be other people around" who were "volunteer parents or others available to assist". He was asked about a "scenario" in which alcohol and cigarettes were supplied to children in the presbytery. He responded by saying that this would have been "totally out of order in every way possible" and "totally foolhardy and irresponsible".

453 The foregoing, together with the findings made about the knowledge of the respondent set out above, unequivocally demonstrates that Fr Pickin's invitation to the appellant to socialise with him on a Friday night was fundamentally unauthorised and foreign to his duties and responsibilities as a priest. It had nothing, whatsoever, to do with the "Church's mission". There was no evidence that these gatherings were "Church events" or that the appellant attended the presbytery for any religious, or even any pastoral or cultural, reason. Moreover, it could not otherwise be said that the gatherings in any way more generally related to Fr Pickin's duties and functions as a priest. As such, it cannot be said that the respondent assumed responsibility for the appellant's welfare on such occasions. On the contrary, had the Bishop been asked to give permission for such events to be hosted at the presbytery, it would have been flatly refused. Inferentially,

Fr Pickin knew this but nonetheless acted contrary to his authority as a priest so that he could contrive the opportunity to abuse the appellant. Those opportunities had nothing to do with the Catholic Church, the respondent or the Bishop of Maitland-Newcastle. They were the product alone of Fr Pickin's unspeakable criminal designs.

454 In any event, it was accepted below that by reason of this Court's decision in *Lepore*, the respondent could not be liable for breach of a non-delegable duty based on an intentional wrong committed by a delegate. The appellant, very properly, sought leave to have the correctness of *Lepore* reviewed by this Court. Because the appellant's case failed at an evidentiary level, it is not appropriate to re-consider *Lepore*. As Gummow and Hayne JJ observed in *Re Patterson; Ex parte Taylor*:[488]

> "in addition to the criteria mentioned in *John v Federal Commissioner of Taxation*, there is the prudential consideration that this Court should not embark upon the reconsideration of an earlier decision where, for the resolution of the instant case, it is not necessary to do so".

455 This prudential approach is consistent with the principle that when considering whether to overrule previous decisions, this Court should be "informed by a strongly conservative cautionary principle, adopted in the interests of continuity and consistency in the law".[489] The overruling of the precedents of this Court should only take place on exceptional occasions, and then only as a matter of last resort.

456 Having said that, there is much to be said for Leeming JA's defence of *Lepore* in the present matter.[490] Moreover, I respectfully agree, for the purposes of the fourth factor identified in *John v Federal Commissioner of Taxation*,[491] that the correctness of *Lepore* has been assumed by the Parliament of New South Wales, in making amendments to the CL Act since the case was decided. The non-delegable duty suggested here would be inconsistent with those amendments. As Leeming JA observed:[492]

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488 (2001) 207 CLR 391 at 473 [249] (footnote omitted).

489 *Wurridjal v The Commonwealth* (2009) 237 CLR 309 at 352 [70].

490 (2025) 117 NSWLR 253 at 292-293 [164]-[167].

491 (1989) 166 CLR 417 at 438-439, citing *The Commonwealth v Hospital Contribution Fund* (1982) 150 CLR 49 at 57-58.

492 (2025) 117 NSWLR 253 at 293-294 [168].

> "any such duty would be incoherent with statute. For conduct committed after 2018, the *Civil Liability Act* imposes vicarious liability for such conduct upon a proper defendant, but subject to a presumption of breach if an individual associated with the organisation perpetrates child abuse, unless the proper defendant establishes that it took reasonable precautions: s 6F(3). That statutory response, and in particular the defence of reasonable precautions, cannot be reconciled with a non-delegable duty which of its nature is strict. Axiomatically, if the common law recognises a non-delegable duty, then it must apply at all times, including after 2018 when s 6F(3) commenced. In this country, judge-made law cannot be altered prospectively ... To my mind, this consideration tells dispositively against the existence of a non-delegable duty."

457 I very respectfully agree with the foregoing observations of Leeming JA.

458 With knowledge of the principle for which *Lepore* stands, it is clear that the Parliament of New South Wales, in enacting Pt 1B of the CL Act,[493] also made a choice that its reforms would apply with prospective force only,[494] thus engaging again the fourth factor identified in *John*. Overruling *Lepore* would contradict that legislative choice.

459 That the law should draw a distinction between taking reasonable care to ensure that unintended conduct does not cause harm as against preventing the occurrence of intentional criminal conduct is both unsurprising and entirely logical. Deliberate criminal behaviour is not a case of merely failing to take reasonable care. It is much more than that. As Gleeson CJ observed in *Lepore*:[495]

> "although deliberately and criminally inflicting injury on another person involves a failure to take care of that person, it involves more. If a member of a hospital's staff with homicidal propensities were to attack and injure a patient, in circumstances where there was no fault on the part of the hospital authorities, or any other person for whose acts or omissions the hospital was

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493 New South Wales, Legislative Assembly, *Parliamentary Debates* (Hansard), 26 September 2018 at 22. The second reading speech reported that Pt 1B (inserted by the *Civil Liability Amendment (Organisational Child Abuse Liability) Act 2018* (NSW)) completed New South Wales's response to the Royal Commission into Institutional Responses to Child Sexual Abuse, which in turn referred to *Lepore* on a number of occasions: see, eg, Royal Commission into Institutional Responses to Child Sexual Abuse, *Final Report: Volume 17, Beyond the Royal Commission* (2017) at 25.

494 *Civil Liability Act 2002* (NSW), Sch 1, cll 43 and 44.

495 (2003) 212 CLR 511 at 531-532 [31] (footnote omitted).

> vicariously responsible, the common law should not determine the question of the hospital's liability to the patient on the footing that the staff member had neglected to take reasonable care of the patient. It should face up to the fact that the staff member had criminally assaulted the patient, and address the problem of the circumstances in which an employer may be vicariously liable for the criminal acts of an employee. Intentional wrongdoing, especially intentional criminality, introduces a factor of legal relevance beyond a mere failure to take care. Homicide, rape, and theft are all acts that are inconsistent with care of person or property, but to characterise them as failure to take care, for the purpose of assigning tortious responsibility to a third party, would be to evade an issue."

460 I very respectfully agree with the foregoing.

Disposition

461 This appeal should be dismissed with costs.

GLEESON J.

Introduction

462 This appeal concerns whether the common law of Australia recognises a duty of care owed by the Diocese of Maitland-Newcastle ("the Diocese"),[496] a Diocese of the Roman Catholic Church, to the appellant, "AA", who in 1969 was a youth living in the Wallsend parish within the Diocese and who was sexually abused by Fr Ronald Pickin, a priest living and working in that parish. The Diocese is an unincorporated organisation[497] through which the Catholic Church in the geographic area of the Diocese fulfilled its religious mission. The Diocese and Fr Pickin were found to be subject to the power and control of the Bishop of the Diocese, who was, at the relevant times, Bishop John Toohey.[498]

463 The duty is alleged to have arisen out of the appointment by Bishop Toohey of Fr Pickin as a priest in the Wallsend parish, living in the parish presbytery, and through the conferral upon Fr Pickin of roles and responsibilities consistent with the pursuit of the aims of the Catholic Church, especially teaching duties at Wallsend High School. The parties agreed that Fr Pickin was given the role of parish priest in the Wallsend parish.[499] Adopting language used by five Justices of this Court in *Prince Alfred College Inc v ADC*[500] to analyse the scope of vicarious liability of a school employer for the wrongful conduct of its employee boarding housemaster, the primary judge found that the Diocese (which I take to mean the Bishop acting on behalf of the Catholic Church in the relevant geographic area) conferred upon Fr Pickin a "special role" that gave him access to children in the parish and required him to actively engage with them;[501] and that the Diocese gave Fr Pickin "the authority, power, trust, control and ability to achieve the intimacy

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496 The Diocese appointed the respondent as its proper defendant for the purposes of Pt 1B of the *Civil Liability Act 2002* (NSW).

497 Within the meaning of Pt 1B of the *Civil Liability Act 2002* (NSW).

498 *Trustees of the Roman Catholic Church for the Diocese of Maitland-Newcastle v AA* (2025) 117 NSWLR 253 at 263 [34], 297 [187], 298 [193].

499 *AA v Trustees, Roman Catholic Church, Diocese of Maitland-Newcastle* (2024) 334 IR 70 at 77 [10].

500 (2016) 258 CLR 134 at 159-160 [81].

501 *AA v Trustees, Roman Catholic Church, Diocese of Maitland-Newcastle* (2024) 334 IR 70 at 104 [210]-[211], 105 [218].

he had with his victim, AA", and "enabled" Fr Pickin to arrange the occasions that gave him the opportunities to assault AA as he did.[502]

464 *Prince Alfred College* illustrates the important exception to the general tort rule of "no liability without fault", namely that an employer's liability extends to vicarious liability for wrongs of an employee acting within the scope of their employment.[503] Aspects of the role the school conferred upon a boarding housemaster who sexually assaulted a pupil were accordingly relevant to the scope of the school's vicarious liability.[504]

465 The Diocese and Fr Pickin are two separate entities. Father Pickin was not an employee of the Diocese and, consequently, the Diocese is not vicariously liable for his torts.[505] Further, there is no legal basis to treat his acts or omissions, insofar as they affected AA, as the acts of the Diocese. Father Pickin's acts of sexual abuse of AA were plainly not the acts of the Diocese. Father Pickin's conduct in sexually abusing AA was not authorised by the Diocese and was the antithesis of the role that Fr Pickin was directed to perform for the Catholic Church in the Wallsend parish.[506]

466 Accordingly, AA did not contend that the Diocese is legally liable for the wrongful conduct of Fr Pickin, without more, or that Fr Pickin's wrongful conduct was also the wrongful conduct of the Diocese. Instead, AA argued that the Diocese is liable for failing to ensure that Fr Pickin did not commit the sexual assaults that occurred, or alternatively, for failing to take reasonable steps to prevent those assaults. If accepted, the former argument effectively involves the imposition of strict liability, being tort liability in the absence of fault on the part of the liable party, because it would be imposed even though the Diocese did not intend the wrongful conduct and even if there was no failure by the Diocese to do all that might have reasonably been expected to avoid the risk of harm. The common law of torts generally does not impose liability on a party who is not at fault in this

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502 *AA v Trustees, Roman Catholic Church, Diocese of Maitland-Newcastle* (2024) 334 IR 70 at 104-105 [216]-[217].

