

# HIGH COURT OF AUSTRALIA

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

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BISHOP PAUL BERNARD BIRD

APPELLANT

AND

DP (A PSEUDONYM)

RESPONDENT

*Bird v DP (a pseudonym)*  
[2024] HCA 41  
*Date of Hearing: 14 March 2024*  
*Date of Judgment: 13 November 2024*  
M82/2023

## ORDER

- Appeal allowed.*
- Set aside orders 2 and 5 of the Court of Appeal of the Supreme Court of Victoria made on 3 April 2023 and, in their place, order that:*
  - The appeal be allowed with costs; and*
  - The orders made by the Supreme Court of Victoria on 25 January 2022 and 28 February 2022 be set aside and, in their place, order that the proceeding be dismissed with costs.*
- The appellant pay the respondent's costs of and incidental to the application for special leave to appeal and the appeal to this Court.*

On appeal from the Supreme Court of Victoria



**Representation**

B W Walker SC with A M Dinelli KC and A D James-Martin for the appellant (instructed by Colin Biggers & Paisley Lawyers)

D R Campbell SC with G J Boas, J A G McComish and E H R Kelly for the respondent (instructed by Ken Cush & Associates)

Notice: This copy of the Court's Reasons for Judgment is subject to formal revision prior to publication in the Commonwealth Law Reports.



## CATCHWORDS

### **Bird v DP (a pseudonym)**

Torts – Intentional torts – Vicarious liability – Where priest committed sexual abuse whilst carrying out pastoral duties as representative of Diocese – Where priest not agent or employee of Diocese – Whether Diocese vicariously liable for priest's sexual abuse – Whether vicarious liability extends beyond relationships of employment to relationships "akin to employment".

Appeals – Issue not raised at trial – Where respondent sought to rely on non-delegable duty – Where factual basis for duty not pleaded or tested at trial – Prejudice.

Words and phrases – "agency", "akin to employment", "course of employment", "negligence", "nominated defendant", "non-delegable duty", "prejudice", "representative", "scope of employment", "sexual abuse", "strict liability", "unincorporated association", "vicarious liability".

*Legal Identity of Defendants (Organisational Child Abuse) Act 2018* (Vic), ss 1, 5, 7.



1 GAGELER CJ, GORDON, EDELMAN, STEWARD AND BEECH-JONES JJ.  
In 1971, at the age of five, the respondent ("DP") was assaulted and sexually  
abused at his parents' home in Port Fairy on two separate occasions by Father  
Bryan Coffey (now deceased) ("Coffey"), a Catholic priest from St Patrick's,  
the local parish church. The church was, and is, within the Roman Catholic  
Diocese of Ballarat ("the Diocese").

2 In 2020, DP commenced proceedings in the Supreme Court of Victoria  
claiming damages for psychological injuries he had sustained as a result of the  
assaults committed by Coffey. DP alleged that the Diocese was vicariously liable  
for the actions of Coffey and, additionally, that it was liable in negligence by  
reason of the Diocese's (and the relevant Bishop's) failure to exercise reasonable  
care in its authority, supervision and control of the conduct of Coffey.  
As the Diocese is an unincorporated association and not a legal person,  
DP instituted the proceeding against the Diocese through the current Bishop of  
Ballarat, Paul Bird, who was the nominated defendant for the purpose of the  
proceeding, pursuant to s 7 of the *Legal Identity of Defendants (Organisational  
Child Abuse) Act 2018* (Vic) ("the Legal Identity Act").

3 The primary judge held the Diocese vicariously liable for the assaults,  
notwithstanding a finding that Coffey was not an employee of the Diocese and in  
the absence of a finding that the assaults occurred in the course of an agency  
relationship between Coffey and the Diocese. DP's claim that the Diocese was  
directly liable to him in negligence failed. The Diocese admitted that it owed a  
duty of care to DP in relation to the conduct of priests appointed to the parish in  
their dealings with parishioners and their families. The primary judge found that  
the relevant risk of harm was that Coffey in the course of his pastoral duties might  
assault a parishioner's child but did not accept that the Diocese knew or ought to  
have known of that risk prior to 1971 or during 1971. The primary judge held that  
the second condition of DP's case on negligence – foreseeability of risk – was not  
met and that the Diocese was therefore not liable for the breach of duty it owed to  
DP. DP did not appeal that finding. The primary judge assessed DP's damages in  
the sum of \$230,000. The Court of Appeal unanimously dismissed the Diocese's  
appeal. The Diocese was granted special leave to appeal.

4 This appeal raises three issues:

- (1) whether, under the common law of Australia, absent a relationship of  
employment between a wrongdoer and a defendant, vicarious liability

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applies – or should be extended – to a relationship which is not one of employment, a relationship sometimes described as akin to employment;<sup>1</sup>

- (2) if the relationship between Coffey and the Diocese was one which gave rise to a relationship of vicarious liability, whether the Diocese was liable for Coffey's conduct; and
- (3) whether this Court should consider DP's notice of contention that the Diocese is liable for breach of a non-delegable duty owed to DP.

5 This is the first time this Court has been asked to consider whether, absent a relationship of employment between a wrongdoer and a defendant, a diocese or a bishop may be held vicariously liable for the unlawful actions of a priest who sexually abuses a child. That, in turn, raises the question whether a relationship of employment is a necessary precursor – or a threshold requirement – to a finding of vicarious liability. As will be explained, the position in Australia is that an employer may be vicariously liable for the acts of its employees, but there is no such liability for the acts of those who are not in an employment relationship but, instead, are, for example, independent contractors or in a relationship "akin to employment". There being no finding of a relationship of employment between the Diocese and Coffey, the appeal must be allowed. The second issue is not reached. DP's notice of contention fails at the threshold; it was not raised in the courts below.

## Background

6 The primary judge considered DP's claim as raising two fundamental and closely inter-related questions. First, was the relationship between Coffey and the Diocese or the Bishop capable of giving rise to a finding of vicarious liability on the part of the Diocese for Coffey's conduct? Second, if there was a relationship that could give rise to vicarious liability, was the Diocese or the Bishop liable for Coffey's unlawful conduct, it being accepted that the assaults were unlawful and far outside Coffey's clerical role?

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1 See, eg, *Various Claimants v Catholic Child Welfare Society* ("*Christian Brothers*") [2013] 2 AC 1 at 18 [47], citing *E v English Province of Our Lady of Charity* [2013] QB 722. See also *Cox v Ministry of Justice* [2016] AC 660 at 673 [32]; *Armes v Nottinghamshire County Council* [2018] AC 355 at 378-380 [59]-[64]; *BXB v Trustees of the Barry Congregation of Jehovah's Witnesses* [2024] AC 567 at 591-592 [68]-[69].

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7 On the first question, the primary judge concluded that there was no binding decision in Australia that foreclosed the possibility that a diocese, or bishop, could be held vicariously liable for the actions (lawful or unlawful) of a priest appointed by a bishop. After considering the decisions of this Court in *Hollis v Vabu Pty Ltd*,<sup>2</sup> *Sweeney v Boylan Nominees Pty Ltd*<sup>3</sup> and *Prince Alfred College Inc v ADC*,<sup>4</sup> of the Supreme Court of Canada in *Bazley v Curry*,<sup>5</sup> and of the Supreme Court of the United Kingdom in *Various Claimants v Catholic Child Welfare Society*<sup>6</sup> ("*Christian Brothers*"), the primary judge rejected the Diocese's central proposition that vicarious liability is confined to a relationship of employment and, among other things, considered that this Court in *Prince Alfred College* did not endorse such a "confined theory".

8 The primary judge said that the correct approach to the first stage of the vicarious liability analysis "ought not be limited by preconceived notions of agency or employment" but, rather, should be "directed to the totality of the relationship". The primary judge considered that, in this case, that required a "holistic and broad inquiry into the circumstances surrounding: the relationship between the Diocese and Coffey; the role of ... the [then] parish priest (Father O'Dowd) and Coffey; Coffey's role within the Port Fairy Catholic community; and Coffey's relationship with DP and his family".

9 To that end, his Honour made findings about: (i) the relationship between Coffey and the Diocese; (ii) Coffey's role as an assistant parish priest in the Catholic community at Port Fairy; (iii) the control exercised by the Diocese or the Bishop over Coffey in his role as assistant parish priest; (iv) the centrality of Coffey's work to that of the Diocese and the Church's mission in Port Fairy; (v) the opportunity the Diocese provided to Coffey to abuse his power or authority; (vi) Coffey's relationship with DP and his family both generally and at the time of the assaults; (vii) the vulnerability of potential victims to the wrongful exercise of Coffey's authority; and (viii) the circumstances in which Coffey carried out the assaults on DP.

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2 (2001) 207 CLR 21.

3 (2006) 226 CLR 161.

4 (2016) 258 CLR 134.

5 [1999] 2 SCR 534.

6 [2013] 2 AC 1.

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10 What follows is a summary of those findings, which were not challenged by the Diocese.

*The relationship between Coffey and the Diocese*

11 A diocese, through the person of the bishop of that diocese, appoints priests and assistant priests to parishes within that diocese. Coffey was ordained in July 1960. In 1966, Coffey was appointed by the then Bishop of Ballarat to St Patrick's parish church in Port Fairy as an assistant parish priest to the then parish priest. Coffey was engaged in this role at the time of the assaults in 1971. Coffey was not employed by the Diocese or engaged by the Diocese as an independent contractor. There was no finding that Coffey was an agent of the Diocese.

*Control exercised by the Diocese or the Bishop over Coffey as assistant parish priest*

12 The relationship between Coffey and the Diocese (through the Bishop of Ballarat) was governed by a strict set of normative rules – encapsulated in Canon Law – that each of them subscribed to. Those rules, although legally unenforceable, permitted the Bishop to exercise control over Coffey that was "at least as great as, if not greater than, that enjoyed by an employer".

13 The Bishop (and by him, the Diocese) exerted no direct control over Coffey's hours of work, his day-to-day tasks or his manner of carrying them out. Such activities were subject to the supervision and direction of the parish priest, who in turn reported to the Bishop. However, Coffey's assignment at St Patrick's parish church was "subject to the ultimate authority of the Diocese, as exercised by the Bishop, to remove any priest". In other words, "it was at the will of the Diocese that Coffey received and maintained the assignment for the entire period". The Diocese was found to have "ultimate control over the parameters of Coffey's appointment, namely the duration, the location, the general duties, the responsibility of supervision and the benefits provided to Coffey for accepting the assignment" at St Patrick's. The Diocese also provided for Coffey's livelihood, accommodation, clerical garb and vestments.

*Centrality of Coffey's work to the Diocese and the Church's mission in Port Fairy*

14 Coffey's role was integrally interconnected with the fundamental work and function of the Diocese. The primary judge found that there was a "general or widely-held expectation by the Port Fairy Catholic community" that "priests stood as representatives of the Church's values and must embody them always" and that "Coffey carried out the work of the Diocese 'in its place'". Coffey was described

as "the servant of the Diocese" and as an "emanation" and "representative" of it. By virtue of his role as assistant parish priest, Coffey's work "comprised the 'very essence' of the public manifestation of the Diocese and the Church in Port Fairy" and he commanded the respect and trust of the local parishioners.

*Coffey's role as assistant parish priest in the Catholic community at Port Fairy*

15 As assistant parish priest, Coffey did the work of the Diocese in the parish and the Diocese did its work by and through him. The primary judge found that the "Diocese, through the Bishop, [had given] Coffey the imprimatur to undertake religious caring for the spiritual life of the Port Fairy flock". This included: conducting religious services in St Patrick's parish church, such as taking confessions and mass; teaching religious education at the local Catholic school, also St Patrick's; and providing pastoral guidance and support and spiritual guidance to parishioners, including through visits to parishioners' homes.

*Opportunity the Diocese provided to Coffey to abuse his power or authority*

16 Pastoral visits to parishioners' homes were "an integral part" of Coffey's role and enabled him to achieve a high degree of intimacy with parishioners and their families. The primary judge found that Coffey made a practice of visiting and interacting with parishioners at their homes at various times of day and establishing a relationship of intimacy with Catholic families within the Diocese, including joining families for dinner and providing advice and support to them on the personal issues they confronted. He also attended social functions of his parishioners.

17 The primary judge found that the provision of unsupervised pastoral care to families, including children, during such visits was "part and parcel of Coffey's role" and reflected the implicit trust of families in him as a priest of the Church whose teachings and ministry they devotedly adhered to. "It was this position, closely connected to his task as a provider of pastoral care, that Coffey was able to take advantage of, in committing his abuse of young boys, including DP." Coffey preyed on the vulnerability of young boys, whom he abused when separated from their parents.

*Coffey's relationship to DP and his family*

18 DP was born in Port Fairy in February 1966. He was raised in a strict Catholic family. DP and his family attended Mass at St Patrick's parish church every Sunday over which, as already mentioned, Coffey sometimes officiated. DP also attended St Patrick's primary school, where he was taught religious education

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by Coffey during his preparatory year in 1971. Both the primary school and the parish church were located close to DP's home.

19 As part of his pastoral role as assistant parish priest, Coffey regularly visited DP's family home. During these visits, Coffey counselled and mediated between DP's parents in respect of their matrimonial issues and also spent time, unsupervised, with DP in his bedroom. The primary judge found that "Coffey's role as the assistant parish priest and his affinity with DP's family placed him in a position of trust and authority vis-à-vis DP and his family" and "[i]t was in this position that he committed the assaults".

*The circumstances in which Coffey assaulted DP*

20 During two such visits to DP's parents' home in 1971, when DP was only five years old, Coffey assaulted and sexually abused DP. The first assault took place around March or April 1971, in the course of "a social gathering at the family home attended by Coffey" one evening. During the evening, DP became tired and Coffey offered to put DP to bed. Once alone in DP's bedroom, Coffey proceeded to sexually assault him. On 26 December 1971, the second assault occurred when Coffey was visiting DP's family home. DP took Coffey out to the backyard to show him a tent he had received for Christmas. Once inside the tent, Coffey sexually assaulted him.

*Primary judge*

21 The primary judge concluded that the Diocese was capable of being vicariously liable for Coffey's conduct by reason of: the close nature of the relationship between the Bishop, the Diocese and the Catholic community in Port Fairy; the Diocese's general control over Coffey's role and duties within St Patrick's parish; Coffey's pastoral role in the Port Fairy Catholic community; and the relationship between DP, his family, Coffey and the Diocese, which was one of intimacy and imported trust in the authority of Christ's representative, personified by Coffey.

22 In relation to the second question – which turned on whether Coffey's role as a priest merely provided an opportunity for the wrongful act or whether it provided the occasion for that act – the primary judge concluded Coffey's role provided both the opportunity and the occasion. That conclusion was reached on the basis that Coffey's role as a priest under the direction of the Diocese placed him in a position of power and intimacy vis-à-vis DP that enabled Coffey to take advantage of DP when alone – just as Coffey had done with other boys. The primary judge also held that this position increased the risk of harm to DP;

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that Coffey misused and took advantage of his position as a confidant and pastor to DP's family and it was this that enabled Coffey to commit the unlawful assaults upon DP.

*Court of Appeal*

23 The Diocese's appeal to the Court of Appeal was dismissed. The Court unanimously upheld the primary judge's conclusion that the Diocese was vicariously liable for the two assaults committed by Coffey.

24 The Court of Appeal recognised that "[o]rdinarily, issues relating to vicarious liability arise in a context in which the particular tortfeasor has been engaged by the principal, against whom liability is asserted, to undertake a particular task or function" and, in such a case, there are two questions: (1) whether the tortfeasor was an employee, as distinct from an independent contractor, engaged by the principal; and (2) if so, whether, at the time the tort was committed, the employee was acting in the course of the employment of the principal.

25 In relation to the first question, the Court of Appeal rejected the Diocese's proposition that vicarious liability was confined to a relationship of employment. The Court of Appeal described the relationship between a diocese and a priest or assistant priest as necessarily *sui generis*, founded in the context of the hierarchical system of a diocese of the Roman Catholic Church, and held that the content of that relationship was such that it could, in an appropriate case, attract the principle of vicarious liability by the Diocese for a wrongful act by a priest in the performance of his work.

26 After referring to the observations of this Court in *Hollis* – that the modern doctrine relating to vicarious liability of an employer for the torts committed by an employee "was adopted not by way of an exercise in analytical jurisprudence but as a matter of policy"<sup>7</sup> and that "[a] fully satisfactory rationale for the imposition of vicarious liability in the employment relationship has been slow to appear in the case law"<sup>8</sup> – the Court of Appeal said "two important points" emerged from the case law. First, vicarious liability has been recognised as extending beyond an

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7 *Hollis* (2001) 207 CLR 21 at 37 [34].

8 *Hollis* (2001) 207 CLR 21 at 37 [35]. See also *Sweeney* (2006) 226 CLR 161 at 166 [11].

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employment relationship to situations of true agency,<sup>9</sup> although the Court cautioned that the term "agent" was apt to be "misused". Second, there was a commonality of the factors that were central to the issue whether, in an appropriate case, the relationship is one to which the principle of vicarious liability might apply. By way of example, the Court of Appeal referred to the power of the principal to control the performance of the work by the tortfeasor, and the degree of integration of the tortfeasor in the business or work of the principal, such that the tortfeasor represented the business of the principal or was "an emanation of the principal", and, in doing so, conducted the business of the principal.