503 *Prince Alfred College* (2016) 258 CLR 134 at 148 [39], 159-160 [80]-[81].

504 *Prince Alfred College* (2016) 258 CLR 134 at 159-161 [80]-[85].

505 *Bird v DP (a pseudonym)* (2024) 98 ALJR 1349; 419 ALR 552.

506 cf *New South Wales v Lepore* (2003) 212 CLR 511 at 535-536 [41], 583 [204], 622 [330], 626 [345].

sense.[507] The latter argument, if accepted, involves the exceptional imposition of liability for failing to prevent the criminal wrongdoing of a third party.[508]

467 AA framed his case by reference to the position in which the Diocese placed Fr Pickin in relation to AA, arguing that the Diocese thereby created a relationship with AA by which the Diocese was directly liable to AA for Fr Pickin's torts. AA proposed two alternative formulations of a common law duty of care owed to him by the Diocese. The more onerous formulation is a duty to ensure that reasonable care was taken of AA, as a child invited onto Diocesan premises by a Diocesan priest, to avoid reasonably foreseeable personal injury caused by the priest at those premises (the "non-delegable duty"). The less onerous formulation is a duty to take reasonable care to avoid reasonably foreseeable personal injury to children invited onto Diocesan premises by a Diocesan priest and caused by a Diocesan priest at those premises (the "affirmative duty").

468 In my view, the common law does not recognise a duty owed by the Diocese in the terms proposed by AA, or otherwise as found by other members of this Court.[509]

469 Where the harm suffered is caused by the criminal conduct of a third party, that fact cannot be ignored in determining the existence and nature or scope of a duty of care.[510] Having regard to the nature of the alleged harm and in the absence of findings by the primary judge as to the foreseeability of a risk of harm apart from sexual abuse, any acceptable formulation of a duty of care in this case must refer to the foreseeable risk of sexual abuse.[511] The alleged duties should be

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507 Sappideen et al, *Fleming's The Law of Torts*, 11th ed (2024) at 447-451 [14.10]-[14.20]; *Northern Territory v Mengel* (1995) 185 CLR 307 at 341-342.

508 *Smith v Leurs* (1945) 70 CLR 256 at 261-262; *Modbury Triangle Shopping Centre Pty Ltd v Anzil* (2000) 205 CLR 254 at 265-266 [26].

509 Reasons of Gageler CJ, Jagot and Beech-Jones JJ at [2]; reasons of Gordon J at [162]; reasons of Edelman J at [334].

510 *Modbury Triangle* (2000) 205 CLR 254 at 266-267 [29]; *Sullivan v Moody* (2001) 207 CLR 562 at 576 [42]; *Adeels Palace Pty Ltd v Moubarak* (2009) 239 CLR 420 at 436 [24].

511 cf *Lepore* (2003) 212 CLR 511 at 531-532 [31].

understood as directed, not merely to personal injury caused by Diocesan priests, but to sexual assault by Diocesan priests.[512]

470 I accept that the primary judge did not err in concluding that it was reasonably foreseeable in 1969 that a parish priest might abuse the trust and status conferred upon him by his role as a priest, and his membership of the Catholic clergy, to commit acts of sexual abuse upon young people with whom he came into contact. Reasonable foreseeability of that risk of harm is a necessary but not sufficient precondition to the recognition of either formulation of the common law duty contended for by AA, in the absence of some pre-existing relationship from which the duty arises.[513] However, none of the propounded or recognised duties is justified by the required incremental and analogical approach to the identification of novel common law duties.[514] In particular, the relationship between AA and the Diocese is not relevantly analogous to any of the "special relationships"[515] that involve a non-delegable duty upon one party to ensure that reasonable care is taken for the other in certain circumstances. Most particularly, the relationship between school authorities and pupils is not relevantly analogous to this case. Nor did the relationship between the Diocese and AA give rise to a lesser duty to protect AA from assaults by Fr Pickin, where the relationship did not come into being for that purpose and assaults of the kind that occurred were not an expected (and not a merely foreseeable or foreseen) risk of the Diocese's activities.

471 No relevant duty to AA arose from the Diocese's conferral upon Fr Pickin of the role of priest or from his appointment to the Wallsend parish with accommodation at the parish presbytery and substantial control over the presbytery's use. In particular, it is insufficient that Fr Pickin was able to take

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512 *Metropolitan Gas Co v Melbourne Corporation* (1924) 35 CLR 186 at 194; *Wyong Shire Council v Shirt* (1980) 146 CLR 40 at 48; *Romeo v Conservation Commission (NT)* (1998) 192 CLR 431 at 490-491 [163]-[164]; *Vairy v Wyong Shire Council* (2005) 223 CLR 422 at 433-434 [29]; *Mulligan v Coffs Harbour City Council* (2005) 223 CLR 486 at 501-502 [50]; *Roads and Traffic Authority (NSW) v Dederer* (2007) 234 CLR 330 at 353 [65].

513 *Kondis v State Transport Authority* (1984) 154 CLR 672 at 687; *Tame v New South Wales* (2002) 211 CLR 317 at 349 [89]; *Lepore* (2003) 212 CLR 511 at 564 [141].

514 *Mallonland Pty Ltd v Advanta Seeds Pty Ltd* (2024) 98 ALJR 956 at 967 [37]; 418 ALR 639 at 649, citing *Brookfield Multiplex Ltd v Owners Corporation Strata Plan 61288* (2014) 254 CLR 185 at 201-202 [25], 214 [69], 230 [134]. See also *Northern Sandblasting Pty Ltd v Harris* (1997) 188 CLR 313 at 400; *Jones v Bartlett* (2000) 205 CLR 166 at 239 [249].

515 *Burnie Port Authority v General Jones Pty Ltd* (1994) 179 CLR 520 at 551, 555; *Northern Sandblasting* (1997) 188 CLR 313 at 333, 345, 362.

advantage of these circumstances to create opportunities to engage in sexual assaults to find that such a duty arose. Nor do the facts support an inference that the Diocese assumed responsibility for the protection of youth whom Fr Pickin invited into the presbytery from sexual abuse by Fr Pickin. Nor do the facts support a conclusion that the sexual assaults occurred in the performance or purported or ostensible performance by Fr Pickin of any aspect of the role that the Diocese assigned to Fr Pickin.

Common law duties arise out of the relationship between the duty-holder and the obligee

472 Common law duties of care arise in the context of a "sufficient relationship of proximity" such that, in the case of an ordinary duty to take reasonable care, a reasonable person in the defendant's position would foresee that carelessness on their part may be likely to cause damage to the plaintiff.[516] Salient features of a relationship that gives rise to an ordinary duty of care include the degree and nature of control able to be exercised by the defendant to avoid harm;[517] any assumption of responsibility by the defendant;[518] the nature or the degree of the hazard or danger liable to be caused by the defendant's conduct or the activity or substance controlled by the defendant;[519] and the degree of vulnerability of the plaintiff to harm from the defendant's conduct or from conduct of a third party that can be controlled by the defendant.[520]

473 In *Kondis v State Transport Authority*, Mason J did not refer to proximity, but found that the cases in which a non-delegable duty had been recognised were

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516 *Brookfield Multiplex* (2014) 254 CLR 185 at 199 [20], quoting *Wyong Shire Council* (1980) 146 CLR 40 at 44.

517 *Howard v Jarvis* (1958) 98 CLR 177 at 183; *Burnie Port Authority* (1994) 179 CLR 520 at 550-552, 556-557; *Hill v Van Erp* (1997) 188 CLR 159 at 198-199, 234; *Graham Barclay Oysters Pty Ltd v Ryan* (2002) 211 CLR 540 at 558-559 [20], 577 [83]-[84], 597 [149], 664 [321].

518 *Bryan v Maloney* (1995) 182 CLR 609 at 627; *Esanda Finance Corporation Ltd v Peat Marwick Hungerfords* (1997) 188 CLR 241 at 263; *Perre v Apand Pty Ltd* (1999) 198 CLR 180 at 228 [124].

519 *Brodie v Singleton Shire Council* (2001) 206 CLR 512 at 559 [102]; *Caltex Refineries (Qld) Pty Ltd v Stavar* (2009) 75 NSWLR 649 at 676 [103].

520 See, eg, *Burnie Port Authority* (1994) 179 CLR 520 at 551; *Northern Sandblasting* (1997) 188 CLR 313 at 346, 353, 363; *Perre* (1999) 198 CLR 180 at 220 [104]-[105], 225 [118], 228-230 [125]-[129]; *Crimmins v Stevedoring Industry Finance Committee* (1999) 200 CLR 1 at 40-41 [100]; *Lepore* (2003) 212 CLR 511 at 551 [100].

characterised by "some element in the relationship between the parties that makes it appropriate to impose on the defendant a duty to ensure that reasonable care and skill is taken for the safety of the persons to whom the duty is owed".[521] The character of the duty as non-delegable meant that responsibility for its due performance remained with the duty-holder. In *Burnie Port Authority v General Jones Pty Ltd*, the "nature of the relationship of proximity" between duty-holder and obligee was explained to give rise to a duty of care "of a special and 'more stringent' kind, namely a 'duty to ensure that reasonable care is taken'".[522] Notwithstanding that a relationship of sufficient proximity between duty-holder and obligee was then the criterion for identifying an ordinary duty of care,[523] the majority invoked proximity for the additional purpose of establishing "a special 'personal' or 'non-delegable' duty of care under the ordinary law of negligence".[524] The relationship of proximity giving rise to a non-delegable duty of care was said to be "marked by special dependence or vulnerability on the part of [the obligee]".[525] "Special relations" had earlier been identified as the source of an affirmative duty to take reasonable care to prevent harm to another caused by a third party.[526]

474 The concepts of "special dependence or vulnerability" and "special relations" conform with the general principle of legal responsibility that there is "a duty to take reasonable care to avoid doing what might cause injury to another, not a duty to act to prevent injury being done to another by that other, by a third person, or by circumstances for which nobody is responsible".[527] That is, in special cases, legal responsibility extends beyond the scope of an ordinary duty of care.[528]

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521 *Kondis* (1984) 154 CLR 672 at 687.

522 *Burnie Port Authority* (1994) 179 CLR 520 at 550. See also *Kondis* (1984) 154 CLR 672 at 686; *Lepore* (2003) 212 CLR 511 at 598 [254]; *CCIG Investments Pty Ltd v Schokman* (2023) 278 CLR 165 at 195 [70].

523 *Burnie Port Authority* (1994) 179 CLR 520 at 541-544.

524 *Burnie Port Authority* (1994) 179 CLR 520 at 552.

525 *Burnie Port Authority* (1994) 179 CLR 520 at 551.

526 *Smith* (1945) 70 CLR 256 at 262.

527 *Sutherland Shire Council v Heyman* (1985) 157 CLR 424 at 478.

528 *Voli v Inglewood Shire Council* (1963) 110 CLR 74 at 94-95; *Kondis* (1984) 154 CLR 672 at 694; *Scott v Davis* (2000) 204 CLR 333 at 416 [247]; *Hollis v Vabu Pty Ltd* (2001) 207 CLR 21 at 34 [27].

475 The critical question in this appeal is whether the features of the relationship between AA and the Diocese justify its characterisation as "special" for the purpose of imposing a common law duty of one of the kinds for which AA contends.

Non-delegable duties of care

476 As a majority of this Court has found that the Diocese owed a non-delegable duty to AA, it is appropriate to consider AA's case for a non-delegable duty first.

Non-delegable duties and the need for caution

477 It should not be ignored that the concept of non-delegable duties has attracted significant and sustained criticism.[529] The categories of relationships in which non-delegable duties are established have been described as an "odd collection of particular instances",[530] a "random group of cases"[531] and "remarkably under-theorised".[532] Non-delegable duties were first explained in this Court, by Windeyer J in *Voli v Inglewood Shire Council*, as "convenient headings" for those cases in which defendants have been held liable for the negligence of their independent contractors.[533] When Mason J addressed the concept of non-delegable duties in *The Commonwealth v Introvigne*, his Honour acknowledged that the concept had been "strongly criticised", referring in particular to the widely cited critique of Professor Glanville Williams.[534] In *Kondis*, Mason J again

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529 See, eg, Williams, "Liability for Independent Contractors" [1956] *Cambridge Law Journal* 180 at 186; Keeton et al, *Prosser and Keeton on the Law of Torts*, 5th ed (1984) at 512; Deakin, Johnston and Markesinis, *Markesinis and Deakin's Tort Law*, 5th ed (2003) at 597 fn 372; McIvor, "The Use and Abuse of the Doctrine of Vicarious Liability" (2006) 35 *Common Law World Review* 268 at 290-296; Stevens, "Non-Delegable Duties and Vicarious Liability", in Neyers, Chamberlain and Pitel (eds), *Emerging Issues in Tort Law* (2007) 331 at 364; Murphy, "The Liability Bases of Common Law Non-Delegable Duties – A Reply to Christian Witting" (2007) 30 *University of New South Wales Law Journal* 86.

530 *Leichhardt Municipal Council v Montgomery* (2007) 230 CLR 22 at 62 [111].

531 Deakin, Johnston and Markesinis, *Markesinis and Deakin's Tort Law*, 5th ed (2003) at 597 fn 372.

532 Murphy, "The Liability Bases of Common Law Non-Delegable Duties – A Reply to Christian Witting" (2007) 30 *University of New South Wales Law Journal* 86 at 101.

533 *Voli* (1963) 110 CLR 74 at 95.

534 *Introvigne* (1982) 150 CLR 258 at 270, citing Williams, "Liability for Independent Contractors" [1956] *Cambridge Law Journal* 180, see especially at 184.

adverted to Professor Williams' critique, as well as other scholarly criticism of non-delegable duties, and noted the contention that such duties impose liability by assertion rather than reasoning.[535] The criticisms that Mason J acknowledged were that no criteria had been offered for distinguishing duties which are non-delegable from duties which are not (essentially the point made by Windeyer J in *Voli*); that classification of a duty as non-delegable rests on little more than assertion; and, that it departs from the basic principles of liability in negligence.[536]

478 As Gummow J put it in *Scott v Davis*, the preferred criteria might be historically descriptive but they are not normatively predictive.[537] Hayne J was equally sceptical in *Leichhardt Municipal Council v Montgomery*, suggesting that the doctrinal roots of non-delegable duties are anything but deep or well-established.[538] His Honour concluded that the identification of duties as non-delegable "should not be done where there is no sound doctrinal basis for the notion, and there is no pressing practical reason for doing so".[539]

479 The criticisms of non-delegable duties made by Gummow and Hayne JJ in *New South Wales v Lepore* are of particular relevance to this case. Their Honours found that a reading of the cases "suggests perhaps no more than pragmatic responses to perceived injustices or other shortcomings associated with the doctrine of common employment, the rules respecting vicarious liability and the rule in *Rylands v Fletcher* [(1868) LR 3 HL 330]".[540] Their Honours pointed to similarities in the justifications for imposing vicarious liability and non-delegable duties, and expressed concern to avoid the imposition of duties that would render the duty-holder an insurer of the obligee.[541]

480 Gummow and Hayne JJ conceived of non-delegable duties as "unusual principles intended to be a particular extension of ordinary negligence principles in certain limited circumstances".[542] That characterisation accurately reflected

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535 *Kondis* (1984) 154 CLR 672 at 684.

536 *Kondis* (1984) 154 CLR 672 at 686.

537 *Scott* (2000) 204 CLR 333 at 416-417 [248].

538 *Montgomery* (2007) 230 CLR 22 at 76 [155].

539 *Montgomery* (2007) 230 CLR 22 at 76 [156].

540 *Lepore* (2003) 212 CLR 511 at 595-596 [246].

541 *Lepore* (2003) 212 CLR 511 at 600-601 [260]-[261]. See also Giliker, *Vicarious Liability in Tort: A Comparative Perspective* (2010) at 117.

542 *Lepore* (2003) 212 CLR 511 at 602 [269].

their Honours' earlier observation that there had been no instance of liability for a non-delegable duty except where the liability was the result of negligence of an independent contractor or other third party, as distinct from deliberate criminal conduct.[543] For their Honours, a non-delegable duty to prevent harm caused by the intentional default of a delegate lacked any relevant relationship with the law of negligence, with which non-delegable duties had become associated. Such a duty would introduce a new and wider form of strict liability, inconsistently with the trend of decisions rejecting the expansion of strict liability, and in a way that would distort the proper development of the law of vicarious liability.[544] Gummow and Hayne JJ accordingly rejected, as anomalous, the imposition of a duty capable of being breached by a third party's unlawful conduct in the absence of fault on the duty-holder's part.

481 The *Civil Liability Act 2002* (NSW), which makes detailed provision for "the recovery of damages for ... personal injury caused by the fault of a person",[545] reveals a distinct legislative preference, in the context of institutional abuse cases, for the imposition of vicarious liability instead of the recognition of non-delegable duties. This can be seen particularly in s 5Q, which provides that the extent of liability in tort of a defendant for breach of a non-delegable duty to ensure that reasonable care is taken by a person in the carrying out of any work or task delegated or otherwise entrusted to the person by the defendant is to be determined as if the liability were the vicarious liability for the negligence of the person in connection with the performance of the work or task.

482 In relation to sexual abuse specifically, the recommendation of the Royal Commission into Institutional Responses to Child Sexual Abuse to create a statutory non-delegable duty was adopted.[546] Section 6F was enacted, imposing a statutory duty upon organisations having "responsibility for a child" to take reasonable precautions to prevent child abuse in connection with that responsibility.[547] Section 6F(3) provides for a presumption of breach of duty if there is a finding of child abuse "in connection with the organisation's responsibility for the child, unless the organisation establishes that it took reasonable precautions to prevent the child abuse". These statutory provisions were explained by the Attorney-General to the New South Wales Legislative Assembly

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543 *Lepore* (2003) 212 CLR 511 at 599 [256].

544 *Lepore* (2003) 212 CLR 511 at 601-602 [265]-[269].

545 *Civil Liability Act*, long title.

546 Australia, Royal Commission into Institutional Responses to Child Sexual Abuse, *Final Report: Recommendations* (2017) at 89 [89].

547 *Civil Liability Act*, s 6F(2).

as an explicit legislative choice to impose a statutory duty that "is fault based, not a strict liability".[548] A necessary corollary of the exception in s 6F(3) is that the statutory duty does not extend to child abuse that occurred in circumstances that the organisation could not have prevented by taking reasonable precautions. The imposition of a non-delegable duty that would defeat the intended scope of the statutory duty thereby raises a problem of coherence with the statutory scheme.[549]

483 Accepting that the concept of non-delegable duties has been developed despite substantial criticism, these matters justify caution in expanding the scope of non-delegable duties or expanding the categories of relationship in which non-delegable duties are imposed, caution that has been repeatedly urged.[550]

Categories of non-delegable duties

484 The relationships giving rise to non-delegable duties that have been acknowledged by the common law of Australia are: (1) adjoining owners of land in relation to work threatening support or common walls;[551] (2) employer and employee;[552] (3) school authority and pupil;[553] (4) hospital and patient;[554] and

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548 New South Wales, Legislative Assembly, *Parliamentary Debates* (Hansard), 26 September 2018 at 22.

549 cf *Sullivan* (2001) 207 CLR 562 at 579-580 [50]. See also *Hill* (1997) 188 CLR 159 at 231.

550 See, eg, *Hughes v Percival* (1883) 8 App Cas 443 at 447; *Stoneman v Lyons* (1975) 133 CLR 550 at 574-576; *Scott* (2000) 204 CLR 333 at 417 [248]; *Lepore* (2003) 212 CLR 511 at 569 [153], 596 [247], 601-602 [266], 608 [289]; *Montgomery* (2007) 230 CLR 22 at 88 [190]; *Michael v Chief Constable of South Wales Police* [2015] AC 1732 at 1761 [100]; Swanton, "Non-Delegable Duties: Liability for the Negligence of Independent Contractors – Part I" (1991) 4 *Journal of Contract Law* 183 at 183.

551 *Kondis* (1984) 154 CLR 672 at 681-682, 685; *Burnie Port Authority* (1994) 179 CLR 520 at 550.

552 *Kondis* (1984) 154 CLR 672 at 687-688; *Burnie Port Authority* (1994) 179 CLR 520 at 550.