27 The Court of Appeal found that the primary judge was "correct to conclude that the relationship between Coffey, as assistant priest, and the Diocese, was one which ... would render the Diocese vicariously liable for any tort committed by Coffey in his role as an assistant priest within the Diocese". The Court rested that conclusion on the following features of the relationship between the Diocese and Coffey:

- (1) the Diocese appointed Coffey to be assistant priest and had ultimate control over the parameters of his appointment including its duration, location, general duties, responsibility of supervision and benefits. The Church's Canon Law "permitted the Bishop to exercise control over Coffey that was at least as great as, if not greater than, that enjoyed by an employer";
- (2) Coffey's work was not carried out independently of the Diocese but as its representative, such that Coffey's work *was* the public manifestation of the Diocese in Port Fairy;
- (3) the Diocese provided for Coffey's livelihood, clerical garb and vestments, and clothed him with "an aura of charisma and authority"; and
- (4) Coffey was "[i]n a real and relevant sense ... the servant of the Diocese, notwithstanding that he was not, in a strict legal sense, an employee of it".

28 On the question of liability – the second question – the Court concluded that the Diocese was vicariously liable for the two assaults committed by Coffey against DP on the basis that, among other things, Coffey in his role as assistant priest did in fact regularly visit the homes of parishioners and interact with their families and Coffey's role as assistant priest placed him in a position of trust and

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9 *Colonial Mutual Life Assurance Society Ltd v Producers and Citizens Co-operative Assurance Co of Australia Ltd* (1931) 46 CLR 41.

authority vis-à-vis DP and his family, and it was in this position that he committed the assaults.

29 As will be explained, in the absence of an employment relationship, it was not open to hold the Diocese vicariously liable for the two assaults committed by Coffey against DP. Any other analysis that uses language that infers fault or risk – such as control – is inapposite in a claim of vicarious liability. As will be explained, pointing to fault seeks to appeal to basic principles or ideas that inform so much of the law of tort but have no role to play in vicarious liability. Vicarious liability is concerned with attribution of liability, not fault.

### What is "vicarious liability"?

30 The expression "vicarious liability" has been used to describe different types of liability in different areas of the law.<sup>10</sup> It is therefore necessary, at the outset, to identify when the expression "vicarious liability" is capable of applying before turning to consider whether an employment relationship is a necessary precursor to such a finding.

### Agency

31 The first area of law where the expression "vicarious liability" has been used is where one person is, in a broad sense, an agent of another.<sup>11</sup> It is a form of primary liability where the *acts* of another person are attributed to the defendant on the basis that the acts were done for the defendant with the defendant's express, implied or apparent authorisation of the acts, or ratification of the acts by the

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10 *CCIG Investments Pty Ltd v Schokman* (2023) 97 ALJR 551 at 561-562 [49]-[53], 565 [65], 567-568 [70]-[75]; 410 ALR 479 at 490-491, 495-496, 497-499. See also *Darling Island Stevedoring and Lighterage Co Ltd v Long* (1957) 97 CLR 36 at 57, 60-61; *The Commonwealth v Introvigne* (1982) 150 CLR 258 at 260, 269, 271; *New South Wales v Lepore* (2003) 212 CLR 511 at 591-592 [231]; *Construction, Forestry, Maritime, Mining and Energy Union v Personnel Contracting Pty Ltd* (2022) 275 CLR 165 ("*CFMMEU*") at 199 [82].

11 *Schokman* (2023) 97 ALJR 551 at 561 [50], 562-563 [55]-[58] and the authorities and materials cited; 410 ALR 479 at 490, 492-493. See also *Deatons Pty Ltd v Flew* (1949) 79 CLR 370 at 380.

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defendant.<sup>12</sup> In other words, the acts were done with the defendant's "seal of ... approval", amounting to an acceptance of the acts as the defendant's own.<sup>13</sup> For this form of liability, based on vicarious acts or vicarious conduct, the expression "vicarious liability" is inapposite.<sup>14</sup> Thus, in contrast to true vicarious liability, it is not the liability, but the acts of the agent that are attributed to the principal.

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Two further points should be made about this particular use of the term vicarious liability. Words like "agent" and "representative" might begin an inquiry about the possible liability of a defendant for the actions of a wrongdoer, but they are not the end of the inquiry.<sup>15</sup> No wider proposition than that just stated has been adopted by this Court.<sup>16</sup> As the majority of this Court stated in *Sweeney*,<sup>17</sup> the previous decisions of this Court, including *Colonial Mutual Life Assurance Society Ltd v Producers and Citizens Co-operative Assurance Co of Australia Ltd*,<sup>18</sup> *Scott v Davis*<sup>19</sup> and *Hollis*,<sup>20</sup> do not establish that A may be vicariously liable

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12 *Schokman* (2023) 97 ALJR 551 at 562 [55]; 410 ALR 479 at 492, citing *Morgans v Launchbury* [1973] AC 127 at 135, 140, 144. See also *Soblusky v Egan* (1960) 103 CLR 215 at 231; *Lepore* (2003) 212 CLR 511 at 591-592 [231]; *CFMMEU* (2022) 275 CLR 165 at 199-200 [82].

13 *Schokman* (2023) 97 ALJR 551 at 561 [50]; 410 ALR 479 at 490, citing Laski, "The Basis of Vicarious Liability" (1916) 26 *Yale Law Journal* 105 at 105, 107. See also (2023) 97 ALJR 551 at 562-563 [55]-[56]; 410 ALR 479 at 492.

14 *Schokman* (2023) 97 ALJR 551 at 561 [50], 562-563 [55]-[58] and the authorities and materials cited; 410 ALR 479 at 490, 492-493. See also *Lloyd v Grace, Smith & Co* [1912] AC 716 at 724-725, 728-729, 738-740.

15 *Sweeney* (2006) 226 CLR 161 at 172 [29], citing *Scott v Davis* (2000) 204 CLR 333 at 423 [268]. cf *CFMMEU* (2022) 275 CLR 165 at 235 [184] and the authorities cited.

16 See, eg, *Sweeney* (2006) 226 CLR 161 at 171 [26].

17 (2006) 226 CLR 161 at 172 [29].

18 (1931) 46 CLR 41 at 48-50.

19 (2000) 204 CLR 333 at 423 [268].

20 (2001) 207 CLR 21 at 40 [42], 42-45 [48]-[57].

for the conduct of B if B does no more than "represent" A (in the loose sense of merely acting for the benefit or advantage of A) whether under the rubric of "representation" or "agency".<sup>21</sup>

33 *Colonial Mutual Life* is instructive. The conclusion reached in that case was that the company that engaged an agent (albeit an independent contractor) to solicit for the creation of legal relationships between the company and others was liable for the slanders uttered in the course of soliciting proposals.<sup>22</sup> The agent's actions were "in right of the [c]ompany with its authority".<sup>23</sup> Liability was imposed because of "the combination of the engagement of the contractor as the agent of the principal to bring about legal relations between the principal and third parties, and the slander being uttered in the course of attempting to induce a third party to enter legal relations with the principal".<sup>24</sup> Put in different terms, the conclusion in *Colonial Mutual Life* "depend[ed] directly upon the identification of the independent contractor as the principal's agent (properly so called) and the recognition that the conduct of which complaint [was] made was conduct undertaken in the course of, and for the purpose of, executing that agency".<sup>25</sup> Contrary to the submissions of DP, the decision in *Colonial Mutual Life* does not justify the attribution of Coffey's conduct to the Diocese or the Bishop under the rubric of "vicarious liability".

34 Nor do the decisions of this Court in *Soblusky v Egan*<sup>26</sup> or *Scott*<sup>27</sup> provide any basis for a conclusion that Coffey's conduct could be attributed to the Diocese or the Bishop through the rules of agency which were at the heart of the reasoning

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21 *Sweeney* (2006) 226 CLR 161 at 172 [29], citing *Colonial Mutual Life* (1931) 46 CLR 41 at 48-50, *Scott* (2000) 204 CLR 333 at 423 [268], and *Hollis* (2001) 207 CLR 21 at 40 [42], 42-45 [48]-[57].

22 *Colonial Mutual Life* (1931) 46 CLR 41 at 46, 50; *Sweeney* (2006) 226 CLR 161 at 171 [24].

23 *Colonial Mutual Life* (1931) 46 CLR 41 at 50.

24 *Sweeney* (2006) 226 CLR 161 at 171 [24].

25 *Sweeney* (2006) 226 CLR 161 at 170 [22].

26 (1960) 103 CLR 215.

27 (2000) 204 CLR 333.

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in those cases.<sup>28</sup> In *Soblusky*, this Court held that responsibility, by attribution of conduct, arose for one party who was "driving by his agent" in the sense that "management of the vehicle is done by the hands of another and is in fact and law subject to direction and control".<sup>29</sup> In *Scott*, a majority of this Court held that the facts did not establish a relationship of agency by which the conduct of a pilot who took an aeroplane on a joyride could be attributed to the owner of the aeroplane, where the owner did not retain direction or control of the aeroplane.<sup>30</sup>

35 Although DP expressly pleaded that Coffey was the agent of the Diocese, there was no finding that Coffey was the true agent of the Diocese in the sense described above. That is unsurprising. The unlawful acts done by Coffey were not done (and could not have been done) as the "true agent"<sup>31</sup> of the Diocese; they were not done with the Diocese's, or the then Bishop's, express, implied or apparent authorisation, and at no time were those acts ratified by them.

### Non-delegable duty

36 The second area of law in which the expression "vicarious liability" has been used, but where its use is also inapposite, is liability imposed on a defendant for breach of a "non-delegable duty". A "non-delegable" or "personal" duty of care is "a duty ... of a special and 'more stringent' kind".<sup>32</sup> It is not merely a duty to take care, but a "duty to ensure that reasonable care is taken";<sup>33</sup> to "ensure that the duty

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28 See also *Schokman* (2023) 97 ALJR 551 at 563 [56]; 410 ALR 479 at 492. cf *Scott* (2000) 204 CLR 333 at 385 [159], 437-438 [305]-[306].

29 (1960) 103 CLR 215 at 231.

30 (2000) 204 CLR 333 at 341-342 [16], 415-416 [244], 440 [311], 459-460 [357]-[358].

31 *Colonial Mutual Life* (1931) 46 CLR 41 at 50.

32 *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 *Lepore* (2003) 212 CLR 511 at 530 [25], 551-552 [101], 598 [254]; *Leichhardt Municipal Council v Montgomery* (2007) 230 CLR 22 at 27 [6].

33 *Kondis* (1984) 154 CLR 672 at 686 (emphasis added). See also *Introvigne* (1982) 150 CLR 258 at 270-271; *Burnie Port Authority* (1994) 179 CLR 520 at 550; *Lepore* (2003) 212 CLR 511 at 551-552 [101], 598 [254].

is carried out";<sup>34</sup> or to "procur[e] the careful performance of work [assigned] to others".<sup>35</sup> Liability for breach of a non-delegable duty is therefore direct – not vicarious.<sup>36</sup>

37 Such duties of care have been recognised as arising out of relationships of employer and employee;<sup>37</sup> school and pupil;<sup>38</sup> hospital and patient.<sup>39</sup> That list is not exhaustive. 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".<sup>40</sup> A "core instance" of a non-delegable duty at common law is the duty that an employer usually owes to employees to provide a safe system of work.<sup>41</sup> Under that non-delegable duty,

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34 *Lepore* (2003) 212 CLR 511 at 565 [144].

35 *Woodland v Swimming Teachers Association* [2014] AC 537 at 573 [5].

36 *Introvigne* (1982) 150 CLR 258 at 271, 275, 279; *Northern Sandblasting Pty Ltd v Harris* (1997) 188 CLR 313 at 329-330; *Schokman* (2023) 97 ALJR 551 at 567-568 [70]-[73]; 410 ALR 479 at 497-499. See also *Lepore* (2003) 212 CLR 511 at 562 [136].

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

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

39 See, eg, *Albrighton v Royal Prince Alfred Hospital* [1980] 2 NSWLR 542 at 561-562 [59]; *Introvigne* (1982) 150 CLR 258 at 270, 275; *Ellis v Wallsend District Hospital* (1989) 17 NSWLR 553 at 601-604.

40 *Lepore* (2003) 212 CLR 511 at 533-534 [35], quoting *Kondis* (1984) 154 CLR 672 at 687. See also, eg, *Burnie Port Authority* (1994) 179 CLR 520 at 550-551; *Schokman* (2023) 97 ALJR 551 at 567 [70]; 410 ALR 479 at 497-498.

41 *Schokman* (2023) 97 ALJR 551 at 567 [70]; 410 ALR 479 at 497-498, citing *Kondis* (1984) 154 CLR 672 at 688.

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the employer is liable for any negligence on the part of its independent contractor or employee in failing to adopt a safe system of work.<sup>42</sup>

*Notice of contention and non-delegable duty*

38 By a notice of contention, DP sought to have this Court affirm the decision of the Court of Appeal on the basis that the Diocese, through the Bishop, is liable to DP for breach of a non-delegable duty owed to DP to protect him from the risk of sexual abuse by its priests, including Coffey, in the course of Coffey's functions and duties as a priest and as a representative, servant or agent of the Diocese. The Bishop submitted that the Diocese would be irremediably prejudiced by a non-delegable duty being advanced on appeal in this Court for the first time. That submission should be accepted. The notice of contention cannot be entertained.

39 As a general rule, all substantial issues between parties should be settled at trial and new issues should not be raised on appeal.<sup>43</sup> That rule, however, is not absolute.<sup>44</sup> A party will generally be refused permission to rely on a point not taken below, among other grounds, where a party seeks to raise a case which did not arise on the pleadings,<sup>45</sup> where if the issue had been raised at the trial, it might have been the subject of evidence,<sup>46</sup> or where the issue requires a fresh consideration of facts that are neither admitted nor beyond controversy.<sup>47</sup> A party may be permitted

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42 *Kondis* (1984) 154 CLR 672 at 688.

43 *Coulton v Holcombe* (1986) 162 CLR 1 at 7-8. See also *Suttor v Gundowda Pty Ltd* (1950) 81 CLR 418 at 438; *D'Orta-Ekenaike v Victoria Legal Aid* (2005) 223 CLR 1 at 17-18 [34]-[36]; *Burrell v The Queen* (2008) 238 CLR 218 at 223 [15]-[16].

44 *Coulton* (1986) 162 CLR 1 at 8-9, quoting *O'Brien v Komesaroff* (1982) 150 CLR 310 at 319. See also *Suttor* (1950) 81 CLR 418 at 438; *Water Board v Moustakas* (1988) 180 CLR 491 at 497; *Dovuro Pty Ltd v Wilkins* (2003) 215 CLR 317 at 365-366 [151].

45 See, eg, *Saffron v Société Minière Cafrika* (1958) 100 CLR 231 at 240.

46 See, eg, *Suttor* (1950) 81 CLR 418 at 438; *Coulton* (1986) 162 CLR 1 at 7-8; *Moustakas* (1988) 180 CLR 491 at 497; *Whisprun Pty Ltd v Dixon* (2003) 77 ALJR 1598 at 1608 [51]; 200 ALR 447 at 461.

47 *Coulton* (1986) 162 CLR 1 at 8, quoting *Komesaroff* (1982) 150 CLR 310 at 319.

to rely upon a point not taken below, however, if the other party concedes that its case would not have been presented differently if the point had been taken below.<sup>48</sup>

40 The imposition of a non-delegable duty on the Diocese was not raised in the courts below. It was not raised on the pleadings or addressed in the evidence.<sup>49</sup> There were only two issues at trial – vicarious liability and negligence. The second issue – that the Diocese was liable in negligence by reason of the Diocese's (and the relevant Bishop's) failure to exercise reasonable care in its authority, supervision and control of the conduct of Coffey – failed at trial. DP did not appeal that finding.<sup>50</sup>

41 The nature and content of the particular duty and responsibility allegedly owed to DP as a non-delegable duty as set out in the notice of contention was not identified or pleaded at trial. For example, there was no pleading about, and the evidence did not address, whether there was an element in the relationship between the Bishop, or the Diocese, and DP from which it could be inferred that they had assumed a special responsibility or higher duty to ensure that reasonable care was taken for the safety of DP in one or more of several circumstances, including in DP's parents' home, because the Bishop or the Diocese had undertaken the care, supervision or control of DP, or were so placed in relation to DP as to assume a particular responsibility for his safety in circumstances where DP might reasonably expect that due care would be exercised by them.<sup>51</sup> Put in different terms, the factual inquiry for a non-delegable duty, a breach of which gives rise to direct liability, can be and often is different from the inquiries that were pursued in respect of the issues argued at trial in this matter.

42 The significance of the fact that the particular nature and content of the non-delegable duty allegedly owed to DP as set out in the notice of contention was not identified or pleaded at trial, or addressed during the course of the trial,

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48 See, eg, *R & R Fazzolari Pty Ltd v Parramatta City Council* (2009) 237 CLR 603 at 634 [108].

49 *Suttor* (1950) 81 CLR 418 at 438, quoting *Grey v Manitoba and North Western Railway Co of Canada* [1897] AC 254 at 267.

50 See [3] above.

51 See, eg, *Lepore* (2003) 212 CLR 511 at 533-534 [35], quoting *Kondis* (1984) 154 CLR 672 at 687. See also *Burnie Port Authority* (1994) 179 CLR 520 at 550-551; *Schokman* (2023) 97 ALJR 551 at 567 [70]; 410 ALR 479 at 497-498.

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is reinforced by two further considerations. First, the notice of contention might require this Court to reopen and overrule this Court's decision in *Lepore* that a non-delegable duty cannot arise for an action based upon intentional wrongs by delegates<sup>52</sup> in circumstances where the facts have not been pleaded or tested. At the very least, the notice of contention would require this Court to consider the existence of any non-delegable duty to ensure that care is taken in circumstances of intentional wrongdoing.<sup>53</sup> Again, the factual basis for such a duty was not pleaded or tested. Second, during the course of oral submissions, the nature and content of the non-delegable duty propounded by DP was stated in less precise and arguably broader terms.