553 *Ramsay v Larsen* (1964) 111 CLR 16 at 27-28; *Introvigne* (1982) 150 CLR 258 at 271, 274-275, 279; *Kondis* (1984) 154 CLR 672 at 685-686; *Burnie Port Authority* (1994) 179 CLR 520 at 550.

554 *Kondis* (1984) 154 CLR 672 at 685, citing *Gold v Essex County Council* [1942] 2 KB 293 at 304. See also *Burnie Port Authority* (1994) 179 CLR 520 at 550.

(5) occupier and entrant in circumstances involving so-called extra-hazardous activities.[555]

485 The first and fifth categories can be put aside as providing little or no useful analogy to this case, and AA did not suggest otherwise. The first has been explained on the basis of correlative duties between adjoining landowners when authorising works that might interfere with the other's rights of support.[556] The fifth category arises in the circumstances of the defendant's occupation and control over premises or activities on premises, and the plaintiff's corresponding lack of control to prevent harm resulting from a dangerous substance or dangerous activity on the defendant's premises.[557] In each case, the defendant can be seen to have placed the plaintiff at risk by doing something that creates a concern to ensure the safety of a person in physical proximity to the defendant's activity.

486 The second category, the employment relationship, has been explained by the circumstance that, in relevant respects, "the employee's safety is in the hands of the employer; it is his responsibility".[558] The employer has exclusive responsibility for the safety of the appliances, premises and system of work to which the employer subjects their employees, and the employee relies on the employer to discharge that responsibility. As noted by Mason J in *Introvigne*, the non-delegable duty of employers to provide a safe system of work for their employees was introduced to overcome the consequences of the doctrine of common employment (long since abrogated by statute[559]), by which an employee could not recover damages from their employer for an injury suffered as a result of the negligence of a fellow worker.[560] Having evolved in this way, any extension of non-delegable duties must be justified by some consideration other than that the relevant relationship is akin to an employment relationship.

487 That leaves the categories of hospital and patient, and school authority and pupil. The non-delegable duty of hospitals is referrable to the particular characteristics of the hospital and patient relationship in which a patient is accepted by the hospital for treatment, with a consequent relinquishing of control to the

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555 *Burnie Port Authority* (1994) 179 CLR 520.

556 *Kondis* (1984) 154 CLR 672 at 685.

557 *Hazelwood v Webber* (1934) 52 CLR 268 at 278.

558 *Kondis* (1984) 154 CLR 672 at 688.

559 In New South Wales, see *Workers' Compensation Act 1926* (NSW), s 65. See now *Workers Compensation Act 1987* (NSW), s 151AA.

560 *Introvigne* (1982) 150 CLR 258 at 270.

hospital over the circumstances to which the patient is exposed.[561] The duty was first imposed to avoid difficulties in identifying the scope of vicarious liability of hospitals.[562] Thus, "those conducting a hospital are under a direct duty of care to those admitted as patients to the hospital".[563] AA did not suggest that his relationship with the Diocese was characterised by an event analogous to the admission to hospital of a patient for treatment.

Non-delegable duty of a school authority

488 The relationship of school authority and pupil is also markedly different from the relationship between the Diocese and a young person such as AA. The relationship of school authority and pupil is created by an enrolment.[564] Somewhat like the relationship of hospital and patient, the school authority assumes a degree of control over the pupil from the enrolled pupil's parents or carers while the pupil is in the care of the school.

489 The characteristics of the school authority and pupil relationship have been explored in several decisions of this Court. In *Ramsay v Larsen*, a case involving a child injured by falling from a tree on school premises, Kitto J reasoned, as a "necessary inference of fact from the acceptance of a child as a pupil by a school authority", that the authority "undertakes not only to employ proper staff but to give the child reasonable care".[565] In *Introvigne*, Mason J formulated the relevant duty as one "to ensure that reasonable care is taken of them whilst they are on the school premises during hours when the school is open for attendance".[566]

490 Apart from the inferred undertaking referred to by Kitto J, other rationales for imposition of the duty appear from the case law, including the legal and factual authority exercised by a school authority over pupils, and the degree of control exercisable by a school authority over school premises. In *Ramsay*, Taylor J explained a less onerous duty, namely, to take reasonable care for the pupil's safety, by reference to the compulsory removal of pupils from the protection and control of their parents to schools established for their reception and provided with

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561 *Gold* [1942] 2 KB 293; *Cassidy v Ministry of Health* [1951] 2 KB 343. cf *Montgomery* (2007) 230 CLR 22 at 74-75 [152]; *Woodland v Swimming Teachers Association* [2014] AC 537 at 583 [23].

562 *Lepore* (2003) 212 CLR 511 at 598 [253].

563 *X (Minors) v Bedfordshire County Council* [1995] 2 AC 633 at 740.

564 *Introvigne* (1982) 150 CLR 258 at 279; *Lepore* (2003) 212 CLR 511 at 564 [142].

565 *Ramsay* (1964) 111 CLR 16 at 28.

566 *Introvigne* (1982) 150 CLR 258 at 269.

teachers to impart instruction and maintain discipline.[567] This source of the less onerous duty drew upon both the authority of a public schoolteacher over the pupils delegated to that teacher by the Crown "in respect of obligations assumed by the Crown" and the nature of the activities performed by those teachers, being instruction and the maintenance of discipline.[568]

491 In *Geyer v Downs*,[569] the Court considered the liability of a headmaster for injuries sustained by an eight-year-old pupil in the school playground before the start of classes. Stephen J noted that children stood in need of care, which could not be provided effectively by their parents while the children were at school.[570] His Honour noted that the "temporal ambit" of the duty would be determined by the circumstances of the relationship on the particular occasion, and adopted the following reasoning of Winneke CJ of the Supreme Court of Victoria of the relationship between schoolmaster and pupil:[571]

> "The reason underlying the imposition of the duty would appear to be the need of a child of immature age for protection against the conduct of others, or indeed of himself, which may cause him injury coupled with the fact that, during school hours the child is beyond the control and protection of his parent and is placed under the control of the schoolmaster who is in a position to exercise authority over him and afford him, in the exercise of reasonable care, protection from injury."

492 In the same case, Murphy and Aickin JJ considered that the nature of the duty owed to pupils was governed by the relationship between schoolmaster and school authority on the one hand and pupils attending the school on the other.[572] Their Honours referred to the duty imposed on children and their parents by the system of compulsory education, and adopted Kitto J's statement in *Ramsay* as to the relevant standard of care.[573]

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567 *Ramsay* (1964) 111 CLR 16 at 37-38.

568 *Ramsay* (1964) 111 CLR 16 at 37-38.

569 (1977) 138 CLR 91.

570 *Geyer* (1977) 138 CLR 91 at 93.

571 *Geyer* (1977) 138 CLR 91 at 93, quoting *Richards v Victoria* [1969] VR 136 at 138-139.

572 *Geyer* (1977) 138 CLR 91 at 101.

573 *Geyer* (1977) 138 CLR 91 at 101-102, quoting *Ramsay* (1964) 111 CLR 16 at 27.

493 Dissenting in *Lepore*, McHugh J concluded that the school authority's duty extended to taking reasonable care to ensure that a pupil is supervised so that they do not suffer harm caused by a teacher in the employment of the relevant school authority.[574] McHugh J's analysis commenced by reference to the source of the duty – for a State authority, in the exercise of government power and the system of compulsory education;[575] and for a private school authority, from the contract between the school and the pupil's parents or guardian.[576] That is, for McHugh J, the legal authority of a school authority over its pupils was of primary significance. McHugh J next referred to the control exercised by schools over their pupils, who were placed beyond the care and protection of their parents and "whose immaturity is likely to lead to harm to the pupil unless the authority exercises reasonable care in supervising him or her",[577] as well as the responsibility assumed by a school for its pupils' protection. For McHugh J, a non-delegable duty arose "because the defendant has expressly or impliedly undertaken to have the duty performed".[578]

494 McHugh J considered it "vital" to determine with precision "what the duty is".[579] His Honour rejected the formulation of the duty, by Mason P in the Court below in *Lepore*, that the duty extended to ensuring that pupils were not injured physically at the hands of an employed teacher whether negligently or intentionally, and confined the non-delegable duty by reference to the school authority's supervisory role over its pupils.[580] Thus, in the case of Mr Lepore, the State owed a duty "to ensure that reasonable care was taken in supervising the activities of the plaintiff and protecting him from harm while he was on the school premises during the times that students were known to be on school grounds".[581]

495 Finally, the decision of the Supreme Court of the United Kingdom in *Woodland v Swimming Teachers Association*[582] considered the non-delegable duty owed by a school authority in connection with personal injury suffered by a pupil

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574 *Lepore* (2003) 212 CLR 511 at 571 [159].

575 *Lepore* (2003) 212 CLR 511 at 563 [139], 571-572 [161].

576 *Lepore* (2003) 212 CLR 511 at 563 [139].

577 *Lepore* (2003) 212 CLR 511 at 563 [139].

578 *Lepore* (2003) 212 CLR 511 at 566 [146].

579 *Lepore* (2003) 212 CLR 511 at 570 [158].

580 *Lepore* (2003) 212 CLR 511 at 571-572 [159]-[161].

581 *Lepore* (2003) 212 CLR 511 at 571 [161].

582 [2014] AC 537.

at a swimming lesson conducted off the school premises and by an independent contractor. Lord Sumption found that the relevant duty involved an assumption by the defendant of "a liability analogous to that assumed by a person who contracts to do work carefully".[583] The duty was "to ensure that the claimant's swimming lessons were carefully conducted and supervised, by whomever [the education authority] might get to perform these functions".[584] His Lordship identified the factors supporting the duty in English common law as "the vulnerability of the claimant, the existence of a relationship between the claimant and the defendant by virtue of which the latter has a degree of protective custody over him, and the delegation of that custody to another person".[585] His Lordship noted that it is "characteristic of such relationships that they involve an element of control over the claimant, which varies in intensity from one situation to another, but is clearly very substantial in the case of schoolchildren".[586] Another defining feature of the relationship was said to be that the defendant "has delegated to a third party some function which is an integral part of the positive duty which [they have] assumed towards the claimant; and the third party is exercising, for the purpose of the function thus delegated to [the third party], the defendant's custody or care of the claimant and the element of control that goes with it".[587]

496 Lord Sumption rationalised the imposition of the non-delegable duty in that case by reference to:[588]

> "the long-standing policy of the law, apparent notably in the employment cases, to protect those who are both inherently vulnerable and highly dependent on the observance of proper standards of care by those with a significant degree of control over their lives. Schools are employed to educate children, which they can do only if they are allowed authority over them. That authority confers on them a significant degree of control. When the school's own control is delegated to someone else for the purpose of performing part of the school's own educational function, it is wholly reasonable that the school should be answerable for the careful exercise of its control by the delegate."

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583 *Woodland* [2014] AC 537 at 573 [7].

584 *Woodland* [2014] AC 537 at 586 [26].

585 *Woodland* [2014] AC 537 at 576 [12]. See also 583 [23].

586 *Woodland* [2014] AC 537 at 583 [23].

587 *Woodland* [2014] AC 537 at 583 [23].

588 *Woodland* [2014] AC 537 at 584 [25(1)].

497 Among other matters, Lord Sumption also relied upon the legal requirement imposed upon parents to entrust their child to a school and parental reliance on the school's ability to look after them; the substantial control of the school over the schoolchildren and the children's lack of control over how the school chooses to perform the assumed obligations (that is, whether through employees or third parties); the fact that swimming lessons were an integral part of the school's teaching function and the alleged negligence "occurred in the course of the very functions which the school assumed an obligation to perform and delegated to its contractors"; and that comparable contractual duties exist in the case of fees-paying schools.[589] His Lordship contrasted the position of parents, whose custody and control "is not only gratuitous, but based on an intimate relationship not readily analysable in legal terms"; while "[s]chools provide a service either by contract or pursuant to a statutory obligation, and while local education authority schools do not receive fees, their staff and contractors are paid professionals".[590]

Undertaking or assumption of responsibility as a common element in special relationships?

498 The concepts of "undertaking", "assumption of responsibility" and "control" have been used to describe elements of the special relationships that attract non-delegable duties of care.

499 In *Kondis*, Mason J identified the characteristics of relationships between the parties that make it appropriate to impose on the defendant a duty to ensure that reasonable care and skill is taken for the safety of the persons to whom the duty is owed by reference to the language of undertaking and assumption of responsibility. Thus, his Honour said:[591]

> "The hospital *undertakes* the care, supervision and control of patients who are in special need of care. The school authority *undertakes* like special responsibilities in relation to the children whom it accepts into its care. If the invitor be subject to a special duty, it is because he *assumes a particular responsibility* in relation to the safety of his premises and the safety of his invitee by inviting him to enter them. And in *Meyers v Easton* the *undertaking* of the landlord to renew the roof of the house was seen as impliedly carrying with it an undertaking to exercise reasonable care to prevent damage to the tenant's property. In these situations the special duty arises because the person on whom it is imposed has *undertaken* the care,

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589 *Woodland* [2014] AC 537 at 584-586 [25]-[26].

590 *Woodland* [2014] AC 537 at 585 [25(6)].

591 *Kondis* (1984) 154 CLR 672 at 687 (emphasis added). See also *Bird* (2024) 98 ALJR 1349 at 1360 [37]; 419 ALR 552 at 562.

> supervision or control of the person or property of another *or is so placed in relation to that person or his property as to assume a particular responsibility for his or its safety*, in circumstances where the person affected might reasonably expect that due care will be exercised."

500 This language is imprecise and provides an uncertain basis for reasoning to the imposition of a non-delegable duty in a new category of case.[592] Mason J's explanation does not reveal the nature of the necessary undertaking or assumption of responsibility, although it suggests that the duty will arise out of some defined task or job on the part of the defendant that places the plaintiff's safety at risk.[593] From Mason J's description of the facts in *Meyers v Easton*,[594] it appears that the relevant undertaking was "at the solicitation of" the landlord's tenant.[595] The requirement of a consensual arrangement about the scope of the undertaking is consistent with the analogy drawn by Lord Sumption in *Woodland* to contractual liability. In three of the categories of cases identified by Mason J (hospital and patient, school authority and pupil, and landlord and tenant), the relationship of duty-holder and obligee involved the performance by the duty-holder of some service or activity for the obligee. In the case of the invitor, Mason J identified the source of the duty as an invitation to the invitee to enter the invitor's premises, so that the scope of the assumed responsibility was inferred from that invitation.[596]

501 Mason J's conception of the "common element" of relationships involving a non-delegable duty was accepted by the majority in *Burnie Port Authority*.[597] In that case, property damage resulted from the negligence of an independent contractor in starting a fire that spread to an area occupied by a licensee and caused damage to the licensee's stock. The majority considered that "[i]n most, though conceivably not all, of such categories of case", what generates the "special responsibility or duty to see that care is taken" was identified by Mason J in *Kondis*, being (1) the duty-holder undertaking the care, supervision or control of the person

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592 Barker, "Unreliable Assumptions in the Modern Law of Negligence" (1993) 109 *Law Quarterly Review* 461. See also *HXA v Surrey County Council* [2024] 1 WLR 335 at 359 [90]; [2024] 3 All ER 341 at 363-364.

593 Murphy, "Juridical Foundations of Common Law Non-Delegable Duties", in Neyers, Chamberlain and Pitel (eds), *Emerging Issues in Tort Law* (2007) 369 at 383-387.

594 (1878) 4 VLR (L) 283.

595 *Kondis* (1984) 154 CLR 672 at 685, citing *Meyers v Easton* (1878) 4 VLR (L) 283 at 283.

596 *Kondis* (1984) 154 CLR 672 at 686.

597 (1994) 179 CLR 520 at 550-551.

or property of another; or (2) the duty-holder being "so placed in relation to that person or his property as to assume a particular responsibility for his or its safety", both in circumstances in which the obligee might reasonably expect that due care will be exercised.[598] The majority referred to this element as the "central element of control" on the part of the duty-holder.[599]

502 The majority in *Burnie Port Authority* found that the relationship between the building owner and licensee corresponded with the second aspect of the central element of control, that is:[600]

> "[T]he person who introduces (or allows another to introduce) the dangerous substance or undertakes (or allows another to undertake) the dangerous activity on premises which he or she controls is 'so placed in relation to [the other] person or his property as to assume a particular responsibility for his or its safety'."

503 The majority later identified the relevant principle in the following terms:[601]

> "[A] person who takes advantage of his or her control of premises to introduce a dangerous substance, to carry on a dangerous activity, or to allow another to do one of those things, owes a duty of reasonable care to avoid a reasonably foreseeable risk of injury or damage to the person or property of another. In a case where the person or property of the other person is lawfully in a place outside the premises that duty of care both varies in degree according to the magnitude of the risk involved and extends to ensuring that such care is taken."

504 The concept of an "assumption of responsibility" was explained by the plurality in *Mallonland Pty Ltd v Advanta Seeds Pty Ltd* as "an undertaking (whether express or implied) by a person to take on a task or job for another person or class of persons, from which it can be inferred that the first person accepted that he or she would take reasonable care when engaging in that task or job".[602] This explanation conforms with the idea that an assumption of responsibility involves some positive act by the defendant to embark upon a defined task or job

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598 *Burnie Port Authority* (1994) 179 CLR 520 at 550-551, citing and quoting *Kondis* (1984) 154 CLR 672 at 687.

599 *Burnie Port Authority* (1994) 179 CLR 520 at 551.

600 *Burnie Port Authority* (1994) 179 CLR 520 at 551-552.

601 *Burnie Port Authority* (1994) 179 CLR 520 at 556-557.

602 *Mallonland* (2024) 98 ALJR 956 at 966 [33]; 418 ALR 639 at 648. See also *Bryan* (1995) 182 CLR 609 at 624.

and implies a measure of control over the results of the assumed task.[603] The plurality in *Mallonland* accepted that a defendant's assumption of responsibility is "a fact found from evidence relating to the relationship between the parties, their conduct, and the reliance of the other party".[604]

505 Identifying a defendant's assumption of responsibility by reference to their promise to do something for the plaintiff, or by the defendant's conduct in embarking upon the performance of a task for the plaintiff, or by accepting a task that is "entrusted" by the plaintiff to the defendant,[605] may be relatively straightforward. For example, in *Cassidy v Ministry of Health*, Denning LJ drew an analogy between hospital authorities who accept patients for treatment and railway or shipping authorities who accept passengers for carriage, saying "[o]nce they undertake the task, they come under a duty to use care in the doing of it, and that is so whether they do it for reward or not".[606]

506 Similarly, by reference to English cases, Professor Donal Nolan has concluded that "the most plausible way of characterising the conduct that, at least prima facie, triggers [the judicial conclusion that an assumption of responsibility has taken place] is that *A has taken on a task or job for B*".[607] The definition of the scope of the duty by reference to a particular task or job appears in some of the earliest cases about non-delegable duties. For example, in *Pickard v Smith*,[608] which Mason J identified as the source of the concept of the non-delegable duty as applied to a common law duty of care,[609] Williams J identified an employer's liability in cases "in which the act which occasions the injury is one which the contractor was employed to do" or "in which the contractor is entrusted with the

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603 Nolan, "Assumption of Responsibility: Four Questions" (2019) 72 *Current Legal Problems* 123 at 128.

604 *Mallonland* (2024) 98 ALJR 956 at 964 [27]; 418 ALR 639 at 646, citing *Mallonland Pty Ltd v Advanta Seeds Pty Ltd* (2023) 13 QR 492 at 527 [118].

605 See, eg, *Lloyd v Grace, Smith & Co* [1912] AC 716; *Colonial Mutual Life Assurance Society Ltd v Producers and Citizens Co-operative Assurance Co of Australia Ltd* (1931) 46 CLR 41; *Morris v C W Martin & Sons Ltd* [1966] 1 QB 716.

606 *Cassidy* [1951] 2 KB 343 at 360. See also *Albrighton v Royal Prince Alfred Hospital* [1980] 2 NSWLR 542 at 561 [55]-[56]; *Elliott v Bickerstaff* (1999) 48 NSWLR 214 at 243 [89].

607 Nolan, "Assumption of Responsibility: Four Questions" (2019) 72 *Current Legal Problems* 123 at 128 (emphasis in original).

608 (1861) 10 CB (NS) 470 [142 ER 535].