43 This Court is confined to deciding the issues which the courts below were invited by DP to decide and which remain in dispute in this Court. The notice of contention must be dismissed.

### **Vicarious liability**

44 The third area of law where the expression vicarious liability has been used, and where its use is apposite, involves cases of secondary liability based on attribution of liability, not attribution of the acts, of a wrongdoer to a defendant. This is vicarious liability in its true or proper sense – liability based on the attribution of the liability of another.<sup>54</sup> As is self-evident, vicarious liability is a form of strict liability, whereby a defendant is held liable for the wrongs of another, despite the defendant being free of fault.<sup>55</sup>

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52 *Lepore* (2003) 212 CLR 511 at 533 [34], 535 [38], 601 [265], 624 [339].

53 *Lepore* (2003) 212 CLR 511 at 572 [162]. See also *Williams v Milotin* (1957) 97 CLR 465 at 474; *Gray v Motor Accident Commission* (1998) 196 CLR 1 at 9-10 [22]; *Australian Securities and Investments Commission v Cassimatis [No 8]* (2016) 336 ALR 209 at 306 [504]-[505].

54 *Schokman* (2023) 97 ALJR 551 at 561-562 [51]; 410 ALR 479 at 491. See also *Darling Island Stevedoring* (1957) 97 CLR 36 at 57.

55 *Prince Alfred College* (2016) 258 CLR 134 at 148 [39]. See also Sappideen and Vines (eds), *Fleming's The Law of Torts*, 11th ed (2024) at 493 [17.10].

45 The common law of Australia, as repeatedly stated by this Court,<sup>56</sup> has adhered to the rule that a relationship of employment is a necessary precursor to a finding of vicarious liability. In that context, a relationship of employment operates within a legal framework, defined by statute<sup>57</sup> and by common law principles which inform the content and construction of a contract of employment.<sup>58</sup>

46 In Australia, an employer may be liable for the acts of its employees, but there is no vicarious liability, in the sense it is now being discussed, for the acts of those not in a relationship of employment, namely acts of third parties outside of that context. If the act complained of is not that of an employee, then the defendant is not, without more, liable.<sup>59</sup> Most recently, in *CCIG Investments Pty Ltd v Schokman*<sup>60</sup> – decided after the Court of Appeal handed down the decision the subject of this appeal – this Court restated that the "just limits",<sup>61</sup> or "essential requirement",<sup>62</sup> for this form of secondary or attributed liability,

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56 *Schokman* (2023) 97 ALJR 551 at 555-556 [12]-[14], 565 [64]-[66]; 410 ALR 479 at 482-483, 495-496. See also *Burnie Port Authority* (1994) 179 CLR 520 at 575; *Scott* (2000) 204 CLR 333 at 380 [139], 436 [301]; *Hollis* (2001) 207 CLR 21 at 36 [32]; *Lepore* (2003) 212 CLR 511 at 535 [40], 580-581 [196]-[197]; *Sweeney* (2006) 226 CLR 161 at 167 [12], 173 [33]; *Prince Alfred College* (2016) 258 CLR 134 at 148 [39]-[40], 149-150 [45], [49]; *CFMMEU* (2022) 275 CLR 165 at 199-200 [82], 239 [191].

57 See, eg, *CFMMEU* (2022) 275 CLR 165 at 225 [161].

58 *WorkPac Pty Ltd v Rossato* (2021) 271 CLR 456 at 477 [56]-[58], 478-479 [62]; *CFMMEU* (2022) 275 CLR 165 at 226 [162], 228 [172].

59 See, eg, a non-delegable duty and statutory duties such as s 91 of the *Wrongs Act 1958* (Vic).

60 (2023) 97 ALJR 551 at 555-556 [12]-[14], 565 [64]; 410 ALR 479 at 482-483, 495. See also *Lepore* (2003) 212 CLR 511 at 535 [40], 582 [202], 588 [221], 594 [242]; *Sweeney* (2006) 226 CLR 161 at 167 [12], 171 [23], citing Pollock, *Essays in Jurisprudence and Ethics* (1882) at 126; *Prince Alfred College* (2016) 258 CLR 134 at 159-160 [80]-[81]; *CFMMEU* (2022) 275 CLR 165 at 239 [191].

61 *Schokman* (2023) 97 ALJR 551 at 555 [13], 565 [64]; 410 ALR 479 at 482, 495.

62 *Schokman* (2023) 97 ALJR 551 at 555 [12]; 410 ALR 479 at 482, citing *Prince Alfred College* (2016) 258 CLR 134 at 148-149 [40]-[41].

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sometimes described as a rule of law,<sup>63</sup> are "marked out" by the rule that the employee's wrongful act – for which liability is attributed to the employer – "must be committed in the course or scope of the employment".<sup>64</sup> The relevant inquiry is, therefore, twofold:<sup>65</sup> whether the alleged tortfeasor was an employee of the defendant,<sup>66</sup> and then the separate question whether the relevant act or omission of the alleged employee took place in the course or scope of that employment.<sup>67</sup>

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The issue is whether, in undertaking the first step of that inquiry, the Court should now expand the boundaries of vicarious liability beyond a relationship of employment to one that is "akin to employment". Contrary to the decisions of the courts below and the submissions of DP, the answer is no.

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**63** *Schokman* (2023) 97 ALJR 551 at 555 [12]; 410 ALR 479 at 482, citing *Bugge v Brown* (1919) 26 CLR 110 at 117.

**64** *Schokman* (2023) 97 ALJR 551 at 555 [13], 565 [64]; 410 ALR 479 at 482-483, 495.

**65** *CFMMEU* (2022) 275 CLR 165 at 239 [191].

**66** *Sweeney* (2006) 226 CLR 161 at 167 [12]; see also 171 [23]. See, eg, *Hollis* (2001) 207 CLR 21 at 41-46 [46]-[60].

**67** See, eg, *Deatons* (1949) 79 CLR 370 at 379-382, 383, 386; *Prince Alfred College* (2016) 258 CLR 134 at 149 [41]-[42], 159-160 [80]-[81]; *Schokman* (2023) 97 ALJR 551 at 556-559 [14]-[34]; 410 ALR 479 at 483-487. See also *Colonial Mutual Life* (1931) 46 CLR 41 at 49.

Vicarious liability has had a tortured history not only in this Court<sup>68</sup> but also in other jurisdictions.<sup>69</sup> So, for example, more than 20 years ago, in *Hollis*,<sup>70</sup> this Court observed that the modern doctrine relating to vicarious liability of an employer for the torts committed by an employee "was adopted not by way of an exercise in analytical jurisprudence but as a matter of policy"<sup>71</sup> and that "[a] fully satisfactory rationale for the imposition of vicarious liability in the employment relationship" has proven to be quite elusive.<sup>72</sup> Since then, this Court has, more than once, repeated those concerns describing vicarious liability as, among other things, an "unstable principle",<sup>73</sup> for which a "coherent basis"<sup>74</sup> and "fully satisfactory rationale" for its imposition have been "slow to appear in

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68 *Prince Alfred College* (2016) 258 CLR 134 at 148 [38]-[39], 149 [41], [44], 150 [46]. See also *Darling Island Stevedoring* (1957) 97 CLR 36 at 56-57; *Scott* (2000) 204 CLR 333 at 424 [277]; *Hollis* (2001) 207 CLR 21 at 37 [35]; *Lepore* (2003) 212 CLR 511 at 580 [196]; *Sweeney* (2006) 226 CLR 161 at 166-167 [11]; *Schokman* (2023) 97 ALJR 551 at 561-562 [48]-[53], 566 [69]; 410 ALR 479 at 490-491, 497.

69 See, eg, *Bazley* [1999] 2 SCR 534 at 543-545 [10]-[14], [16]; *Jacobi v Griffiths* [1999] 2 SCR 570 at 581 [11]. See also *Lister v Hesley Hall Ltd* [2002] 1 AC 215 at 223-224 [15], 226 [20], 231-232 [34]-[35]; *English Province of Our Lady of Charity* [2013] QB 722 at 728-731 [12]-[25]; *Christian Brothers* [2013] 2 AC 1 at 11 [19]; *Various Claimants v Barclays Bank plc* [2020] AC 973 at 981-987; *BXB* [2024] AC 567 at 572-573 [2]-[3].

70 (2001) 207 CLR 21.

71 *Hollis* (2001) 207 CLR 21 at 37 [34], citing *Darling Island Stevedoring* (1957) 97 CLR 36 at 56-57. See also *Lepore* (2003) 212 CLR 511 at 580 [196]; *Sweeney* (2006) 226 CLR 161 at 166-167 [11]; *Schokman* (2023) 97 ALJR 551 at 566-567 [69]; 410 ALR 479 at 497.

72 *Hollis* (2001) 207 CLR 21 at 37 [35]. See also *Lepore* (2003) 212 CLR 511 at 580 [196]; *Sweeney* (2006) 226 CLR 161 at 166-167 [11]; *Prince Alfred College* (2016) 258 CLR 134 at 149 [44], 150 [46]; *Bird v DP (a pseudonym)* (2023) 69 VR 408 at 428 [81].

73 *Prince Alfred College* (2016) 258 CLR 134 at 148 [39]. See also *Sweeney* (2006) 226 CLR 161 at 166-167 [11].

74 *Prince Alfred College* (2016) 258 CLR 134 at 148 [39].

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the case law".<sup>75</sup> Part of the difficulty may have been the use of the expression "vicarious liability" to describe three different concepts. But even with vicarious liability in its true or proper sense – liability based on the attribution of the liability of another – this Court has not accepted an overarching theory based on "enterprise risk" beyond any employment relationship.<sup>76</sup> Whether or not true vicarious liability can be explained by any theory based on a relationship of employment,<sup>77</sup> a relationship of employment has always been a necessary precursor in this country to a finding of vicarious liability and it has always been necessary that the wrongful acts must be committed in the course or scope of the employment.<sup>78</sup> There is no solid foundation for expansion of the doctrine or for its bounds to be redrawn.

49 Over the last 25 years, this Court has repeatedly refused to extend the boundaries to include independent contractors<sup>79</sup> or to extend the doctrine by reference to policy considerations as the sole or determinative basis for developing

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75 *Prince Alfred College* (2016) 258 CLR 134 at 148 [39], quoting *Hollis* (2001) 207 CLR 21 at 37 [35]; see also 149-150 [44]-[46]. See also *Sweeney* (2006) 226 CLR 161 at 166-167 [11]; *Schokman* (2023) 97 ALJR 551 at 561 [48], 566 [69]; 410 ALR 479 at 490, 497. See also Rolph et al, *Balkin & Davis Law of Torts*, 6th ed (2021), ch 26 at 861-862 [26.1].

76 *Prince Alfred College* (2016) 258 CLR 134 at 153 [59], 158 [74]; *Schokman* (2023) 97 ALJR 551 at 555-556 [13]; 410 ALR 479 at 482-483. See also Stevens, *Torts and Rights* (2007) at 258-259.

77 See *Sweeney v Boylan Nominees Pty Ltd* (2006) 226 CLR 161 at 167 [12], referring to Neyers, "A Theory of Vicarious Liability" (2005) 43 *Alberta Law Review* 287.

78 *Schokman* (2023) 97 ALJR 551 at 555 [13], 565 [64]; 410 ALR 479 at 482-483, 495.

79 See, eg, *Scott* (2000) 204 CLR 333 at 342 [18], 343 [20], 422-424 [268]-[273], [276]-[277], 440 [311], 459-460 [357]-[358]; *Hollis* (2001) 207 CLR 21 at 36 [32]; *Sweeney* (2006) 226 CLR 161 at 171 [26], 172 [29]; *Schokman* (2023) 97 ALJR 551 at 562 [51]; 410 ALR 479 at 491.

the principle. For this Court to do so now would require the Court to revisit and overrule *Hollis*<sup>80</sup> and *Sweeney*<sup>81</sup> and at least aspects of *Scott*<sup>82</sup> and *Lepore*.<sup>83</sup>

50 The redrawing of the boundaries in Canada and the United Kingdom of the relationships between a tortfeasor and one who may be liable for the conduct of the tortfeasor under the rubric of "vicarious liability" has previously been rejected by this Court on a number of occasions at a level of principle. Moreover, subsequent history has also shown that the expansion adopted by those countries has not been without difficulty.

51 That redrawing arguably started with the 1999 decision of the Supreme Court of Canada in *Bazley* which held that an employer could be vicariously liable for sexual assaults committed by an employee.<sup>84</sup> That case focussed on whether there was a material increase in the risk of harm as a consequence of the employer's enterprise and duties entrusted to the employee. The imposition of liability on the employer in such circumstances was said to be justified by two policy considerations:<sup>85</sup> first, that the employer carried on an enterprise which carried risks (and that employer should be liable if the risks materialised);<sup>86</sup> and second, deterrence of future harm, including that holding the employer responsible would encourage the employer to take greater care when deciding who to employ.<sup>87</sup>

52 Then, in 2002, a decision of the House of Lords in *Lister v Hesley Hall Ltd*,<sup>88</sup> another employment case in which an employer was found vicariously liable

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80 (2001) 207 CLR 21.

81 (2006) 226 CLR 161. See [63] below.

82 (2000) 204 CLR 333.

83 (2003) 212 CLR 511.

84 [1999] 2 SCR 534 at 567-568 [57]-[58].

85 *Bazley* [1999] 2 SCR 534 at 555 [35].

86 *Bazley* [1999] 2 SCR 534 at 546-547 [19], 548-549 [22], 553 [30], 554 [31].

87 *Bazley* [1999] 2 SCR 534 at 554-555 [32]. See also *John Doe v Bennett* [2004] 1 SCR 436 at 445-446 [20].

88 [2002] 1 AC 215.

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for its employee warden's sexual assaults, went further. The previous Canadian decisions (including *Bazley*) were very influential.<sup>89</sup> The approach focussed on the "relative closeness of the connection between the nature of the employment and the particular tort"<sup>90</sup> – the degree of connection between the conduct and the employment – which was to be shown to warrant finding vicarious responsibility.<sup>91</sup> Specifically, the question was whether there was a "sufficient connection" between the abuse and the work the warden was employed to do;<sup>92</sup> or such a connection of the unlawful acts with the duties of the employee that they fell within the scope of the employment duties.<sup>93</sup> Even so, there were some significant differences in the reasons given by the members about how that focus on connection should be understood to be related to the United Kingdom's existing understanding of vicarious liability.<sup>94</sup> For example, Lord Steyn described the case of *Morris v C W Martin & Sons Ltd*<sup>95</sup> as a "classic example of vicarious liability for intentional wrongdoing" and as "high authority on the principles of vicarious liability".<sup>96</sup> But that case, properly understood, involved a breach of a personal, non-delegable duty owed by the sub-bailee to the bailor of goods.<sup>97</sup> What was said in *Lister* conflated the two species of liability.<sup>98</sup> As stated earlier, breach of a non-delegable duty is not a species of vicarious liability but, rather, is a form of direct liability.

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89 *Lister* [2002] 1 AC 215 at 222-223 [10], 229 [23], 230 [27], 237 [48].

90 [2002] 1 AC 215 at 229, 238.

91 *Lister* [2002] 1 AC 215 at 223-224 [15], 226-227 [20], 229-230 [24]-[25], 230 [28], 232 [37], 245 [69]-[70].

92 *Lister* [2002] 1 AC 215 at 237.

93 [2002] 1 AC 215 at 229, 238.

94 See, eg, *Lister* [2002] 1 AC 215 at 223-224 [15], 226-227 [20], 230 [27]-[28], 232-233 [36]-[38], 237 [48], 241 [59], 250 [82]-[83].

95 [1966] 1 QB 716.

96 *Lister* [2002] 1 AC 215 at 225-226 [19]. See also *Schokman* (2023) 97 ALJR 551 at 567-568 [71]-[76]; 410 ALR 479 at 498-500.

97 *Morris* [1966] 1 QB 716 at 725, 728, 736-738.

98 See [36] above.

53 Five Justices of this Court in *Prince Alfred College* stated that principles of vicarious liability such as those stated in *Bazley* in Canada and *Lister* in the United Kingdom "do not reflect the current state of the law in Australia".<sup>99</sup> That approach was not new. This Court took an important turn in 2003 in *Lepore*<sup>100</sup> when it rejected the vicarious liability reasoning in *Bazley* and in *Lister*.

54 Something must then be said of later decisions of the United Kingdom on which much emphasis was placed by the courts below and by DP. These decisions built on the approaches to vicarious liability in *Bazley* and *Lister* which this Court had rejected. It is appropriate to start with the decision of the Supreme Court of the United Kingdom in 2012 in *Christian Brothers*.<sup>101</sup> That case concerned the liability of a lay Roman Catholic order – the Brothers of the Christian Schools ("the Institute") – for sexual and physical abuse perpetrated by teachers against pupils at a residential institution for boys in need of care.<sup>102</sup> The teachers were lay brothers of the Roman Catholic Church and, although members of the Institute, were not bound by contract to the Institute but by vows each had taken.<sup>103</sup> The Institute was an unincorporated association whose mission was to provide Christian education to children.<sup>104</sup> The question on appeal was whether the relationship between the Institute and the teachers attracted the principles of vicarious liability.<sup>105</sup>

55 Lord Phillips of Worth Matravers, for the Supreme Court of the United Kingdom, opened his analysis by observing that "[t]he law of vicarious liability is on the move".<sup>106</sup> It is important to understand, however, that this "movement" in the law of vicarious liability in England emerged from a radically different set of starting principles, which were not the law in Australia. The point is best

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99 (2016) 258 CLR 134 at 149-150 [45].

100 *Lepore* (2003) 212 CLR 511 at 584-586 [210]-[213] and 587 [218].