609 *Kondis* (1984) 154 CLR 672 at 684.

performance of a duty incumbent upon his employer, and neglects its fulfilment, whereby an injury is occasioned".[610] In *Hughes v Percival*, Lord Blackburn identified the non-delegable duty by asking whether "the operation, during which the defendant's duty required him to see that reasonable care and skill should be used, [was] over at the time when those engaged in the work cut into the party-wall".[611] Lord Watson identified a defence to liability that "it could not have been reasonably anticipated that any workman of ordinary skill in such operations, who was neither insane nor dishonest, would have dreamt of cutting the wall".[612] Lord FitzGerald considered that the defendant was not his neighbour's insurer but was under a duty "to have used every reasonable precaution that care and skill might suggest in the execution of his works".[613]

507 More recently, in *Bryan v Maloney*, Mason CJ, Deane and Gaudron JJ found a builder's assumption of responsibility to future owners of a house in his undertaking "the responsibility of erecting a structure".[614] In *Pyrenees Shire Council v Day*, Gummow J stated that a public authority which enters upon the exercise of statutory powers with respect to a particular subject matter may place itself in a relationship to others which imports a common law duty to take care which is to be discharged by the continuation or additional exercise of those powers.[615] Conversely, in *Hill v Van Erp*, his Honour disapproved of a general notion of "assumption of responsibility" without identification of those for whom or for whose benefit services are performed.[616]

508 An assumption of responsibility arising from the duty-holder being "placed in relation to" the obligee reflects the creation of a substantial risk to the obligee with which the duty-holder is relevantly connected. This explanation was identified by Kirby J in *Montgomery*,[617] referring to an argument developed by Professor John Murphy. Professor Murphy posited that the creation of a substantial

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610 *Kondis* (1984) 154 CLR 672 at 684, quoting *Pickard v Smith* (1861) 10 CB (NS) 470 at 480 [142 ER 535 at 539].

611 *Hughes* (1883) 8 App Cas 443 at 447.

612 *Hughes* (1883) 8 App Cas 443 at 451.

613 *Hughes* (1883) 8 App Cas 443 at 455.

614 *Bryan* (1995) 182 CLR 609 at 627.

615 *Pyrenees Shire Council v Day* (1998) 192 CLR 330 at 391-392 [177], citing *Sutherland Shire Council* (1985) 157 CLR 424 at 459-460.

616 *Hill* (1997) 188 CLR 159 at 231.

617 (2007) 230 CLR 22 at 64 [117].

risk "carries with it a necessary assumption (or imputation) of responsibility",[618] and concluded that a non-delegable duty "arises out of something the defendant has done (or had done) to place the claimant at risk, or heighten his or her vulnerability".[619] Kirby J considered that non-delegable duties apply in the context of "clear affirmative duties to control either a dangerous person or a dangerous thing and to protect the claimant's person, property or legal affairs as a result".[620] Substantial risk and its obverse, "special dependence or vulnerability",[621] were grounds for the assumed responsibility identified in *Burnie Port Authority*. These observations emphasise that the relevant vulnerability is not simply the obvious vulnerability of a child to sexual abuse by a person who seeks to commit sexual acts upon that child. Rather, the relevant vulnerability is the vulnerability of a child in the Wallsend parish to sexual abuse resulting from the Catholic Church's pursuit of its religious mission in that parish through the provision by priests of care for or supervision of children.

509 The existence or otherwise of a substantial risk is also material to the non-delegable duty owed by a school authority. In *Introvigne*, Mason J referred to the "immaturity and inexperience of the pupils and their propensity for mischief" as one of the bases of the special responsibility which founds the non-delegable duty.[622]

Authority as a basis for a non-delegable duty?

510 In *Burnie Port Authority*, the majority identified the defendant's authority over the plaintiff as a consideration supporting the non-delegable duty in that case, because "it is the person in control who has authorized or allowed the situation of foreseeable potential danger to be imposed on the other person by authorizing or allowing the dangerous use of the premises and who is likely to be in a position to insist upon the exercise of reasonable care".[623]

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618 Murphy, "Juridical Foundations of Common Law Non-Delegable Duties", in Neyers, Chamberlain and Pitel (eds), *Emerging Issues in Tort Law* (2007) 369 at 380.

619 Murphy, "Juridical Foundations of Common Law Non-Delegable Duties", in Neyers, Chamberlain and Pitel (eds), *Emerging Issues in Tort Law* (2007) 369 at 391.

620 *Montgomery* (2007) 230 CLR 22 at 65 [120].

621 *Burnie Port Authority* (1994) 179 CLR 520 at 551.

622 *Introvigne* (1982) 150 CLR 258 at 271.

623 *Burnie Port Authority* (1994) 179 CLR 520 at 552.

511 Similar reasoning can be seen in *McInnes v Wardle*,[624] which held that an occupier owed a duty to take care that his land was so used and the operations carried out upon it were so managed that his neighbours were not exposed to injury by exceptional dangers, such as fire. Gavan Duffy CJ and Starke J found that an occupier is liable for damage by fire lit in dangerous circumstances by an authorised person, whether servant or contractor, notwithstanding that the conditions of authority have not all been complied with or have been abused.[625] Dixon J found that the occupier "knew, or ought to have known, that in the course of operations conducted for his benefit upon land in his occupation, fire would be employed if, as was likely, its use was found necessary or expedient in the opinion of the person whom he had authorized to be there for the execution of the work".[626] Evatt J found that the occupier must be taken to have expressly authorised the independent contractor to burn for the intended purpose.[627] McTiernan J found that the "pivots" of the case were the duty of the defendant as occupier of land where the fires were lit and the fact that the fires were kindled in the course of carrying on operations on the land which were authorised by the defendant.[628] Quoting *Black v Christchurch Finance Co Ltd*,[629] McTiernan J considered it relevant that the defendant's independent contractor, who lit the fire, did not do so "for amusement or maliciously".[630]

512 In *Black*, the Privy Council also considered that authority was determinative of liability. Lord Shand, for their Lordships, concluded that "[h]aving authorized and entrusted the operation of burning to another [the defendants] must answer for his proceedings, however much he may have violated their instructions or the detailed conditions of his contract with them. ... There was but one contract, to fell and to burn, that is to clear the land, and though the contractor disregarded the stipulation which the defendants made with him as to the time of burning, this cannot relieve them from responsibility."[631]

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624 (1931) 45 CLR 548.

625 *McInnes* (1931) 45 CLR 548 at 550.

626 *McInnes* (1931) 45 CLR 548 at 551.

627 *McInnes* (1931) 45 CLR 548 at 552.

628 *McInnes* (1931) 45 CLR 548 at 553.

629 [1894] AC 48.

630 *McInnes* (1931) 45 CLR 548 at 553, quoting *Black* [1894] AC 48 at 51.

631 *Black* [1894] AC 48 at 55-56.

513 As already noted, the duty-holder's authority is significant in the special relationship between a school authority and a pupil. A school is placed in a position of significant power over its students. It has been argued that the potential for abuse of authority provides a justification for strict liability for sexual abuse where authority is conferred upon a teacher or other educator to direct the conduct of a student.[632] As Gummow and Hayne JJ noted in *Lepore*, the opportunity for sexual assaults on young people by a teacher is obviously provided by the role, central to the teacher's task, "of guiding and leading the child ... through the journey of learning".[633]

514 In the employment context, vicarious liability has been imposed where the teacher or other educator is purporting to exercise the employer's authority by performing their assigned role immediately before the abuse occurred.[634] Conversely, the absence of relevant authority over the plaintiff resulted in a conclusion that a recreational club was not liable for sexual abuse committed by the club's employed program director.[635] The club had no power or authority over the children.[636] Attendance at the club was voluntary and children were free to come and go as they pleased.[637]

515 A religious organisation such as the Diocese, while not vested with any statutory or other legal authority, may be capable of conferring moral authority on a member of the organisation, such as a priest. In a case such as the present, it would be necessary to identify the nature and extent of such an authority to determine its legal significance, and whether any wrongful conduct occurred in the purported exercise of the conferred moral authority. Conferral of authority would not support a duty extending to conduct that is not relevantly connected to that authority.

Scope of non-delegable duties

516 A non-delegable duty is imposed "in relation to a particular kind of activity – employing others in some business or other venture, conducting a school

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632 See, eg, Beuermann, *Reconceptualising Strict Liability for the Tort of Another* (2019), ch 5.

633 *Lepore* (2003) 212 CLR 511 at 587 [216].

634 *Bazley v Curry* [1999] 2 SCR 534; *Lister v Hesley Hall Ltd* [2002] 1 AC 215.

635 *Jacobi v Griffiths* [1999] 2 SCR 570.

636 *Jacobi* [1999] 2 SCR 570 at 595 [41], 597 [43].

637 *Jacobi* [1999] 2 SCR 570 at 621 [83].

or hospital. The duty concerns the *conduct* of that activity."[638] Thus, for example, the scope of a non-delegable duty to provide medical care depends upon what services the defendant has undertaken to supply.[639] The duty extends only to negligence "in the performance of the very function assumed by the defendant and delegated by the defendant to [the third party]".[640] Thus, an employer's liability is for anything necessarily involved in the performance of the task given to an independent contractor but not for the contractor's "collateral" or "casual" negligence.[641] The latter descriptions have been criticised as meaning no more than that the liability extends only to acts within the scope of the contractor's authority or within the course of employment.[642] A suggested alternative formulation of the applicable limit is that the employer's liability extends to risks inherent in the undertaking – that is, risks arising from how the undertaking will necessarily be performed or how the employer directs the undertaking to be performed.[643] As already noted, other suggested limits include the "temporal ambit" of the duty,[644] whether the negligent conduct was not done out of amusement or malice,[645] and the sanity and honesty of the alleged wrongdoer.[646] Each of these limits serves to ensure that the wrongful conduct of the duty-holder's delegate is sufficiently connected with the relationship between the duty-holder and obligee so as to fall within the scope of the duty.

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638 *Lepore* (2003) 212 CLR 511 at 600 [261] (emphasis in original).

639 *Ellis v Wallsend District Hospital* (1989) 17 NSWLR 553 at 604; *A (A Child) v Ministry of Defence* [2005] QB 183.

640 *Woodland* [2014] AC 537 at 583 [23].