101 [2013] 2 AC 1.

102 *Christian Brothers* [2013] 2 AC 1 at 7-8 [1]-[4].

103 *Christian Brothers* [2013] 2 AC 1 at 20 [57].

104 *Christian Brothers* [2013] 2 AC 1 at 20 [59].

105 *Christian Brothers* [2013] 2 AC 1 at 8 [2].

106 *Christian Brothers* [2013] 2 AC 1 at 11 [19].

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illustrated by looking at what Lord Phillips described as the established propositions underpinning the law of vicarious liability in England:<sup>107</sup> (i) it is possible for an unincorporated association to be vicariously liable for the tortious acts of one or more of its members; (ii) D2 may be vicariously liable for the tortious act of D1 even though the act in question constitutes a violation of the duty owed to D2 by D1 and even if the act in question is a criminal offence; (iii) vicarious liability can even extend to liability for a criminal act of sexual assault; and (iv) it is possible for two different defendants, D2 and D3, each to be vicariously liable for the single tortious act of D1.<sup>108</sup>

56 Proposition (i) did not then, and does not now, reflect the law in Australia.<sup>109</sup> Proposition (iii) is in tension with the requirement that the acts must be committed in the course of employment.<sup>110</sup> Another way of analysing the propositions is that the Court included under the general rubric of "vicarious liability" the areas of "agency" and "non-delegable duty" when, as has been explained, those areas of law are distinct and should not be shoe-horned into a single doctrine of vicarious liability but kept separate.

57 It was these propositions, unchallenged in that Court, that led Lord Phillips to state that it had become "more difficult to identify the criteria that must be demonstrated to establish vicarious liability than it was 50 years ago".<sup>111</sup> It was in that context that although the two-stage inquiry remained, the principle was expanded beyond a relationship of employment so that, in some circumstances, a relationship that is "akin to employment" will be sufficient to impose vicarious liability.

58 Decided as a preliminary issue, the Supreme Court held that the Institute was capable of being held vicariously liable on that extended basis for the sexual and other abuse alleged to have been committed by the brother teachers at the residential institution. The factors which led the Supreme Court to conclude that the relationship between the Institute and the brother teachers was

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107 *Christian Brothers* [2013] 2 AC 1 at 11 [20].

108 *Christian Brothers* [2013] 2 AC 1 at 11-12 [20].

109 See, eg, *Trustees of the Roman Catholic Church for the Archdiocese of Sydney v Ellis* (2007) 70 NSWLR 565 at 577 [52].

110 See *Lepore* (2003) 212 CLR 511 at 594 [240]; cf 544 [67].

111 *Christian Brothers* [2013] 2 AC 1 at 12 [21].

"sufficiently akin" to employment<sup>112</sup> as to warrant the imposition of vicarious liability were that: "(i) The institute was subdivided into a hierarchical structure and conducted its activities as if it were a corporate body. (ii) The teaching activity of the brothers was undertaken because the provincial directed the brothers to undertake it. ... (iii) The teaching activity undertaken by the brothers was in furtherance of the objective, or mission, of the institute. (iv) The manner in which the brother teachers were obliged to conduct themselves as teachers was dictated by the institute's rules."<sup>113</sup>

59 The Supreme Court justified its adoption of the test of "akin to employment" on the grounds that the policy objective underlying vicarious liability is "to ensure, in so far as it is *fair, just and reasonable*, that liability for tortious wrong is borne by a defendant with the means to compensate the victim".<sup>114</sup> The Court stated that it was for "the court to identify the policy reasons why it is fair, just and reasonable to impose vicarious liability and to lay down the criteria that must be shown to be satisfied in order to establish vicarious liability".<sup>115</sup> The policy reasons for the overarching test – that usually made it "fair, just and reasonable" to impose vicarious liability on an employer – were stated to be:<sup>116</sup> "(i) the employer is more likely to have the means to compensate the victim than the employee and can be expected to have insured against that liability; (ii) the tort will have been committed as a result of activity being taken by the employee on behalf of the employer; (iii) the employee's activity is likely to be part of the business activity of the employer; (iv) the employer, by employing the employee to carry on the activity will have created the risk of the tort committed by the employee; (v) the employee will, to a greater or lesser degree, have been under the control of the employer".<sup>117</sup> It followed, in the Court's view, that "[w]here the defendant and the tortfeasor are not bound by a contract of employment, but their relationship has the same [five]

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112 *Christian Brothers* [2013] 2 AC 1 at 20 [60].

113 *Christian Brothers* [2013] 2 AC 1 at 20 [56].

114 *Christian Brothers* [2013] 2 AC 1 at 15 [34] (emphasis added).

115 *Christian Brothers* [2013] 2 AC 1 at 15 [34].

116 *Christian Brothers* [2013] 2 AC 1 at 15 [35].

117 *Christian Brothers* [2013] 2 AC 1 at 15 [35]. cf *Cox* [2016] AC 660 at 669 [20]-[21].

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incidents, that relationship can properly give rise to vicarious liability on the ground that it is 'akin to that between an employer and an employee'.<sup>118</sup>

60 The decision at the time contributed to, and provoked, discussion and debate about whether departing from the classical paradigm of employer-employee would introduce too much uncertainty.<sup>119</sup> History showed those concerns were not unfounded. Less than four years later, the primacy of the five incidents enunciated in *Christian Brothers* became less clear.<sup>120</sup> The enduring relevance of the distinction between employee and independent contractor as a relevant touchstone of vicarious liability in England was then also open to doubt.<sup>121</sup> In later cases in the United Kingdom, the question became whether "the relationship between the defendant and the tortfeasor has particular characteristics justifying the imposition of [vicarious] liability".<sup>122</sup> Some of the subsequent cases and the resulting imposition of liability for the acts of a tortfeasor in circumstances deemed "akin to employment" have been described as "difficult"<sup>123</sup> and subject to criticism.<sup>124</sup> These have included the vicarious liability of a prison service for injuries caused to a prison catering manager by the negligence of a prisoner,<sup>125</sup> and the liability of

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118 *Christian Brothers* [2013] 2 AC 1 at 18 [47].

119 See, eg, Morgan, "Case and comment – Revising vicarious liability: a commercial perspective" [2012] *Lloyd's Maritime and Commercial Law Quarterly* 175; Morgan, "Recasting Vicarious Liability" (2012) 71 *Cambridge Law Journal* 615; O'Sullivan, "Case and Comment – The Sins of the Father: Vicarious Liability Extended" (2012) 71 *Cambridge Law Journal* 485; Tan, "A sufficiently close relationship akin to employment" (2013) 129 *Law Quarterly Review* 30.

120 *Cox* [2016] AC 660 at 669 [20]-[21].

121 See, eg, *Armes* [2018] AC 355. See also *Barclays Bank plc v Various Claimants* [2018] EWCA Civ 1670 at [61].

122 *Armes* [2018] AC 355 at 376 [54].

123 See, eg, *Armes* [2018] AC 355 at 383 [76].

124 See, eg, Rolph et al, *Balkin & Davis Law of Torts*, 6th ed (2021), ch 26 at 878-880 [26.16]; Dickinson, "Fostering Uncertainty in the Law of Tort" (2018) 134 *Law Quarterly Review* 359.

125 See, eg, *Cox* [2016] AC 660.

a council for physical and sexual abuse allegedly carried out by two foster parents.<sup>126</sup>

61 So, just over seven years after *Christian Brothers*, in *Various Claimants v Barclays Bank plc*, the Supreme Court revisited Lord Phillips' statement that "[t]he law of vicarious liability is on the move" and asked "how far that move can take it".<sup>127</sup> The Court clarified that two elements had to be shown before a person could be made vicariously liable for the torts committed by another and that both had been expanded by the courts in the United Kingdom in recent years. The two elements were identified as: "a relationship between the two persons which makes it proper for the law to make the one pay for the fault of the other" and "the connection between that relationship and the tortfeasor's wrongdoing".<sup>128</sup> In relation to the first element – the issue with which *Barclays Bank* was concerned – the Court noted that, historically, vicarious liability had been limited to the relationship between employee and employer.<sup>129</sup> Whether or not it is a correct reading of the decision to suggest that the Supreme Court sought to "walk back' the scope of vicarious liability",<sup>130</sup> the Court nevertheless restated the approach to be adopted in these terms:<sup>131</sup>

"The question ... is, as it has always been, whether the tortfeasor is carrying on business on his own account or whether he is in a relationship akin to employment with the defendant. In doubtful cases, the five 'incidents' identified by Lord Phillips may be helpful in identifying a relationship *which is sufficiently analogous to employment to make it fair, just and reasonable to impose vicarious liability*. Although they were enunciated in the context of non-commercial enterprises, they may be relevant in deciding whether workers who may be technically self-employed or agency workers are effectively part and parcel of the employer's business. But the key, as it was in *Christian Brothers* [2013] 2 AC 1, *Cox* [2016] AC 660 and *Armes* [2018] AC 355, will usually lie in understanding the details of the

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126 See, eg, *Armes* [2018] AC 355.

127 [2020] AC 973 at 980 [1].

128 *Barclays Bank* [2020] AC 973 at 980 [1].

129 *Barclays Bank* [2020] AC 973 at 980 [1].

130 Rolph et al, *Balkin & Davis Law of Torts*, 6th ed (2021), ch 26 at 880 [26.16].

131 *Barclays Bank* [2020] AC 973 at 987 [27] (emphasis added).

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relationship. Where it is clear that the tortfeasor is carrying on his own independent business it is not necessary to consider the five incidents."

62 In sum, the decision in *Christian Brothers* not only started from a different set of propositions, but the identified rationale for the expansion of the doctrine – being an assessment of what is fair, just and reasonable – depended on contestable policy choices and the allocation of risk, which are matters upon which minds might differ<sup>132</sup> and which this Court has repeatedly rejected as a sound basis for determining and developing the law of vicarious liability<sup>133</sup> and duties of care.<sup>134</sup>

63 In light of this Court having rejected, on more than one occasion over the last 25 years, both the starting point and the basis on which the Supreme Court of the United Kingdom extended the law of vicarious liability, the issue is squarely in the hands of the legislatures. This Court should not, by developing the common law, deny the centrality of the employment relationship nor abandon that requirement. As this Court stated in *Sweeney*, "[w]hatever may be the logical and doctrinal imperfections and difficulties in the origins of the law relating to vicarious liability, the two central conceptions of distinguishing between independent contractors and employees and attaching determinative significance to course of employment are now too deeply rooted to be pulled out".<sup>135</sup> Those deep roots of reliance on a threshold requirement of an employment relationship for a finding of vicarious liability extend to other Australian courts, the legislatures (including in relation to drafting employment legislation) and insurers. That list is not exhaustive.

64 Insisting on a threshold requirement of an employment relationship for a finding of vicarious liability, including in cases such as the present, has been described as harsh.<sup>136</sup> The acts of perpetrators, like those of Coffey, are predatory

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132 See, eg, *Cox* [2016] AC 660 at 669 [20]-[21].

133 See, eg, *Lepore* (2003) 212 CLR 511 at 560 [128], 586 [212]; *Prince Alfred College* (2016) 258 CLR 134 at 148-150 [38]-[47].

134 See, eg, *Sullivan v Moody* (2001) 207 CLR 562 at 579-581 [49]-[54], which rejected the test in *Caparo Industries Plc v Dickman* [1990] 2 AC 605 at 617-618.

135 *Sweeney* (2006) 226 CLR 161 at 173 [33].

136 Rolph et al, *Balkin & Davis Law of Torts*, 6th ed (2021), ch 26 at 863 [26.3]. See, eg, *English Province of Our Lady of Charity* [2013] QB 722 at 734 [36].

and the effect of them devastating.<sup>137</sup> The relationship between the Diocese and Coffey – whilst distinct – exhibited certain features that resembled that of a relationship of employer and employee.

65 But without a "clear or stable" principle for the imposition of vicarious liability,<sup>138</sup> expanding the threshold requirement to accommodate relationships that are "akin to employment" would produce uncertainty and indeterminacy in at least two ways. The first has been addressed – the "akin to employment" test has led to results in the United Kingdom which have expanded liability to relationships which hitherto would not have been understood to involve one party being liable for another's wrongs.

66 The second area of uncertainty and indeterminacy that comes from divorcing the threshold test for vicarious liability from an employment relationship is that it risks further complicating the already fraught distinction between employees and independent contractors. It is true that the case law in the United Kingdom still insists on the separateness of the category of independent contractor (or, more generally, relationships not akin to employment), in which vicarious liability will not arise.<sup>139</sup> The relevant question "is, as it has always been, whether the tortfeasor is carrying on business on his own account or whether [the tortfeasor] is in a relationship akin to employment with the defendant".<sup>140</sup> Nevertheless, it is difficult to see how reliance on only a subset of the indicia in cases "akin to employment" will not generate difficulty distinguishing employees from independent contractors more broadly. It is no answer to that challenge that central instances of contracting will still be simply resolved; the difficulties are inevitable with "borderline cases".<sup>141</sup>

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137 Australia, Royal Commission into Institutional Responses to Child Sexual Abuse, *Final Report* (2017), vol 3 at 14, 23-24, 77-156.

138 *Sweeney* (2006) 226 CLR 161 at 166 [11]. See also *Hollis* (2001) 207 CLR 21 at 37-38 [35]; *Lepore* (2003) 212 CLR 511 at 580 [196]; *Prince Alfred College* (2016) 258 CLR 134 at 149 [44], 150 [46]; *Schokman* (2023) 97 ALJR 551 at 561 [48], 566 [69]; 410 ALR 479 at 490, 497.

139 *Barclays Bank* [2020] AC 973 at 986 [24].

140 *Barclays Bank* [2020] AC 973 at 987 [27].

141 *Lepore* (2003) 212 CLR 511 at 536 [42].

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67 In *Breen v Williams*,<sup>142</sup> Gaudron and McHugh JJ said:

"Advances in the common law must begin from a baseline of accepted principle and proceed by conventional methods of legal reasoning. Judges have no authority to invent legal doctrine that distorts or does not extend or modify accepted legal rules and principles. Any changes in legal doctrine, brought about by judicial creativity, must 'fit' within the body of accepted rules and principles."

Abandoning the threshold requirement of a relationship of employment for the purposes of vicarious liability does not fit within the body of accepted rules and principles. The difficulties that have existed and presently exist with vicarious liability in Australia, and overseas, as well as the other matters that have been identified, do not provide a proper basis for the development of the common law by extension of the threshold more broadly, or to address the specific issue of whether a diocese or a bishop may be held vicariously liable for the unlawful actions of a priest who sexually abuses a child, on an incremental basis.<sup>143</sup> Reformulation of the law of vicarious liability is properly the province of the legislature.<sup>144</sup>

68 In Australia, the legislature has sought to address these issues of institutional liability following on from various reports,<sup>145</sup> which have explicitly called for reform by parliamentary intervention given the confined, and uncertain, scope of liability for intentional torts under the doctrine of vicarious liability at

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142 (1996) 186 CLR 71 at 115. See also *Dietrich v The Queen* (1992) 177 CLR 292 at 320-321.

143 See generally *Crimmins v Stevedoring Industry Finance Committee* (1999) 200 CLR 1 at 13 [3], 33-34 [77]; *Swick Nominees Pty Ltd v LeRoi International Inc [No 2]* (2015) 48 WAR 376 at 449 [387].

144 *Breen* (1996) 186 CLR 71 at 115. Victoria, Family and Community Development Committee, *Betrayal of Trust: Inquiry into the Handling of Child Abuse by Religious and Other Non-Government Organisations* (2013), vol 2 at 546-552 ("Parliamentary Committee Report"); Australia, Royal Commission into Institutional Responses to Child Sexual Abuse, *Redress and Civil Litigation Report* (2015) at 77-78, 470-473, 495.

145 See Parliamentary Committee Report (2013) at 552; Redress Report (2015) at 57-59.

common law in Australia.<sup>146</sup> The 2015 *Redress and Civil Litigation Report* of the Commonwealth Royal Commission into Institutional Responses to Child Sexual Abuse ("the Redress Report") considered parliamentary reform to be the proper and appropriate vehicle for ensuring institutional accountability and redress for the harms committed by members and employees.<sup>147</sup> And steps have been taken by legislatures. The difficulty is that the steps taken by the various legislatures have not been consistent<sup>148</sup> and, in some important respects, amendments to civil liability, following the recommendations of Royal Commissions,<sup>149</sup> are prospective.<sup>150</sup>

69 It is sufficient to address the position in Victoria. The introduction in Victoria of the Legal Identity Act does not provide a basis for imposing vicarious liability. The lack of a legal person capable of being sued had historically been a notorious impediment to the redress of abuse occurring in the context of unincorporated organisations, even when those organisations controlled valuable property held by corporate trustees.<sup>151</sup> That was remedied by the Legal Identity Act, the stated purpose of which is "to provide for child abuse plaintiffs to sue an organisational defendant in respect of unincorporated non-

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146 See Parliamentary Committee Report (2013) at 546-551; Redress Report (2015) at 53-54.

147 Redress Report (2015) at 54-55, 491-492.

148 See, eg, *Civil Liability Act 2002* (NSW), ss 6G, 6H, inserted by the *Civil Liability Amendment (Organisational Child Abuse Liability) Act 2018* (NSW). See also *Civil Liability Act 2002* (Tas), ss 49I, 49J, inserted by the *Justice Legislation Amendment (Organisational Liability For Child Abuse) Act 2019* (Tas); *Civil Liability Act 1936* (SA), ss 50A, 50G, inserted by the *Civil Liability (Institutional Child Abuse Liability) Amendment Act 2021* (SA); *Personal Injuries (Liabilities and Damages) Act 2003* (NT), s 17G, inserted by the *Personal Injuries (Liabilities and Damages) Amendment Act 2022* (NT).

149 See, eg, Redress Report (2015) at 57.

150 See, eg, *Civil Liability Act 2002* (NSW), Sch 1, cl 44; *Civil Liability Act 2002* (Tas), s 4(8); *Wrongs Act 1958* (Vic), s 93; cf *Civil Liability Act 1936* (SA), s 50D(1); *Personal Injuries (Liabilities and Damages) Act 2003* (NT), s 17B(5).

151 Parliamentary Committee Report (2013) at 511, 530-536; Redress Report (2015) at 496-511; cf *Ellis* (2007) 70 NSWLR 565.

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government organisations which use trusts to conduct their activities".<sup>152</sup> It makes it possible for an "NGO", defined to mean a non-government organisation that is an unincorporated association or body,<sup>153</sup> to be vicariously liable for the wrongs of its employees. But, as the Diocese submitted, the Act deals with the issue of legal personality. It does not alter the substantive law of vicarious liability. A relationship of employment is still required.

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That construction of the Legal Identity Act is reinforced by the extrinsic materials to the Act. The Explanatory Memorandum recorded that the "Bill responds to the problem identified in finding 26.3 and recommendation 26.1 [of the 2013 Parliamentary Committee Report], and adopts an approach to the same problem recommended by recommendation 94 of the [Redress Report]".<sup>154</sup> Chapter 26 of the Parliamentary Committee Report is divided into five sections. Finding 26.3 and recommendation 26.1 deal with the use of trusts as an aspect of legal identity of non-governmental organisations.<sup>155</sup> Section 26.5 deals separately with issues of vicarious liability and non-delegable duty.<sup>156</sup> Recommendation 94 of the Redress Report, to which the Explanatory Memorandum refers, forms an aspect of Ch 16.<sup>157</sup> Issues of vicarious liability and non-delegable duty are, however, addressed in recommendations 89 to 93, found within Ch 15.<sup>158</sup> Those recommendations were directed to the establishment of statutory liability for child sexual abuse with a reverse onus, and a statutory non-delegable duty. In particular, recommendation 93 was that "[s]tate and territory governments should ensure that the non-delegable duty and the imposition of liability with a reverse onus of proof apply prospectively and not retrospectively".<sup>159</sup> The Victorian Parliament gave effect to that recommendation in March 2017,

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152 Legal Identity Act, s 1.

153 Legal Identity Act, s 5.

154 Victoria, Legislative Assembly, *Legal Identity of Defendants (Organisational Child Abuse) Bill 2018*, Explanatory Memorandum at 1.

155 Parliamentary Committee Report (2013) at 536.

156 Parliamentary Committee Report (2013) at 545-552.

157 Redress Report (2015) at 511.

158 Redress Report (2015) at 495.

159 Redress Report (2015) at 495.

with the suggested prospective effect, under the *Wrongs Amendment (Organisational Child Abuse) Act 2017* (Vic), inserting Pt XIII of the *Wrongs Act 1958* (Vic).

71 This is not one of those areas of the law where the intersection between the common law and statute permits the Court to analogise from statute to adapt or expand the principle of vicarious liability beyond relationships of employment.<sup>160</sup>

### Conclusion and orders

72 For those reasons, the appeal should be allowed. The appellant agreed to pay DP's costs of and incidental to the special leave application and the appeal. Orders 2 and 5 of the Court of Appeal of the Supreme Court of Victoria made on 3 April 2023 should be set aside and, in their place, order that:

1. The appeal is allowed with costs.
2. The orders made by the Supreme Court of Victoria on 25 January 2022 and 28 February 2022 be set aside and, in their place, order that the proceeding be dismissed with costs.

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**160** *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, eg, *R v Swaffield* (1998) 192 CLR 159 at 193-195 [66]-[70], 202 [92]; *PGA v The Queen* (2012) 245 CLR 355 at 369 [18], 373 [30], 378 [46], 384 [64].

GLEESON J.

**Introduction**

73 In Canada,<sup>161</sup> England and Wales,<sup>162</sup> and Ireland,<sup>163</sup> the courts have imposed vicarious liability on religious bodies for sexual abuse by priests and members of religious orders in certain circumstances. In doing so, those courts have recognised that an organisation can be vicariously liable not only for the torts of its employees, but also for the torts of persons whose relationship with the organisation is "akin to employment". In Singapore, vicarious liability has also been held to be capable of arising in relationships that are akin to employment.<sup>164</sup> Similarly, in the civilian tradition, a defendant can be vicariously liable for the wrongs committed by someone who is not strictly an employee.<sup>165</sup>

74 In 2015, the Royal Commission into Institutional Responses to Child Sexual Abuse anticipated that Australian courts, too, would recognise and impose liability on institutions for criminal acts of their members or employees that cause harm to children, in the absence of legislative action.<sup>166</sup>

75 In Victoria, the State in which DP suffered sexual abuse as a child at the hands of a Catholic assistant parish priest in 1971, the *Limitation of Actions Amendment (Child Abuse) Act 2015* (Vic) lifted the previous limitation period for actions for personal injury suffered as a result of child abuse. That legislative change was made in response to the publication in 2013 of a report entitled *Betrayal of Trust*, following the Inquiry into the Handling of Child Abuse by Religious and Other Non-Government Organisations.<sup>167</sup> A key finding of the report

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161 See, eg, *John Doe v Bennett* [2004] 1 SCR 436.

162 See, eg, *Various Claimants v Catholic Child Welfare Society* [2013] 2 AC 1 ("*Christian Brothers*").

163 See, eg, *Hickey v McGowan* [2017] 2 IR 196.

164 See, eg, *Ng Huat Seng v Munib Mohammad Madni* [2017] 2 SLR 1074 ("*Ng Huat Seng*").

165 *Code civil* (France), Art 1242; *Bürgerliches Gesetzbuch* (Germany), §831-832; *Codice civile* (Italy), Art 2049; *Obligationenrecht* (Switzerland), Art 55; *Allgemeines bürgerliches Gesetzbuch* (Austria), §1313a-1315.

166 Australia, Royal Commission into Institutional Responses to Child Sexual Abuse, *Redress and Civil Litigation Report* (2015) at 54.

167 Victoria, Legislative Assembly, *Limitation of Actions Amendment (Child Abuse) Bill 2015*, Explanatory Memorandum at 1.

was that victims of child abuse found it difficult to initiate actions within the relevant limitation period and this was a barrier to claims against non-government organisations arising out of such abuse.<sup>168</sup>

76 Following the Victorian initiative, Parliaments across Australia removed limitation periods for civil actions for damages arising from sexual abuse of children.<sup>169</sup> These reforms have been described as "a landmark socio-legal development in the common law world".<sup>170</sup> There is no reason to doubt that the main reason for lifting these limitation periods was to enable survivors of historical child sexual abuse to bring claims against institutions with which perpetrators of that abuse were associated. Without vicarious liability being an available cause of action for such historical abuse, the point of removing those limitation periods is significantly diminished, particularly in the context of this Court's rejection of the principle of non-delegable duty as a basis for a school authority's liability for the sexual abuse of a pupil by an employed teacher in *New South Wales v Lepore*.<sup>171</sup>

77 Since the Royal Commission's *Redress and Civil Litigation Report* (2015), Parliaments across Australia have also taken legislative action to impose organisational liability for child abuse.<sup>172</sup> For example, in Victoria, a duty has been imposed on "relevant organisations" to take "the care that in all the circumstances of the case is reasonable to prevent the abuse of a child by an individual associated with the relevant organisation while the child is under the care, supervision or

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168 Victoria, Family and Community Development Committee, *Betrayal of Trust: Inquiry into the Handling of Child Abuse by Religious and Other Non-Government Organisations* (2013), vol 2 at 527, 543 [Finding 26.8].

169 *Limitation of Actions Act 1936* (SA), s 3A; *Limitation of Actions Act 1958* (Vic), s 27P(1); *Limitation Act 1969* (NSW), s 6A(1); *Limitation of Actions Act 1974* (Qld), s 11A; *Limitation Act 1974* (Tas), s 5B(1)(a); *Limitation Act 1981* (NT), s 5A; *Limitation Act 1985* (ACT), s 21C(1)-(2); *Limitation Act 2005* (WA), s 6A.

170 Mathews and Dallaston, "Reform of Civil Statutes of Limitation for Child Sexual Abuse Claims: Seismic Change and Ongoing Challenges" (2020) 43 *University of New South Wales Law Journal* 386 at 386.

171 (2003) 212 CLR 511 ("*Lepore*") at 534-535 [36]-[39], 598-601 [254]-[263], 609-610 [292]-[295], 624 [340]. See also *Prince Alfred College Inc v ADC* (2016) 258 CLR 134 ("*Prince Alfred College*") at 141 [3].

172 See, eg, *Civil Liability Act 1936* (SA), ss 50E, 50G; *Civil Liability Act 2002* (NSW), ss 6G, 6H; *Civil Liability Act 2002* (WA), s 15B; *Civil Liability Act 2002* (Tas), ss 49I, 49J; *Civil Liability Act 2003* (Qld), ss 33D, 33F; *Personal Injuries (Liabilities and Damages) Act 2003* (NT), s 17G.

authority of the relevant organisation".<sup>173</sup> "An individual associated with a relevant organisation" is defined broadly and, includes, if the relevant organisation is a religious organisation, "a minister of religion, a religious leader, an officer or a member of the personnel of the religious organisation".<sup>174</sup>

78 Government attention to historical child abuse by members of religious and other non-government organisations, and subsequent legislative reform to extend liability for personal injury suffered because of child abuse, reflect an evolution of attitudes to the treatment of children in our society. That evolution has produced a general intolerance of physical, sexual and psychological abuse of children, and increased recognition of societal responsibility for setting and maintaining appropriate standards of care for children, especially in institutional settings. The evolution has also been accompanied by reduced deference towards religious and charitable organisations and a commensurate preparedness to impose legal liability upon religious and other non-government organisations, including for harms inflicted by persons associated with such organisations. These changes in social conditions are not unique to Australia and can be observed across the common law world and beyond.

79 This case is a missed opportunity for the Australian common law to develop in accordance with changed social conditions and in tandem with developments in other common law jurisdictions. For the reasons given below, I do not agree with the plurality that relationships that are akin to employment do not attract vicarious liability in Australia.

80 In my view, the relationship between the Diocese of Ballarat ("the Diocese"), sued by its nominated defendant (the appellant), and Father Bryan Coffey ("Coffey"), an assistant parish priest appointed to that role in the parish of Port Fairy, is capable of attracting vicarious liability. Nevertheless, the Diocese is not vicariously liable for the sexual assaults that Coffey inflicted upon DP because those torts occurred in circumstances where Coffey opportunistically took advantage of his role to commit them. The torts were therefore not committed in the course of Coffey's performance of his role as assistant parish priest. Accordingly, I agree with the orders proposed by the plurality.

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173 *Wrongs Act 1958* (Vic), s 91(2).

174 *Wrongs Act 1958* (Vic), s 90(1)(b). See also *Civil Liability Act 1936* (SA), s 50C(1)(b); *Civil Liability Act 2002* (NSW), s 6E(1)(a); *Civil Liability Act 2002* (Tas), s 49G(1)(a); *Civil Liability Act 2003* (Qld), s 33C(1)(b); *Personal Injuries (Liabilities and Damages) Act 2003* (NT), s 17C(1)(b).

### An overview of vicarious liability

81 Vicarious liability remains "a longstanding and vitally important part of the common law of tort".<sup>175</sup> Such liability is imposed where two elements are satisfied: (1) there is a recognised relationship between the tortfeasor and the defendant; and (2) the tortfeasor committed a tort in the course of that relationship.<sup>176</sup> The plurality in this case states that the only relevant relationship is an employment relationship. It is true that, in the overwhelming majority of cases, the relevant relationship is an employment relationship. However, as explained below, that position has arisen in a context of an apparent dichotomy<sup>177</sup> in which workers have been classified as either employee or independent contractor in relation to the enterprises for which they work.

82 As a general rule, the relationship between an enterprise owner (often referred to as the "principal") and independent contractor does not attract vicarious liability.<sup>178</sup> This general rule is based upon the principle that the independent contractor carries out their work, not as the representative of another, but as a principal in their own enterprise (or the enterprise of a third party).<sup>179</sup>

83 Where vicarious liability arises, it is a species of strict liability, in the sense of liability imposed on a defendant for the wrongdoing of another, regardless of any fault on the part of the defendant.<sup>180</sup> Despite difficulties in explaining the bases for liability regardless of fault which have led strict liability to be viewed with

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175 *Christian Brothers* [2013] 2 AC 1 at 15 [34].

176 *Hollis v Vabu Pty Ltd* (2001) 207 CLR 21 ("*Hollis*") at 35 [29], 38 [38], 46 [59].

177 *Hollis* (2001) 207 CLR 21 at 38 [36], 38-39 [39]-[40].

178 *Quarman v Burnett* (1840) 6 M & W 499 [151 ER 509]; *Colonial Mutual Life Assurance Society Ltd v Producers and Citizens Co-operative Assurance Co of Australia Ltd* (1931) 46 CLR 41 ("*Colonial Mutual Life*") at 48; *Leichhardt Municipal Council v Montgomery* (2007) 230 CLR 22 at 29 [9], 41 [44], 58 [98], 71 [143].

179 *Colonial Mutual Life* (1931) 46 CLR 41 at 48; *Kondis v State Transport Authority* (1984) 154 CLR 672 at 691-692; *Burnie Port Authority v General Jones Pty Ltd* (1994) 179 CLR 520 at 574.

180 *Scott v Davis* (2000) 204 CLR 333 at 418 [250]; *Prince Alfred College* (2016) 258 CLR 134 at 148 [39]; *Armes v Nottinghamshire County Council* [2018] AC 355 at 390 [91]; Rolph et al, *Balkin & Davis Law of Torts*, 6th ed (2021) at 861-862 [26.1]; Sappideen and Vines (eds), *Fleming's The Law of Torts*, 11th ed (2024) at 493 [17.10]; Beuermann, *Reconceptualising Strict Liability for the Tort of Another* (2019) at 3.

disfavour,<sup>181</sup> strict liability persists for many common law actions and "[t]here is certainly no presumption in the common law against strict liability".<sup>182</sup>

84 As explained by the plurality, the label "vicarious liability" has been used to describe cases in which either the conduct or the liability of a third party is "attributed" to a defendant.<sup>183</sup> At least as a matter of language, "vicarious liability" seems to involve the attribution of liability to the defendant. The significance of the distinction between attribution of conduct and attribution of liability is that, where common law principles support the attribution of the conduct of person A to person B, there is arguably a more secure rationale for the imposition of liability. For example, the common law imposes liability upon a principal for the conduct of the principal's agent where that conduct was authorised or ratified by the principal.<sup>184</sup> The principal's authorisation or ratification of tortious conduct provides a satisfying explanation for the imposition of liability upon the principal,<sup>185</sup> although the explanation arguably becomes problematic when the principal's authorisation is "apparent" or "ostensible", or where the principal expressly prohibited the conduct attributed to them.<sup>186</sup>

### **The justification for expanding vicarious liability to relationships that are akin to employment**

85 The plurality considers that "[t]here is no solid foundation for expansion of the doctrine [of vicarious liability] or for its bounds to be redrawn".<sup>187</sup> I do not

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181 See, eg, *Stevens v Brodribb Sawmilling Co Pty Ltd* (1986) 160 CLR 16 at 42; *Scott v Davis* (2000) 204 CLR 333 at 417-418 [250]; *Majrowski v Guy's and St Thomas's NHS Trust* [2007] 1 AC 224 at 228-229 [8]. See also Holmes, "Agency II" (1891) 5 *Harvard Law Review* 1 at 14.

182 *Benning v Wong* (1969) 122 CLR 249 at 304. See also Goudkamp, "Rethinking Fault Liability and Strict Liability in the Law of Torts" (2023) 139 *Law Quarterly Review* 269.

183 Joint judgment at [31], [44].

184 *McGowan & Co v Dyer* (1873) LR 8 QB 141 at 145 (authorisation); *Wilson v Tumman* (1843) 6 M & G 236 at 242 [134 ER 879 at 882] (ratification).

185 *Stevens, Torts and Rights* (2007) at 244-245.

186 See, eg, *Lloyd v Grace, Smith & Co* [1912] AC 716; *Rose v Plenty* [1976] 1 WLR 141; [1976] 1 All ER 97. See also *Bilta (UK) Ltd (In liq) v Nazir [No 2]* [2016] AC 1 at 28-29 [70].

187 Joint judgment at [48].

agree that there is no adequate foundation for the development of the law of vicarious liability recognised by the courts below.

86 The expansion of vicarious liability to encompass relationships that are akin to employment of the kind in this case is modest in its operation. Such an expansion recognises that certain relationships "when whittled down to their essence, possess the same fundamental qualities as those which inhere in employer-employee relationships", so that it is anomalous not to impose vicarious liability for torts committed in the course of the relationship.<sup>188</sup> In particular, the imposition of vicarious liability for torts committed in the course of the relationship between a diocese and parish priest (or assistant parish priest) conforms with the important statement made by Gleeson CJ, Gaudron, Gummow, Kirby and Hayne JJ in *Hollis v Vabu Pty Ltd* that:<sup>189</sup>

"In general, under contemporary Australian conditions, the conduct by the defendant of an enterprise in which persons are identified as representing that enterprise should carry an obligation to third persons to bear the cost of injury or damage to them which may fairly be said to be characteristic of the conduct of that enterprise."