641 *Transfield Services (Australia) Pty Ltd v Hall* (2008) 75 NSWLR 12 at 29-30 [88]-[89]. cf *McDermid v Nash Dredging & Reclamation Co Ltd* [1987] AC 906 at 911-912, 919-920.

642 Swanton, "Non-Delegable Duties: Liability for the Negligence of Independent Contractors – Part II" (1992) 5 *Journal of Contract Law* 26 at 41-42.

643 *Northern Sandblasting* (1997) 188 CLR 313 at 332-333; Sappideen et al, *Fleming's The Law of Torts*, 11th ed (2024) at 533 [17.270].

644 *Geyer* (1977) 138 CLR 91 at 93.

645 *McInnes* (1931) 45 CLR 548 at 553.

646 *Hughes* (1883) 8 App Cas 443 at 451.

No non-delegable duty in this case

517 For the following reasons, the relationship between the Diocese and AA was not analogous to one of the "special relationships" in which a non-delegable duty is owed to ensure that reasonable care is taken of the obligee. The relationship did not involve the Diocese taking on a task or job for AA, or for a class of persons of which AA was a member, by which the Diocese assumed a legal responsibility to exercise due care in the performance of that task or job. More specifically, the Diocese did not take on any task or job for children invited onto Diocesan premises by a Diocesan priest. An appropriately cautious approach to the development of the common law would not impose a non-delegable duty of the kind contended for by AA, or any broader non-delegable duty, on the Diocese.

General aspects of the relationship between AA and the Diocese

518 As the primary judge did not address AA's claim that he was owed a non-delegable duty of care by the Diocese, her Honour's findings did not focus attention on features of the relationship between AA and the Diocese. Her Honour made no findings that there were any relevant dealings between AA's parents and any person on behalf of the Diocese, let alone dealings that could be characterised as an entrustment of AA into the care of the Diocese. In contrast with the relationship of school authority and pupil, any relationship between AA and the Diocese was entirely voluntary. The Diocese had no legal authority to require AA to attend the presbytery and otherwise exercised no legal control over AA. There was no suggestion that AA was not free to leave the presbytery at any time on the occasions that he visited it.

519 The primary judge found that the Bishop's appointment of a priest to a parish conferred a status which led to parishioners affording that priest trust, respect, loyalty and cooperation, and resulted in priests being held in high regard by the vast majority of the wider general community. While the primary judge found that Fr Pickin had "authority, power, trust [and] control" in relation to AA,[647] she did not explain the precise nature of those aspects of the relationship between Fr Pickin and AA, or how those aspects of Fr Pickin's situation were derived from his role as a priest. For example, her Honour made no explicit findings about Fr Pickin's authority in relation to AA or when or how Fr Pickin exercised that authority. Nor did the primary judge find that AA or his parents trusted Fr Pickin in any particular respect, including as a carer for or educator of AA. In *Prince Alfred College*, these aspects of the boarding housemaster's role were combined with "the ability to achieve intimacy" with the plaintiff.[648] The primary

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647 *AA v Trustees, Roman Catholic Church, Diocese of Maitland-Newcastle* (2024) 334 IR 70 at 104 [216].

648 *Prince Alfred College* (2016) 258 CLR 134 at 160 [81].

judge made no findings that Fr Pickin's role required, or was even likely to involve, Fr Pickin engaging with AA in any intimate way such as having access to his sleeping quarters. There was also no finding of any intimate contact between Fr Pickin and AA, except to the extent that the sexual assaults themselves could be misdescribed as involving intimacy.

Creation of an opportunity for wrongdoing is insufficient

520 The primary judge found that Fr Pickin's role as a Diocesan priest afforded him the opportunity to sexually abuse AA. Her Honour explained the significance of that role in terms of the "access" which it gave Fr Pickin to children and students, and found that the Diocese "enabled" Fr Pickin to arrange those opportunities.

521 These findings do not sufficiently connect Fr Pickin's role as a priest with the occurrence of the sexual assaults to support the imposition of a non-delegable duty of care upon the Diocese. Her Honour found that the Friday night assaults did not occur at "Church events" and did not otherwise find any link between the assaults and the discharge of Fr Pickin's role as a priest, including his roles in the provision of pastoral care or religious education. Her Honour made no finding that the assaults occurred in the actual or purported performance of any task or job taken on by the Diocese in relation to AA and delegated by the Diocese to Fr Pickin. More broadly, the primary judge made no finding that the assaults occurred in the actual or purported performance by Fr Pickin of his priestly role. There was no evidence capable of supporting any such findings.

522 As to the significance of the presbytery as the location of the abuse, although the primary judge accepted the effect of Fr Dillon's evidence that a priest had broad, and generally unsupervised, authority to invite parishioners to the presbytery, there was no finding that the Bishop conferred any function upon Fr Pickin that required him to invite youths like AA to the presbytery, or that justified the invitations that led to AA's visits. As Ball JA observed in the Court of Appeal, it is difficult to conceive of a plausible explanation for Fr Pickin's supply of AA and other boys with alcohol at the presbytery except to create the opportunity for the sexual abuse that occurred. Fr Dillon gave evidence about the limits of Fr Pickin's authority and the primary judge found no reason to doubt his evidence. That evidence included that a Diocesan property could not be used in any way contrary to the wishes or directions of the Bishop; and while the parish priest's authorisation and permission would normally be sufficient for activities and uses that were directly part of the Church's mission, the Bishop could and usually would prohibit the use of premises for a purpose of which he disapproved.

No entrustment of AA into the care of the Diocese

523 In written submissions, AA framed the issue in this appeal as being whether the Diocese, in the 1960s, owed a non-delegable duty to children "entrusted to the pastoral care of a priest of the [D]iocese for religious education", to ensure that the

priest did not commit an intentional criminal act, namely sexual abuse. AA's submissions referred to young people "entrusted to [the Diocese's] pastoral and educational care", and described AA as a young person "entrusted to the care of an institution" or "entrusted to the care of one of the Diocese's priests".

524 The language of entrustment is evocative of a bailment relationship, in which goods are entrusted by the bailor to the custody of the bailee; or the school authority and pupil relationship, in which, as Lord Sumption said in *Woodland*, parents are required to entrust their children into the school's care, which has a degree of "protective custody".[649] It is inherent in the relationship of bailor and bailee that the bailee has a duty to take reasonable care to keep the goods bailed safe against third parties, including criminal third parties, because the bailee, by reason of its control of the goods, is in the best position to fulfil it.[650]

525 AA's written submissions obscured the identity of the person who was said to have "entrusted" AA to the Diocese. AA acknowledged that there was no act of entrustment by AA's parents, analogous to enrolment of a child at a school. There was no finding, and no evidence, that AA was otherwise entrusted to the care of the Diocese by either his parents, or the State, on any occasion. To the extent that it might be said that AA entrusted himself to Fr Pickin's care by accepting his invitations to the presbytery, there was no finding that AA sought Fr Pickin's care by, for example, seeking refuge at the presbytery from some danger, or some form of pastoral care. In any event the evidence was inconsistent with any belief on AA's part that Fr Pickin offered or provided him with care. In those circumstances, there is no evidentiary basis for reasoning from the primary judge's finding that AA was "in the care of" Fr Pickin when Fr Pickin sexually abused him to a finding that AA was in the care of the Diocese on those occasions, and AA did not submit to the contrary.

526 The only explanations offered for why AA visited the presbytery on the occasions of his abuse were that AA feared that he would anger his parents if he did not make those visits and because Fr Pickin told him to. AA submitted that the relevant facts were that he and other children went to the presbytery and that the parents believed they were going to a religious class or something of that nature. Unsurprisingly, the only available evidence about his parents' beliefs was AA's evidence about what he told his parents. This did not include an explanation from AA to them about why he visited the presbytery. AA was cross-examined as to what he had told his parents. He gave evidence that he told his father and stepmother that "we were going up with the meeting with [Fr Pickin]" and "we were going to meet [Fr Pickin] up at the church". In answer to a question about

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649 *Woodland* [2014] AC 537 at 576 [12].

650 *Ashrafi Persian Trading Co Pty Ltd t/as Roslyn Gardens Motor Inn v Ashrafinia* (2002) Aust Torts Reports ¶81-636 at 68,335-68,336 [65].

whether they asked anything about what AA had been doing up at the presbytery, AA answered "[n]o, not really". This evidence does not provide a solid basis to infer that AA's parents believed that AA went to meet Fr Pickin, and the primary judge did not make a finding to that effect.

527 Consistently with the limited available evidence, the primary judge made no finding that AA's parents gave him permission to attend the presbytery. Apparently to the contrary, AA had told one of the expert psychiatrists, Dr Apler, that his father was "a hard man, he drank at the pub every night and he would come home feeling merry, but sometimes he could come home and explode and hit [AA's stepmother] and throw things". Further, the primary judge found that, on one occasion, AA and his friend Mr Perry returned from the presbytery to AA's home, where AA's father noticed that they had been drinking. AA's father responded by forcing Mr Perry to drink more alcohol, to the point that he became drunk. Her Honour's finding raises doubt about the knowledge of AA's father about AA's visit to the presbytery on that occasion and, given his nightly attendance at the pub, on other occasions. The evidence does not support a finding that AA's parents played any role in permitting his visits to the presbytery.

No undertaking by the Diocese of AA's care, supervision or control

528 Bishop Toohey directed priests including Fr Pickin, whom he appointed to parishes within the Diocese, to live and work in those parishes and to engage in religious education and pastoral care as part of their ordinary functions as a priest of the Catholic Church. The Bishop encouraged and expected parish priests to "engage" with the youth of their parish and to give them religious education and pastoral care; and a priest was subject to the direction and control of the Bishop in relation to the performance of his ministry. Parish priests were permitted to hold events "as they saw fit".

529 These facts are insufficient to support a conclusion that the Diocese's activities included the provision of care for or supervision of children analogous to the activities of a school authority. There was no finding by the primary judge that the Diocese's activities included the care for or supervision of children, aside from occasions such as movie nights, camping trips and other parish community activities which may have involved some incidental care or supervision. The Bishop's expectation of priests to "engage" with youth is too general to describe an undertaking of the Diocese, and there was no suggestion that the Catholic Church's expectation of priestly engagement by priests with youth was unqualified by an expectation of compliance with laws against sexual misconduct. Further, any such undertaking was confined by the purposes of the Diocese: it did not extend to engagement for the personal gratification of a priest.