87 That statement was affirmed by Gummow and Hayne JJ and Kirby J in *New South Wales v Lepore*,<sup>190</sup> and by Gleeson CJ, Gummow, Hayne, Heydon and Crennan JJ in *Sweeney v Boylan Nominees Pty Limited*.<sup>191</sup>

88 The statement explains vicarious liability by reference to the responsibility of an enterprise for harms caused in the conduct of the enterprise, and particularly, responsibility for harms caused by persons who are "identified as representing that enterprise". That is not a new idea. The suggestion that vicarious liability reflects the function of an enterprise "as a mechanism for absorbing, controlling and

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**188** *Ng Huat Seng* [2017] 2 SLR 1074 at 1097 [63]. See also Nolan, "Reining in Vicarious Liability" (2020) 49 *Industrial Law Journal* 609 at 615.

**189** (2001) 207 CLR 21 at 40 [42].

**190** (2003) 212 CLR 511 at 581 [197], 603 [273], 604 [277].

**191** (2006) 226 CLR 161 ("*Sweeney*") at 172 [29].

spreading social and economic risks"<sup>192</sup> appears in both early case law<sup>193</sup> and academic writings.<sup>194</sup>

89 The plurality's statement in *Hollis* is consistent with the enterprise liability theory of vicarious liability, which underpins the current doctrine of vicarious liability in Canada<sup>195</sup> and England and Wales.<sup>196</sup> In particular, the statement accords with the observation of Lord Reed (with whom Baroness Hale, Lord Kerr and Lord Clarke agreed) in *Armes v Nottinghamshire County Council* that, of the various justifications for the imposition of vicarious liability in the English and Welsh case law:<sup>197</sup>

"The most influential idea in modern times has been that it is just that an enterprise which takes the benefit of activities carried on by a person integrated into its organisation should also bear the cost of harm wrongfully caused by that person in the course of those activities."

90 In *Hollis*, Gleeson CJ, Gaudron, Gummow, Kirby and Hayne JJ quoted Dean Prosser and Professor Keeton's identification of further justifications for imposing vicarious liability in the context of an employment relationship that had been accepted as persuasive "to some degree", including: (1) control, or the right to control, the conduct of the employee; (2) the role of the employer in "set[ting] ... in motion" the events in which the tortious conduct occurred; (3) the role of the employer in selecting the employee who committed the tort and in whom the employer reposed trust; and (4) the likely greater capacity of the employer to compensate a plaintiff for harm suffered as a result of a tort in comparison with

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192 Deakin, "'Enterprise-Risk': The Juridical Nature of the Firm Revisited" (2003) 32 *Industrial Law Journal* 97 at 112.

193 See, eg, *Limpus v London General Omnibus Co* (1862) 1 H & C 526 at 539 [158 ER 993 at 998].

194 See, eg, Pollock, *Essays in Jurisprudence and Ethics* (1882) at 129; Laski, "The Basis for Vicarious Liability" (1916) 26 *Yale Law Journal* 105 at 111-112; Atiyah, *Vicarious Liability in the Law of Torts* (1967) at 22-28; Sappideen and Vines (eds), *Fleming's The Law of Torts*, 11th ed (2024) at 493 [17.10].

195 *Bazley v Curry* [1999] 2 SCR 534 at 548 [22].

196 *Cox v Ministry of Justice* [2016] AC 660 at 670 [24]; *BXB v Trustees of the Barry Congregation of Jehovah's Witnesses* [2024] AC 567 ("*BXB*") at 588 [58(iv)].

197 *Armes v Nottinghamshire County Council* [2018] AC 355 at 381 [67]. See also *BXB* [2024] AC 567 at 588 [58(iv)].

the employee.<sup>198</sup> Each of these reasons reflect the central idea that an enterprise should be held liable for creating or increasing a risk of harm that has materialised in the employee's pursuit of the enterprise.

91 The plurality in *Hollis* also found support for the imposition of vicarious liability in the Canadian notion of "enterprise risk" (namely, that "the employer's enterprise [has] created the risk that produced the tortious act"<sup>199</sup>) and in the application of the doctrine of *respondeat superior* in United States jurisprudence, which was said to be explained by a "deeply rooted sentiment that a business enterprise cannot justly disclaim responsibility for accidents which may fairly be said to be characteristic of its activities".<sup>200</sup>

92 Subsequently, in *Lepore*, Gleeson CJ noted that enterprise risk is an "explanation of the willingness of the law to impose vicarious liability", notwithstanding that it has not been adopted in Australia as the exact test for determining whether conduct is in the course of employment.<sup>201</sup> Kirby J also considered that enterprise risk was a "persuasive" justification for the imposition of vicarious liability upon an enterprise.<sup>202</sup> Gummow and Hayne JJ referred to the common element in cases of vicarious liability, identified by Pollock, "that a man has for his own convenience brought about or maintained some state of things which in the ordinary course of nature may work mischief to his neighbours"<sup>203</sup> but rejected the imposition of liability solely by reference to the increased risk of wrongdoing because that would overlook the need to characterise the wrongdoing as having been done in the course of employment.<sup>204</sup>

93 The enterprise liability theory, as articulated by this Court in *Hollis*, and as followed in *Lepore* and in *Sweeney*, is the central justification for vicarious liability

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**198** *Hollis* (2001) 207 CLR 21 at 37 [35], quoting *Prosser and Keeton on the Law of Torts*, 5th ed (1984) at 500.

**199** (2001) 207 CLR 21 at 40 [42], quoting *Bazley v Curry* [1999] 2 SCR 534 at 548-549.

**200** (2001) 207 CLR 21 at 40 [42], quoting *Ira S Bushey & Sons Inc v United States* (1968) 398 F 2d 167 at 171.

**201** (2003) 212 CLR 511 at 543-544 [65].

**202** (2003) 212 CLR 511 at 612-613 [303].

**203** (2003) 212 CLR 511 at 582 [202].

**204** (2003) 212 CLR 511 at 588-589 [222]-[223].

in Australia. A modest expansion of vicarious liability to relationships that are akin to employment accords with that central justification.

94 This conclusion provides a principled basis to test whether a religious organisation that forms part of the Catholic Church, which can be held vicariously liable for the tort of an employee, should also be held vicariously liable for the same tort if committed by a person engaged in pursuit of the purposes of the organisation whose legal relationship with the organisation is based upon canon law instead of a contract of employment. This question should be answered in the affirmative.

95 The different legal bases of the two relationships do not affect the fact of harm wrongfully caused by a person in the course of activities pursued for the purposes of the organisation, and otherwise do not provide a satisfactory explanation for imposing liability on an organisation in one case, and for not imposing liability on that organisation in the other. For example, on the facts of this case there was no suggestion that canon law placed Coffey, in relation to the Diocese, in a role analogous to that of an independent contractor.

96 Furthermore, there is no reason to distinguish between the case of a diocese and any other enterprise. It is well established that non-profit organisations may be vicariously liable for the torts of their employees.<sup>205</sup> The functions of an enterprise in absorbing, controlling and spreading risks have particular importance in an organisation whose workers are personally unable to take legal responsibility for risks because those workers are engaged exclusively on terms that do not involve remuneration (or only a contribution for living expenses) and that do not allow them to earn remuneration by working in another enterprise. The same applies to Catholic religious orders whose members take a vow of poverty. The work of such organisations is done by persons who have joined the organisation on terms that deny their individual capability to compensate victims of any personal injuries for harm that they might inflict in the course of the organisation's work.

97 There is also no suggestion that the Diocese in this case is not vicariously liable for the torts of its employees committed in the course of their employment. As explained below, each of the reasons identified in *Hollis* for the existence of an employment relationship can be used to describe the relationship between the Diocese and Coffey. The imposition of vicarious liability on the Diocese for torts committed by an assistant priest in the course of the performance of that role is consistent with the imposition of vicarious liability on an enterprise for the torts of an employee, and does not offend the general rule that an enterprise is not vicariously liable for the torts of an independent contractor.

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205 See, eg, *Cassidy v Ministry of Health* [1951] 2 KB 343 at 361.

98 Finally, the proposition that vicarious liability might extend to a relationship that is relevantly the same as an employment relationship in the respects that justify the imposition of vicarious liability in the employment context is not problematic. The difficulty is said to be the lack of consensus around the aspects of the employment relationship that warrant the imposition of vicarious liability. In *Construction, Forestry, Maritime, Mining and Energy Union v Personnel Contracting Pty Ltd* ("*Personnel Contracting*"), employment was explained as a voluntary relationship in which the employee performs some service for the employer in return for remuneration.<sup>206</sup> Kiefel CJ, Keane and Edelman JJ noted that "the existence of a right of control by a putative employer over the activities of the putative employee serves to sensitise one to the subservient and dependent nature of the work of the employee".<sup>207</sup> Their Honours also explained that the "own business/employer's business" dichotomy usefully focuses attention on whether the work done was "so subordinate to the employer's business that it can be seen to have been performed as an employee of that business rather than as part of an independent enterprise".<sup>208</sup>

99 These key aspects of the employment relationship focus attention upon the integration of the worker's role into the enterprise and the centrality of the worker's role to the enterprise. Where a person's role in an enterprise has the characteristics of subservience and dependence, subordination, and integration, the reasons for imposing vicarious liability on the enterprise for an employee's torts apply with the same force to torts committed in the performance of that role even though the person is not bound by a contract of employment.

### **Vicarious liability apart from an employment relationship in Australia?**

100 The plurality consider that an employment relationship is a necessary precursor to a finding of vicarious liability, in the most accurate sense of attributing liability for the wrongdoing of another regardless of fault on the part of the defendant.<sup>209</sup> I do not accept that this is an accurate statement of the position under the common law of Australia. As discussed below, a significant exception to that conception of vicarious liability is the liability that is imposed on the owner or bailee of a motor vehicle for torts committed by a driver of that vehicle.

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206 (2022) 275 CLR 165 at 205 [104].

207 (2022) 275 CLR 165 at 197 [73].

208 (2022) 275 CLR 165 at 185 [39].

209 Joint judgment at [48]; see also Jagot J at [241].

101 I also do not agree with the plurality's contention<sup>210</sup> that a decision imposing vicarious liability on the Diocese in this case would require this Court to overturn *Hollis, Sweeney, Scott v Davis*<sup>211</sup> and *Lepore*. The question whether vicarious liability arises in the context of the relationship between a diocese and a parish priest has not previously arisen in this Court. While it is true that vicarious liability is almost always imposed on an employer for the torts of an employee, the cases that state that employment relationships give rise to vicarious liability have concerned either: (1) the scope of employment (with the prospect of imposing vicarious liability on a relationship other than an employment relationship not being in issue); or (2) an assumed dichotomy between the relationships of employer and employee, and principal and independent contractor. Accordingly, those cases do not bear directly on the question in this appeal of whether relationships that are akin to employment attract vicarious liability. A case is not authority for a proposition that is not argued.<sup>212</sup>

102 *Lepore, Prince Alfred College Inc v ADC*,<sup>213</sup> and *CCIG Investments Pty Ltd v Schokman*<sup>214</sup> are all cases that were concerned with whether a tortfeasor had committed a tort within the scope of their employment. In *Lepore*, in which the Court delivered six separate judgments, Gaudron J explicitly rejected the proposition that vicarious liability for another's deliberate criminal acts is necessarily limited to the acts of an employee, stating:<sup>215</sup>

"The only principled basis upon which vicarious liability can be imposed for the deliberate criminal acts of another, in my view, is that the person against whom liability is asserted is estopped from asserting that the person whose acts are in question was not acting as his or her servant, agent or representative when the acts occurred. And on that basis, vicarious liability is not necessarily limited to the acts of an employee, but might properly extend to those of an independent contractor or other person who, although as a strict matter of law, is acting as principal, might reasonably

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210 Joint judgment at [49]; see also Jagot J at [241], [251].

211 (2000) 204 CLR 333.

212 *Felton v Mulligan* (1971) 124 CLR 367 at 413; *CSR Ltd v Eddy* (2005) 226 CLR 1 at 11 [13]; *Spence v Queensland* (2019) 268 CLR 355 at 486-487 [294]; *Bell Lawyers Pty Ltd v Pentelow* (2019) 269 CLR 333 at 346 [28].

213 (2016) 258 CLR 134.

214 (2023) 97 ALJR 551; 410 ALR 479.

215 (2003) 212 CLR 511 at 561 [130].

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be thought to be acting as the servant, agent or representative of the person against whom liability is asserted."

103 In *Hollis and Sweeney*, the principal question was whether the wrongdoer was the defendant's employee or its independent contractor. *Scott* is the only relatively recent decision of this Court about vicarious liability to arise in the context of a relationship where it was accepted that the tortfeasor was not an employee. The decision in *Scott* turned on the decision of this Court in *Soblusky v Egan*.<sup>216</sup>

#### *Soblusky and Scott*

104 Having regard to the diverse reasoning in *Scott* that is set out below, there is no identifiable aspect of the decision that would need to be re-opened to reach a conclusion that the relationship between the Diocese and Coffey was capable of giving rise to vicarious liability even though it was not an employment relationship. Instead, *Scott* should be treated as a case, decided prior to *Hollis*, in which the Court confirmed that vicarious liability was capable of arising in the relationship of a bailee and a driver of a motor vehicle and, accordingly, did not insist upon an employment relationship as a precursor to vicarious liability. Rather, the Court maintained the "branch" that *Soblusky* recognised to have grown from the "main trunk of traditional doctrine governing vicarious responsibility".<sup>217</sup>

105 *Soblusky* holds that the owner or bailee of a motor vehicle is vicariously liable for the negligence of the driver whose management of the vehicle is "in fact and law subject to direction and control" by the owner or bailee.<sup>218</sup> This principle is not in any way concerned with a relationship of employment.

106 The facts of the case were that the bailee of a motor vehicle was a passenger in the vehicle. While he was asleep, the vehicle was involved in an accident caused by the negligence of the driver and the passengers in the vehicle sustained bodily injuries. This Court held that the bailee was vicariously liable for the driver's negligence.

107 The Court (Dixon CJ, Kitto and Windeyer JJ) reasoned that the relevant principle applied even though the bailee was asleep because "in point of law ... he is driving by his agent" and the fact that he was asleep "meant no more than a

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**216** (1960) 103 CLR 215.

**217** *Scott* (2000) 204 CLR 333 at 384-385 [157], quoting *Soblusky v Egan* (1960) 103 CLR 215 at 229.

**218** (1960) 103 CLR 215 at 231.

complete delegation to his agent during his unconsciousness."<sup>219</sup> The agency relationship was said to arise from the bailee's "full legal authority to direct what is done with [the vehicle]" and his appointment of "another to do the manual work of managing it and to do this on his behalf in circumstances where he can always assert his power of control".<sup>220</sup> This reasoning suggests that the case may have been decided on the basis that the driver's acts, rather than his liability, were attributed to the bailee. However, that conclusion is a tenuous one. This Court's decision in *Colonial Mutual Life Assurance Society Ltd v Producers and Citizens Co-operative Assurance Co of Australia Ltd*,<sup>221</sup> the leading authority in respect of when an agent's acts can be attributed to their principal, was not referred to in the Court's judgment. Moreover, the Court's language of "complete delegation" in the reasons set out above acknowledges the absence of any true capacity of the bailee to assert the power of control, and points to the artificiality of attributing the driver's negligence to the bailee. Indeed, this aspect of the Court's reasoning was later doubted by Gummow J and Hayne J in *Scott*.

108 In *Scott*, the issue that arose for consideration was whether the owner of a light aeroplane was vicariously liable for the pilot's negligence that caused the aeroplane to crash. The pilot was not the owner's employee. Gleeson CJ, considering cases including *Soblusky*, found that the owner was not liable because he was not in a position to assert a power of control over the manner in which the pilot was flying the aeroplane and because the pilot was neither in fact, nor in law, subject to the owner's direction and control at the critical time.<sup>222</sup> Nor was the pilot the representative or delegate of the owner so as to render the owner liable in accordance with *Colonial Mutual Life*.<sup>223</sup> Gleeson CJ did not reason that the owner of the aeroplane was not vicariously liable merely because the pilot was not his employee.

109 Gummow J provided a detailed analysis of the case law prior to *Soblusky*, including the history by which "agency" had become the preferred basis for the principle of "vicarious" liability in cases involving the liability of a vehicle owner for the driver's negligence.<sup>224</sup> Gummow J concluded that "any general principle

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219 (1960) 103 CLR 215 at 231.

220 (1960) 103 CLR 215 at 231.

221 (1931) 46 CLR 41.

222 (2000) 204 CLR 333 at 340-342 [12]-[16].

223 (2000) 204 CLR 333 at 342-343 [19].

224 (2000) 204 CLR 333 at 407 [223].

respecting 'agency' and 'vicarious liability' derived from [*Soblusky*] cannot have a sound foundation".<sup>225</sup>

110 Concerning the evolution of the tortious liability of a master for the acts of his servant, Gummow J noted that vicarious liability in the common law was derived from medieval notions of "headship of a household, including wives and servants, whereby their legal standing was absorbed into that of the master",<sup>226</sup> and accepted that "there can be a relationship between tort and agency, but ... the extent thereof remains a matter of debate".<sup>227</sup> Gummow J considered that the House of Lords decision in *Morgans v Launchbury*,<sup>228</sup> and the cases upon which it rested, "appear to introduce a new type of agent, who is not an employee, nor an independent contractor; rather, it is 'one whose job is not to make contracts but to do such favours as driving cars for his temporary principal'".<sup>229</sup> Gummow J ultimately concluded that "[t]he principle of 'vicarious' liability [in these cases] does not rest upon 'agency', in its proper sense, nor simply upon the employment relationship".<sup>230</sup>

111 Hayne J considered that, contrary to how *Soblusky* had purportedly been reasoned, the cases involving liability for another's negligent use of a chattel had been concerned with inferences of vicarious liability, and "not inferences of direct liability".<sup>231</sup> In particular, Hayne J acknowledged that, since the bailee of the vehicle in *Soblusky* was asleep in the vehicle at the time of the accident, the decision in that case "did not depend on any finding that the [bailee] had in fact directed the commission of the tort".<sup>232</sup>

112 When analysing the principle of vicarious liability more generally, Hayne J observed that, "in a commercial setting, much will depend upon the distinction between the relationship of employer and employee and that of employer and

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225 (2000) 204 CLR 333 at 385 [159].