530 The primary judge found that there was no suggestion that Fr Pickin invited the boys to the presbytery for religious instruction, and that the Friday nights were not "Church events". AA's evidence that AA thought he was invited to the

presbytery to further his religious instruction, not explicitly rejected by the primary judge, provides no additional support for a finding that the Diocese undertook to provide AA with care or supervision on the Friday nights when the sexual assaults occurred. The primary judge did not find that Fr Pickin was acting in the purported performance of any function conferred upon him by the Diocese on the occasions of the sexual assaults, and there is no evidentiary basis for a finding to that effect.

Diocese not placed so as to assume responsibility for AA's safety

531 AA argued that the Diocese assumed responsibility for his care, through its educational and pastoral functions directed to the youth of the Diocese, which were delegated to Fr Pickin in the Wallsend parish. The Diocese, so the argument went, knew that parishioners would be likely to hold the parish priest in high regard and would trust him not to harm children. AA argued that the scope of the obligation assumed by the Diocese towards him was to be inferred from these circumstances.

532 By directing priests to undertake the role of a priest within a parish, the Diocese can be taken to have assumed responsibility for the careful and proper exercise of the functions of a priest in the parish to which he was appointed, on occasions when those functions were exercised for lay people living in the parish. The Diocese's assumption of responsibility therefore extended to the conduct of priests that was connected to their functions, most relevantly the provision of religious education and pastoral care, and engagement with local youth. The assumption of responsibility extended to the avoidance of reasonably foreseeable risks that inhered in the performance of those functions.

533 The functions conferred upon Fr Pickin by the Diocese did not extend to engaging with youth by entertaining them at the presbytery for his personal gratification. Nor was there any finding that any relevant person on behalf of the Diocese knew or believed that it was an inherent risk of the performance of the functions of a priest that he might arrange to sexually abuse a young person in the position of AA on some other occasion when those functions were not being performed.

534 The position can be compared with the assumption of responsibility of a school authority. Accepting that a school authority can be taken to know that its teachers will be regarded as people who can be trusted to look after children placed in the school's care, in *Lepore* McHugh J confined the scope of the school's duty to occasions when pupils were placed in that care.[651] Similarly, in *Woodland*, the relevant duty was found to arise only in relation to the performance by an

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651 *Lepore* (2003) 212 CLR 511 at 571 [159].

independent contractor of functions which "the school has assumed for itself a duty to perform, generally in school hours and on school premises".[652]

535 Finally, AA did not demonstrate that the circumstances of his abuse were circumstances in which he (or his parents) might reasonably have expected that the Diocese would exercise due care for his safety.

No other purported or ostensible exercise of authority

536 The primary judge did not find that the assaults occurred in the pursuit or purported pursuit of any mission of the Catholic Church conferred upon Fr Pickin by Bishop Toohey. The Friday night occasions at which the assaults occurred were not authorised by the Bishop or anyone else on behalf of the Diocese, and it can hardly be doubted that the events were unauthorised, at least to the extent that they invariably involved the supply of alcohol and cigarettes to minors, as well as, on six occasions, sexual assaults upon AA. As Fr Dillon put it, providing alcohol and cigarettes to minors was "just totally out of order in every way possible". The primary judge found that it was "not expected that priests would have unsupervised children at the presbytery, or give them alcohol and cigarettes"; that is, this conduct was not expected by anyone, including any person with authority to act on behalf of the Diocese.

537 The primary judge found that, as a parish priest, Fr Pickin was "entitled" to invite boys from scripture class to the presbytery on Friday nights and was "entitled" to control who had access to the presbytery, which permitted him to invite those boys to the presbytery at night even though no other adult was present. These findings do not entail that the Diocese gave Fr Pickin either unlimited authority to invite children to the presbytery or authority to invite children to the presbytery for social functions antithetical to the aims and purposes of the Catholic Church.

538 Finally, there was no ostensible performance by Fr Pickin of a function conferred by the Diocese in the absence of evidence that the Diocese led AA or his parents to believe that the Friday night events were authorised or permitted by the Diocese.

No affirmative duty to take reasonable care in this case

539 The alternative duty proposed by AA was a duty to take reasonable care to avoid reasonably foreseeable personal injury to children invited onto Diocesan premises by a Diocesan priest and caused by a Diocesan priest at those premises. As explained above, that proposed duty should be understood as a duty to take

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652 *Woodland* [2014] AC 537 at 585 [25(3)].

reasonable care to avoid sexual abuse to children invited onto Diocesan premises by a Diocesan priest and caused by a Diocesan priest at those premises.

540 There is no general duty of care to prevent third parties from causing damage by sexual abuse.[653] As a general rule, the law does not impose a duty to prevent harm to another from the criminal behaviour of a third party, even if the risk of such harm is foreseeable.[654] Three cases illustrate the exceptional nature of the duty and the absence of relevant features to support the proposed duty in this case.

541 First, in *Smith v Leurs*, Dixon J noted that it is "exceptional" to find a duty to control another's actions to prevent harm to strangers, but that "special relations" are the source of a duty of this nature.[655] The example Dixon J gave was the duty of a "parent who maintains control over a young child to take reasonable care so to exercise that control as to avoid conduct on his part exposing the person or property of others to unreasonable danger".[656] In that relationship, exceptional circumstances might justify the imposition of a more stringent duty than an ordinary duty of care, including the identification of a risk of "unreasonable danger" or an "unreasonable risk of injury to others".[657] Dixon J referred to examples given in *Salmond's Law of Torts* concerning the personal negligence of a parent "in affording or allowing his child an opportunity of doing mischief", particularly by authorising or allowing the child to use a dangerous horse or have access to a dangerous weapon.[658]

542 Second, in *Pitt Son & Badgery Ltd v Proulefco*, where the bailee wool broker owed a duty to take such care of goods in its custody as was reasonable in the circumstances, that duty required the broker to take reasonable care to keep out intruders who might misappropriate or damage the goods.[659] The factors that explained the scope of the duty included that it was "foreseeable that, under

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653 *Smith v Littlewoods Organisation Ltd* [1987] AC 241 at 270, quoted in *Modbury Triangle* (2000) 205 CLR 254 at 266 [26].

654 *Modbury Triangle* (2000) 205 CLR 254 at 266-267 [29]; *HXA* [2024] 1 WLR 335 at 359 [88]; [2024] 3 All ER 341 at 363.

655 *Smith* (1945) 70 CLR 256 at 262.

656 *Smith* (1945) 70 CLR 256 at 262.

657 *Smith* (1945) 70 CLR 256 at 262.

658 Stallybrass, *Salmond's Law of Torts: A Treatise on the English Law of Liability for Civil Injuries*, 9th ed (1936) at 69, cited in *Smith* (1945) 70 CLR 256 at 262.

659 *Pitt Son* (1984) 153 CLR 644 at 647.

modern conditions, there might be intruders who might, in one way or another, cause damage to the wool".[660] Rejecting a submission that the bailee was not liable for the acts of an independent third party, Gibbs CJ observed that "[t]he tortious act of the intruder was of the very kind which the appellant was obliged to take reasonable care to prevent".[661] Subsequently, in *March v E & M H Stramare Pty Ltd*, Mason CJ considered that intervening conduct of a third party would not negate liability in negligence "if the intervening action was in the ordinary course of things the very kind of thing likely to happen as a result of the defendant's negligence".[662] The Chief Justice cited, with approval, Lord Reid's observation in *Home Office v Dorset Yacht Co Ltd* that "tortious or criminal action by a third party is often the 'very kind of thing' which is likely to happen as a result of the wrongful or careless act of the defendant".[663]

543 Third, in *Chomentowski v Red Garter Restaurant Pty Ltd*,[664] the plaintiff employee was injured in a violent assault by robbers while engaged in depositing the business takings of the defendant employer in the night safe of a local bank at an early hour of the morning. The risk of robbery with violence was identified "according to the evidence and probably as a matter of common knowledge" as an "ever-present risk".[665] Sugerman P identified the case as "one of exposure of an employee to an enhanced risk – a jury might well think a greatly enhanced risk – peculiar to himself as originating from the circumstances in which he was required to perform his duties and readily capable of elimination".[666] Mason JA considered that the occurrence of some such event as occurred "could be reasonably foreseen as the likely result of sending the plaintiff on the errand on which he was sent in the absence of any protection designed to safeguard him from the danger to which

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660 *Pitt Son* (1984) 153 CLR 644 at 647.

661 *Pitt Son* (1984) 153 CLR 644 at 648. See also Santayana, "Vicarious Liability, Non-Delegable Duties and the 'Intentional Wrongdoing Problem'" (2019) 25 *Torts Law Journal* 152 at 178.

662 *March* (1991) 171 CLR 506 at 518.

663 *March* (1991) 171 CLR 506 at 518, quoting *Home Office v Dorset Yacht Co Ltd* [1970] AC 1004 at 1030.

664 (1970) 92 WN (NSW) 1070.

665 *Chomentowski* (1970) 92 WN (NSW) 1070 at 1074.

666 *Chomentowski* (1970) 92 WN (NSW) 1070 at 1074-1075.

he was exposed".[667] The employer was held to owe a duty of care to the employee to guard against the risk of injury arising from robbery.

544 AA did not suggest that the sexual assaults he endured were the "very kind of thing" that was likely to happen as a result of placing a priest in a parish and conferring upon that priest functions including religious education, pastoral care and engagement with local youth. Nor was there a finding that a person whose knowledge was attributable to the Diocese knew or suspected or believed that Fr Pickin might commit sexual assaults on youth in the Wallsend parish. Without more, there is no basis for the imposition of an exceptional affirmative duty upon the Diocese to take reasonable care to prevent Fr Pickin from causing AA harm by sexual assault.

Conclusion

545 I would dismiss the appeal with costs. Accordingly, it is unnecessary to consider the Diocese's notice of contention concerning the Court of Appeal's consideration of alleged errors in the fact-finding process of the primary judge, including her Honour's finding that AA was sexually assaulted by Fr Pickin. Nor is it necessary to determine whether this Court's judgment in *Lepore* should be overruled.

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667 *Chomentowski* (1970) 92 WN (NSW) 1070 at 1084.