226 (2000) 204 CLR 333 at 409-410 [230].

227 (2000) 204 CLR 333 at 410-411 [233].

228 [1973] AC 127.

229 (2000) 204 CLR 333 at 412 [237].

230 (2000) 204 CLR 333 at 413 [239].

231 (2000) 204 CLR 333 at 437-438 [305].

232 (2000) 204 CLR 333 at 438 [306].

independent contractor".<sup>233</sup> His Honour also observed that, in drawing that distinction, questions of control, and power to control, are often significant and that the relevant control or power is "much affected by the nature of the contract" between the defendant and the wrongdoer. Hayne J concluded that, in the social setting under discussion, vicarious liability should not be imposed as the owner of the aeroplane could not stipulate what control, if any, he would have over the pilot such that the management of the aircraft was not subject to the owner's direction and control.<sup>234</sup>

113 Callinan J considered that the conditions necessary to establish liability under the principle stated in *Soblusky* were not satisfied on the facts of the case. His Honour took into account that: (1) the context was "entirely non-commercial"; (2) the owner derived no relevant benefit from providing the aeroplane and making the request of the pilot; (3) nothing suggested itself to the owner as being untoward or calling for his intervention in the pilot's earlier conduct in flying the aeroplane; and (4) there was no occasion calling for, nor the opportunity for, the owner to take any steps that could have been effective to prevent the pilot from operating the aeroplane in the way that he did.<sup>235</sup>

#### *Hollis and Sweeney*

114 In each of *Hollis* and *Sweeney*, the principal question was whether the wrongdoer was the defendant's employee or independent contractor. The outcomes in these cases are therefore not directly relevant to the question raised in this appeal. Further, and contrary to what is suggested by the plurality in this case, the reasoning in *Hollis* and *Sweeney* tends to support the development of the doctrine of vicarious liability contended for by the respondent.

115 In *Hollis*, Gleeson CJ, Gaudron, Gummow, Kirby and Hayne JJ noted the general rule, not challenged in that case, that an employer is vicariously liable for the torts of an employee but a principal is not vicariously liable for the torts of an independent contractor.<sup>236</sup> Their Honours also noted that vicarious liability "more usually flows" from a relationship of employment than from a relationship of

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233 (2000) 204 CLR 333 at 436 [301].

234 (2000) 204 CLR 333 at 437 [302], 440 [311].

235 (2000) 204 CLR 333 at 459-460 [358].

236 (2001) 207 CLR 21 at 36 [32].

principal and independent contractor.<sup>237</sup> A similar statement was made recently by Kiefel CJ, Keane and Edelman JJ in *Personnel Contracting*.<sup>238</sup>

116 The plurality in *Hollis* found vicarious liability on the ground that the negligent bicycle courier was an employee of the defendant,<sup>239</sup> while McHugh J found that the courier was neither an employee nor an independent contractor but was the defendant's agent, acting within his authority, as its representative in carrying out its contractual obligations for its benefit.<sup>240</sup> The plurality concluded:<sup>241</sup>

"This decision applies existing principle in a way that is informed by a recognition of the fundamental purposes of vicarious liability *and the operation of that principle in the context of one of the many particular relationships* that has developed in contemporary Australian society."

117 These remarks, alongside the fact that the plurality expressly contemplated that vicarious liability could "flow" from relationships other than those of employment, indicate that the decision in *Hollis* does not need to be re-opened to support an extension of the doctrine of vicarious liability to relationships that are akin to employment.

118 It is also important to recognise that the plurality's conclusion in *Hollis* followed their consideration of Dixon J's explanation, in *Colonial Mutual Life*, of the dichotomy between the relationships of employer and employee, and principal and independent contractor.<sup>242</sup> *Colonial Mutual Life* was a case in which the appellant insurer was found liable for the defamatory statements of its agent, who was not the insurer's employee. The plurality in *Hollis* noted that Dixon J "fixed upon the absence of representation and of identification with the alleged employer as indicative of a relationship of principal and independent contractor".<sup>243</sup>

119 What the plurality in *Hollis* meant by this was that, in *Colonial Mutual Life*, Dixon J reasoned that liability was imposed by considering the function of the agent which, his Honour concluded, was "that of representing the person who

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237 (2001) 207 CLR 21 at 35 [29].

238 (2022) 275 CLR 165 at 200 [83].

239 (2001) 207 CLR 21 at 46 [61].

240 (2001) 207 CLR 21 at 60-61 [101]-[102].

241 (2001) 207 CLR 21 at 46 [59] (emphasis added).

242 (1931) 46 CLR 41 at 48-50.

243 (2001) 207 CLR 21 at 39 [40].

requests its performance in a transaction with others, so that the very service to be performed consists in standing in his place and assuming to act in his right and not in an independent capacity".<sup>244</sup> Dixon J noted that, at that time, the rule which imposed liability upon a master for the wrongs of their servant was "commonly regarded as part of the law of agency".<sup>245</sup> That said, his Honour also observed that he had identified "no case which distinctly decides that a principal is liable generally for wrongful acts which he did not directly authorize, committed in the course of carrying out his agency by an agent who is not the principal's servant or partner, except, perhaps, in some special relations, such as solicitor and client, and then within limitations".<sup>246</sup>

120 In that context, Gleeson CJ, Gaudron, Gummow, Kirby and Hayne JJ in *Hollis* did not state a rule that confines vicarious liability in tort to the employment relationship. Rather, their Honours gave support to the notion of the tortfeasor's representation of, and identification with, the defendant as critical to the imposition of vicarious liability. Further, their Honours accepted that an agency relationship of the kind identified in *Colonial Mutual Life* was capable of supporting the principal's vicarious liability.

121 Similarly, in *Sweeney*, Gleeson CJ, Gummow, Hayne, Heydon and Crennan JJ noted that the concept of representation that is relevant to vicarious liability meant more than that the tortfeasor acted for the benefit or advantage of the defendant.<sup>247</sup> Their Honours cautioned that terms like "representative", "delegate" or "agent" should not be permitted to obscure "the need to examine what exactly are the relationships between the various actors".<sup>248</sup> Consistently with this observation, their Honours found that the defendant company was not vicariously liable for the torts of a mechanic (who was the tortfeasor on the facts of the case) because particular features of the relationship indicated that the mechanic was the defendant's independent contractor.<sup>249</sup>

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244 (1931) 46 CLR 41 at 48-49.

245 (1931) 46 CLR 41 at 49.

246 (1931) 46 CLR 41 at 49.

247 (2006) 226 CLR 161 at 172 [29].

248 (2006) 226 CLR 161 at 167 [13].

249 (2006) 226 CLR 161 at 168 [14]-[15], 173 [31]-[33].

122 As in *Hollis*, the different majority in *Sweeney* considered the judgment of Dixon J in *Colonial Mutual Life*, explaining that the insurer's liability for the tort of its agent (who was not an employee):<sup>250</sup>

"stands wholly within the bounds of the explanations proffered by Pollock for the liability of a master for the tortious acts of a servant. It stands within those bounds because of the closeness of the connection between the principal's business and the conduct of the independent contractor for which it is sought to make the principal liable."

123 The majority's later statement – that the "two central conceptions" of the law relating to vicarious liability, being the distinction between independent contractors and employees and the determinative significance of the course of employment, are "now too deeply rooted to be pulled out"<sup>251</sup> – does not detract from their Honours' earlier explanation of *Colonial Mutual Life* as a case in which vicarious liability was imposed for the torts committed outside of an employment relationship. The majority did not preclude, and specifically affirmed, the possibility of vicarious liability in the context of a relationship other than a relationship of employment.

#### **Did this Court take an important turn in *Lepore*?**

124 The plurality in this case has referred to the statement of French CJ, Kiefel, Bell, Keane and Nettle JJ in *Prince Alfred College* that principles of the kind 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".<sup>252</sup> The plurality in this case has interpreted this statement as a rejection of "[the] principles of vicarious liability such as those stated in *Bazley* in Canada and *Lister* in the United Kingdom".<sup>253</sup> The plurality contends that this rejection was not new because in *Lepore* this Court took an "important turn ... when it rejected the vicarious liability reasoning in *Bazley* and in *Lister*".<sup>254</sup> I do not agree with this analysis.

125 The analysis in each of *Lepore* and *Prince Alfred College* concerned an established employment relationship. Any rejection of the principles stated in

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250 (2006) 226 CLR 161 at 171 [24].

251 (2006) 226 CLR 161 at 173 [33].

252 (2016) 258 CLR 134 at 150 [45].

253 Joint judgment at [53].

254 Joint judgment at [53].

*Bazley v Curry*<sup>255</sup> and *Lister v Hesley Hall Ltd*<sup>256</sup> concerned the separate question of whether the employer was vicariously liable because the employee's conduct occurred in the course of their employment.

126 Although vicarious liability had been extended to relationships akin to employment in both Canada and England and Wales before *Prince Alfred College*, that development was not considered in any of the reasons for judgment in that case, being irrelevant to the issue that was raised. The English and Welsh decision that extended vicarious liability to relationships akin to employment, *Various Claimants v Catholic Child Welfare Society* ("*Christian Brothers*"),<sup>257</sup> was referred to in argument, but was cited only by Gageler and Gordon JJ, and only for the proposition that the imposition of vicarious liability for intentional wrongdoing is fact-specific.<sup>258</sup>

127 Otherwise, as was noted by French CJ, Kiefel, Bell, Keane and Nettle JJ in *Prince Alfred College, Lepore* produced no majority view on the question of the school's liability for sexual abuse of a pupil and left intermediate appellate courts in an uncertain position about the approach to be taken to the question of vicarious liability.<sup>259</sup> It was for this reason that French CJ, Kiefel, Bell, Keane and Nettle JJ stated that the Court needed to address "existing uncertainties" that had arisen from the differing views expressed in the judgments in *Lepore*. Plainly, their Honours did not identify any important turn taken by the Court in *Lepore*.

128 Nor did the principal joint judgment in *Prince Alfred College* consider that *Lepore* had rejected the principles of vicarious liability stated by the Supreme Court of Canada in *Bazley* and the House of Lords in *Lister*. To the contrary, while their Honours in the principal joint judgment in *Prince Alfred College* concluded that the correct approach to deciding whether vicarious liability is imposed for a wrongful act that is a criminal offence did not involve applying the "tests" used in Canada and in England and Wales, the correct approach drew heavily on various factors identified in cases involving child sexual abuse in those jurisdictions.<sup>260</sup>

129 As for *Lepore*, it clearly cannot be said that the six reasons for judgment in that case, either unanimously or by a majority, rejected the vicarious liability

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255 [1999] 2 SCR 534.

256 [2002] 1 AC 215.

257 [2013] 2 AC 1.

258 (2016) 258 CLR 134 at 171 [128].

259 (2016) 258 CLR 134 at 141 [3], 143 [10].

260 *Prince Alfred College* (2016) 258 CLR 134 at 160 [82], 172 [130].

reasoning in *Bazley* and in *Lister*. Gleeson CJ considered that the "orthodox method of analysing the problem" of liability for criminal wrongdoing of another was "that adopted by the House of Lords and the Supreme Court of Canada".<sup>261</sup> His Honour also considered that the decisions in *Bazley* and *Lister* demonstrated that, "in those jurisdictions, as in Australia, one cannot dismiss the possibility of a school authority's vicarious liability for sexual abuse merely by pointing out that it constitutes serious misconduct on the part of a teacher".<sup>262</sup>

130 Gaudron J rejected the test identified in *Bazley* for vicarious liability for an employee's sexual abuse of a child, namely, whether the employer's enterprise and empowerment of an employee "materially increased the risk" of harm caused by the employee's act.<sup>263</sup> Her Honour also considered that the "close connection" between what was done and what the person was engaged to do, the focus of attention in *Lister*, was not the test for the estoppel that she identified as the justification for imposing vicarious liability for the criminal conduct of an employee.<sup>264</sup> For vicarious liability, her Honour identified as the relevant state of affairs "simply that the person whose acts or omissions are in question was acting as the servant[,] agent or representative of the person against whom liability is asserted".<sup>265</sup>

131 McHugh J decided the three cases in *Lepore* on principles of non-delegable duty and made only a brief and uncritical reference to *Bazley* and *Lister*.<sup>266</sup>

132 Gummow and Hayne JJ disapproved of the decision in *Bazley*.<sup>267</sup> However, their Honours quoted with approval the House of Lords in *Dubai Aluminium Co Ltd v Salaam*,<sup>268</sup> a case which refined the House of Lords' analysis in *Lister*. Gummow and Hayne JJ quoted the decision in support of their conclusion that "an

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261 (2003) 212 CLR 511 at 535 [39].

262 (2003) 212 CLR 511 at 546 [72].

263 (2003) 212 CLR 511 at 560 [126].

264 (2003) 212 CLR 511 at 561 [131].

265 (2003) 212 CLR 511 at 561 [131].

266 (2003) 212 CLR 511 at 573 [166].

267 (2003) 212 CLR 511 at 584-586 [210]-[212], 587 [218].

268 [2003] 2 AC 366.

important element" of the analysis in vicarious liability cases is the "'closeness of the connection' between the employment relationship and the wrongful act".<sup>269</sup>

133 Kirby J considered that the common law of Australia on the subject of children who are harmed by an employee of an organisation in whose care they are placed "marches in step with that pronounced by the final courts of the United Kingdom and Canada".<sup>270</sup> His Honour therefore referred to both *Bazley* and *Lister* with evident approval.

134 Callinan J rejected the test for liability adopted in *Lister*.<sup>271</sup> His Honour said nothing about principles stated in *Bazley*.

135 In summary, *Lepore* has no real significance for whether vicarious liability can be imposed in the context of a relationship akin to employment.

### **Imposing liability on church bodies in relation to the clergy and members of religious communities**

136 In addition to the fact that the existing case law governing the doctrine of vicarious liability does not foreclose the extension of the doctrine to relationships that are akin to employment, the international case law and recent statutory reforms in Australia provide justification for that extension to cover relationships between church bodies and the members who represent them.

#### *The international case law*

137 In as early as the 14th century, a religious authority was found to be liable for the tort of waste committed by a "co-canon ... 'for that is adjudged the deed of the abbot'".<sup>272</sup> It should therefore come as no surprise that, in many international jurisdictions, religious authorities have been held liable for torts committed by the members who represent them.

138 In *John Doe v Bennett*, the Supreme Court of Canada found that the relationship between a Catholic parish priest and a "diocesan enterprise" was "sufficiently close" to support a finding of vicarious liability for sexual abuse of

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269 (2003) 212 CLR 511 at 586 [213].

270 (2003) 212 CLR 511 at 604 [277].

271 (2003) 212 CLR 511 at 626 [345].

272 Holmes, "Agency" (1891) 4 *Harvard Law Review* 345 at 357, citing YB 49 Ed III at 25-26, pl 3.

boys in the priest's parishes.<sup>273</sup> One of the defendants was an ecclesiastical corporation sole, incorporated by statute, and created "to serve as a point of legal interface between the Roman Catholic Church and the community at the diocesan level".<sup>274</sup> McLachlin CJ, delivering the Court's judgment, concluded that:<sup>275</sup>

"The relationship between the bishop [who constituted the corporation sole] and a priest in a diocese is not only spiritual, but temporal. The priest takes a vow of obedience to the bishop. The bishop exercises extensive control over the priest, including the power of assignment, the power to remove the priest from his post and the power to discipline him. It is akin to an employment relationship."

139 In England and Wales, the Court of Appeal in the 2010 case of *Maga v Archbishop of Birmingham*<sup>276</sup> extended vicarious liability to cases in which the tortfeasor held a position with the defendant that was functionally analogous to employment. There, the Archbishop of Birmingham admitted that a Roman Catholic priest, who the claimant alleged had sexually abused him, was an employee of the Archdiocese for the purpose of the proceeding. Lord Neuberger identified, as reasons for determining that the defendant was vicariously liable, the following:<sup>277</sup>

"A priest has a special role, which involves trust and responsibility in a more general way even than a teacher, a doctor, or a nurse. He is, in a sense, never off duty; thus, he will normally be dressed in 'uniform' in public and not just when at his place of work. So, too, he has a degree of general moral authority which no other role enjoys; hence the title of 'Father Chris', by which Father Clonan was habitually known. It was his employment as a priest by the archdiocese which enabled him, indeed was intended to enable him, to hold himself out as having such a role and such authority."

140 In the later decision of *E v English Province of Our Lady Charity*,<sup>278</sup> the Court of Appeal found that the relationship between the Roman Catholic Diocese

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273 [2004] 1 SCR 436 at 447.

274 [2004] 1 SCR 436 at 442.

275 [2004] 1 SCR 436 at 449.

276 [2010] 1 WLR 1441.

277 [2010] 1 WLR 1441 at 1455 [45].

278 [2013] QB 722.

of Portsmouth and a priest was so close in character to one of employer and employee that it was just and fair to hold the defendant vicariously liable.

141 The claimant, E, alleged that she was sexually abused by a priest (known as Father Baldwin) when Father Baldwin, in the course of his duties within the Roman Catholic Diocese of Portsmouth, had visited a children's home (operated by a religious order) of which E was a resident. E commenced proceedings against the order and the trustees of a trust which had stood in the place of the diocesan bishop at the material time.

142 Ward LJ (with whom Davis LJ concurred in a separate judgment) identified the central question as whether the Roman Catholic Bishop of Portsmouth employed Father Baldwin and, if not, was the relationship akin to employment. Ward LJ posed the question whether the relationship between the bishop and the priest was "so close in character to one of employer/employee that it is just and fair to hold the employer vicariously liable".<sup>279</sup> His Lordship identified as hallmarks of the employment relationship similar characteristics to those identified by this Court in *Personnel Contracting*: control, whether the worker's role is an integral part of the employer's business, and whether the worker's work is done as part of the employer's business or as part of some other business.<sup>280</sup>

143 Concerning control, Ward LJ noted that the priest had significant discretion to decide how to run his parish within a pre-existing framework of rights and obligations set out in canon law, but he was ultimately subject to the sanctions and control of his bishop. His Lordship compared the bishop's control over the priest with a health trust's control over a surgeon: "neither is told how to do the job but both can be told how not to do it".<sup>281</sup> Ward LJ concluded:<sup>282</sup>

"In my judgment the question of control should be viewed in a wider sense than merely inquiring whether the employer has the legal power to control how the employee carries out his work. It should be viewed more in terms of whether the employee is accountable to his superior for the way he does the work so as to enable the employer to supervise and effect improvements in performance and eliminate risks of harm to others ... In this sense the priest is accountable to his bishop."

144 Concerning integration, his Lordship had no doubt that the role of the parish priest is "wholly integrated into the organisational structure of the church's

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279 [2013] QB 722 at 769 [73].

280 [2013] QB 722 at 769 [74], 771-772 [78]-[79].

281 [2013] QB 722 at 770 [75].

282 [2013] QB 722 at 770-771 [76].

enterprise".<sup>283</sup> For his Lordship, the requirement that the priest must reside in the parochial house close to the church and the priest's receipt of "decent support" from parish collections were somewhat like being paid a wage, but "certainly [did] not resonate with being an entrepreneur".<sup>284</sup> Ward LJ posited the scenario of a parish priest responding to an urgent call to administer the last rites to a parishioner in accordance with his duties under canon law:<sup>285</sup>

"To perform this sacred duty he jumps on his battered old bicycle and pedals furiously down the hill to attend his ailing parishioner. Alas he does so negligently, fails to observe another of his flock on a controlled pedestrian crossing. She is knocked down and suffers injury. The priest was clearly in the course of doing what he was appointed to do ... But he has taken a vow of poverty. He is not himself insured. But the parish is. Are we really having to conclude that his bishop and/or the diocesan trust are not vicariously liable because he is not employed or in a relationship akin to employment? Are we to say he is simply an office holder personally responsible for the manner in which he conducts his office. I think not."

145 In *Christian Brothers*,<sup>286</sup> the Supreme Court of the United Kingdom found that the relationship between a Christian Brother and a lay Catholic teaching order (namely, an unincorporated association known as the Institute of the Brothers of the Christian Schools ("the Institute")) was akin to employment because it had "all the essential elements" of an employment relationship.<sup>287</sup>

146 Lord Phillips (with whom Baroness Hale, Lord Kerr, Lord Wilson and Lord Carnwath agreed) affirmed the approach of the Court of Appeal in *E* that "[w]here the defendant and the tortfeasor are not bound by a contract of employment, but their relationship has the same incidents, that relationship can properly give rise to vicarious liability on the ground that it is 'akin to that between an employer and an employee'".<sup>288</sup> His Lordship considered that the case for finding vicarious liability was much stronger in the case of the Institute than in the case of the bishop in *E*.<sup>289</sup> Lord Phillips concluded that the relationship between

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283 [2013] QB 722 at 771 [78].

284 [2013] QB 722 at 771-772 [79].

285 [2013] QB 722 at 772 [83].

286 [2013] 2 AC 1.

287 [2013] 2 AC 1 at 20 [56]. See also *BXB* [2024] AC 567 at 581 [36].

288 [2013] 2 AC 1 at 18 [47].

289 [2013] 2 AC 1 at 20 [55].

the teacher brothers and the Institute was different from an employment relationship in only two immaterial respects. These were: (1) the brothers were bound to the Institute not by contract, but by their vows; and (2) "[f]ar from the institute paying the brothers, the brothers entered into deeds under which they were obliged to transfer all their earnings to the institute. The institute catered for their needs from these funds."<sup>290</sup> Finally, Lord Phillips found that the members of the Institute were united in the objective of providing Christian teaching for boys, and the relationship between the teaching brothers and the institute was directed to achieving that objective.<sup>291</sup>

147 In the recent decision of *BXB v Trustees of the Barry Congregation of Jehovah's Witnesses*,<sup>292</sup> the Supreme Court of the United Kingdom found a relationship akin to employment, supporting the imposition of vicarious liability, between the wrongdoer and the Watch Tower Bible and Tract Society of Pennsylvania, a charitable corporation that supported the worldwide activities of the Jehovah's Witnesses. In that case, the claimant was a woman who was sexually assaulted by an elder of the Jehovah's Witnesses. She commenced an action for damages for personal injury including psychiatric harm against two entities that conducted or supported the religious activities of Jehovah's Witnesses. Lord Burrows (with whom Lord Reed, Lord Hodge, Lord Briggs and Lord Stephens agreed) identified relevant features to consider when deciding whether a relationship is "akin to employment" as including:<sup>293</sup>

"whether the work is being paid for in money or in kind, how integral to the organisation is the work carried out by the tortfeasor, the extent of the defendant's control over the tortfeasor in carrying out the work, whether the work is being carried out for the defendant's benefit or in furtherance of the aims of the organisation, what the situation is with regard to appointment and termination, and whether there is a hierarchy of seniority into which the relevant role fits. It is important to recognise ... that the 'akin to employment' expansion does not undermine the traditional position that there is no vicarious liability where the tortfeasor is a true independent contractor in relation to the defendant."

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**290** [2013] 2 AC 1 at 20 [57].

**291** [2013] 2 AC 1 at 20 [59].

**292** [2024] AC 567.

**293** [2024] AC 567 at 587 [58(ii)].

*The statutory reforms in Australia*

148 Since the Royal Commission, all States and Territories have introduced laws that impose liability upon organisations for child abuse committed by members of those organisations. Other than in the Australian Capital Territory, institutional liability is extended beyond liability for the wrongs of an employee. In New South Wales, South Australia, Tasmania and the Northern Territory, liability extends to abuse by an individual who is "akin to an employee" of the organisation.<sup>294</sup> In Victoria and Queensland, new duties of care have been enacted to prevent child abuse by an individual associated with the relevant organisation and, if the organisation is a religious organisation, this includes a minister of religion, a religious leader or a member of the personnel of the religious organisation.<sup>295</sup> In Western Australia, liability extends to a case where a person was subjected to child sexual abuse "by a person associated with an institution".<sup>296</sup>

149 Increasing recognition that priests and other members of religious orders are analogous to employees in important respects, and should be treated accordingly, is apparent in contexts apart from tort law, both in Australia and elsewhere. For example, in the House of Lords decision of *Percy v Board of National Mission of the Church of Scotland*, it was found that the relationship between an ordained minister of the Church of Scotland and the Board of National Mission of the Church of Scotland was an employment relationship for the purposes of a sex discrimination statute, although there was no contract of employment.<sup>297</sup> In Australia, taxation laws treat priests as employees,<sup>298</sup> and anti-discrimination laws impose vicarious liability for the conduct of an agent where that conduct is in connection with duties of the agent.<sup>299</sup>

150 These instances of liability imposed on religious organisations demonstrate a marked social change in which relationships established under non-legal

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**294** *Civil Liability Act 1936* (SA), s 50A(1); *Civil Liability Act 2002* (NSW), s 6G(1); *Civil Liability Act 2002* (Tas), s 49I(1); *Personal Injuries (Liabilities and Damages) Act 2003* (NT), s 17G(1).

**295** *Wrongs Act 1958* (Vic), ss 90(1)(b), 91(2); *Civil Liability Act 2003* (Qld), ss 33C(1)(b), 33D.

**296** *Civil Liability Act 2002* (WA), ss 15B, 15D.

**297** [2006] 2 AC 28.

**298** *Fringe Benefits Tax Assessment Act 1986* (Cth), ss 57, 136 (definitions of "employment" and "employee"); Taxation Ruling 2019/3, "Fringe benefits tax: benefits provided to religious practitioners" at 2 [5], 3 [11].

**299** See, eg, *Sex Discrimination Act 1984* (Cth), s 106.

frameworks, or alternative legal frameworks such as canon law, are not an acceptable justification for the non-imposition of vicarious liability where the relevant relationships are regarded as "functionally analogous to employment"<sup>300</sup> or, in other words, akin to employment.

### **An alternative statement of the positive law**

151 An approach to vicarious liability that responds to contemporary Australian conditions first asks whether the tortfeasor is an employee or an independent contractor. The extension of vicarious liability to relationships akin to employment does not cut across the general rule that enterprises are not vicariously liable for the torts of an independent contractor. Outside of the category of religious organisations, this question will resolve whether the relationship between the defendant and the tortfeasor is capable of giving rise to vicarious liability in the vast majority of cases. "The long-standing distinction ... between employees and independent contractors remain[s] of crucial importance."<sup>301</sup>

152 If, however, the tortfeasor is neither an employee nor an independent contractor, a court must then ask whether the relationship between the tortfeasor and defendant is akin to one of employment by focusing on the details of the relationship. The relevant features to focus on will be those identified in *Hollis* and *Personnel Contracting*.<sup>302</sup>

153 Liability for the torts of another requires that the tortious conduct be committed "in the course or scope of" the relationship between the tortfeasor and the defendant.<sup>303</sup> Vicarious liability for unauthorised wrongful conduct by employees has been explained by connections between the wrongful conduct and features of the role that the employee is engaged to perform, including, as identified in *Prince Alfred College*, "authority, power, trust, control and the ability to achieve intimacy with the victim".<sup>304</sup>

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300 Nolan, "Reining in Vicarious Liability" (2020) 49 *Industrial Law Journal* 609 at 615.

301 *BXB* [2024] AC 567 at 585 [50]. See also *Various Claimants v Barclays Bank plc* [2020] AC 973 at 986 [24], 987 [27].

302 *Hollis* (2001) 207 CLR 21 at 42 [48]-[50], 43 [53]-[54], 44 [56]-[57]; *Personnel Contracting* (2022) 275 CLR 165 at 186-187 [41]-[44], 220 [143].

303 *Prince Alfred College* (2016) 258 CLR 134 at 148 [40]. See also *Bugge v Brown* (1919) 26 CLR 110 at 117-118; *Lepore* (2003) 212 CLR 511 at 535 [40], 586 [213], 588 [220], 589 [223].

304 (2016) 258 CLR 134 at 160 [81].

### The relationship between the Diocese and Coffey

154 The Diocese acknowledged that it owed a duty of care "to DP in relation to the conduct of priests appointed to the Port Fairy parish in their dealings with parishioners and their families".<sup>305</sup> Thus, the Diocese accepted that it bore direct legal responsibility for Coffey's conduct in certain circumstances because of its capacity to affect interactions between Coffey and parishioners and their family members.

155 The primary judge found that the Diocese did not breach the duty of care because the risk of harm to DP of the kind suffered was not reasonably foreseeable.<sup>306</sup> DP's case on fault-based liability in negligence was not pursued on appeal. As explained by the plurality, whether the relationship between the Diocese and DP gave rise to a non-delegable duty to ensure that the priest did not harm DP was the subject of a notice of contention filed in this Court but, as the contention was not addressed in the courts below, it would be unfair for the issue to be considered at this late stage of the proceedings. Accordingly, this case is not concerned with whether the Diocese is liable for breach of a non-delegable duty.

156 Although the Court of Appeal of the Supreme Court of Victoria did not state that it applied a test of whether the relationship was "akin to employment" in imposing vicarious liability on the Diocese, this was the effect of the Court's reasoning. In particular, the Court found that the relationship between the Diocese and Coffey was one which "in an appropriate case, would render the Diocese vicariously liable for any tort committed by Coffey in his role as an assistant priest within the Diocese".<sup>307</sup> In my view, having regard to the state of the law as I have described it, the Court of Appeal was correct to consider that the relationship between the Diocese and Coffey was akin to an employment relationship and to conclude that the relationship could give rise to vicarious liability in an appropriate case.

157 Some basic facts about the relationship between the Diocese and Coffey were not in issue. The activities of the Diocese could be characterised as the conduct of an enterprise. Coffey was appointed to his role in the Port Fairy parish by the then Bishop of Ballarat ("the Bishop") on behalf of the Diocese to serve parishioners on behalf of the Catholic Church by performing the ministry of the Church in the parish. That is, the Diocese placed Coffey in his role as assistant parish priest to perform the functions of a priest of the Catholic Church, of which the Diocese was a part, in activities that were central to the purposes of the Diocese.

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305 *DP (a pseudonym) v Bird* [2021] VSC 850 ("*DP*") at [4], [283].

306 *DP* [2021] VSC 850 at [307].

307 *Bird v DP (a pseudonym)* (2023) 69 VR 408 ("*Bird*") at 441 [130].

In a general sense, Coffey was "identified as representing that enterprise", to use the language of the plurality in *Hollis*. However, the appellant argued that this meant no more than that Coffey was an assistant priest.

158 There was no suggestion that, in his role as an assistant parish priest, Coffey was engaging in an independent enterprise, or that Coffey represented any person or entity apart from the Catholic Church in his role. Plainly enough, the relationship between the Diocese and Coffey bore no resemblance to the relationship between a principal and independent contractor.<sup>308</sup>

*Analogy with the relationship in Hollis*

159 In *Hollis*, the plurality identified seven features of the enterprise's engagement of the relevant workers that indicated that they were employees.<sup>309</sup> All but one of those features, which concerned actual control over the manner of performance of work, can be seen in the Diocese's appointment of Coffey as an assistant parish priest.

160 First, he was not providing skilled labour or labour that required skilled qualifications. Coffey was not able to make an independent career as an assistant parish priest.

161 Secondly, Coffey was presented to the parishioners of the Diocese as an emanation of the Catholic Church by his attire. The Bishop selected Coffey for the role of assistant parish priest and reposed trust in Coffey to perform pastoral work in the Port Fairy parish.

162 Thirdly, fixing the Diocese with responsibility for an assistant parish priest's torts could be expected to have a deterrent effect because of the Diocese's capacity to organise and supervise such a priest's activities through the authority of the Bishop.

163 Fourthly, there was no apparent scope for Coffey to bargain for his rate of remuneration.

164 Fifthly, there was no suggestion that Coffey was required to provide tools or equipment or, indeed, his own accommodation. Coffey was entirely dependent upon the Diocese for his tools of trade.

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308 *Personnel Contracting* (2022) 275 CLR 165 at 184-185 [35]-[39].

309 (2001) 207 CLR 21 at 42 [48]-[50], 43 [53]-[54], 44 [56]-[57].

165 Sixthly, the Bishop as head of the Diocese had considerable scope for the actual exercise of control over Coffey. This included where Coffey lived and whether he would continue in his role as assistant parish priest at any given time.

*Subservience*

166 The relationship between Coffey and the Diocese is analogous to an employment relationship in the important respects that distinguish an employment relationship from a relationship of principal and independent contractor. Coffey had no entitlement to delegate any part of his role to a third party. The Court of Appeal found that Coffey's duties as an assistant priest, and his appointment to that position, were entirely personal to him.<sup>310</sup> Under the terms of the Diocese's appointment of Coffey, Coffey was accountable to the Diocese for the performance of his activities and was required to obey the Bishop. The Court of Appeal found, as a "fundamental point", that the position of an assistant priest within the Diocese was subject to the appointment of the Bishop of the Diocese and to the maintenance of that appointment by that Bishop.<sup>311</sup> Accordingly, the terms of the appointment placed Coffey in a position of subservience in relation to the Bishop and in a position of dependence in relation to the Diocese.

167 The Court of Appeal found that the canon law that governed the relationship between Coffey and the Diocese permitted the Bishop to exercise control over Coffey "that was at least as great as, if not greater than, that enjoyed by an employer".<sup>312</sup> The Court of Appeal's finding cannot be understood as a finding about legal rights and obligations. Rather, the finding must be understood alongside its finding that the relationship between Coffey and the Diocese was governed by a strict set of rules that each of them had subscribed to, and that enabled the priest to embody the Diocese in his pastoral role.

168 The appellant did not dispute the finding that the Diocese had "a general control over Coffey's appointment and over his role and duties in the parish".<sup>313</sup> Nor did the appellant dispute the finding that Coffey was subject to the direction and control of the Bishop of the Diocese.<sup>314</sup> However, the appellant disputed that the relevant control was analogous to an employer's legal capacity to control the conduct of an employee, arguing that it was the result of ecclesiastical rules that did not have legal significance. In addition, the appellant rejected the Court of

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310 *Bird* (2023) 69 VR 408 at 440 [128].

311 *Bird* (2023) 69 VR 408 at 439 [124].

312 *Bird* (2023) 69 VR 408 at 439-440 [125].

313 *Bird* (2023) 69 VR 408 at 440 [127].

314 *Bird* (2023) 69 VR 408 at 440 [127].

Appeal's "uneasy equivalence" of the Bishop's ecclesiastical authority with the Diocese.

169 The appellant's contentions are unpersuasive. Coffey was accountable to the Bishop and was required to obey him. In this sense, the Bishop could supervise and effect improvements in Coffey's performance and eliminate risks of harm to others as a result of Coffey's duties as an assistant priest. That is a sufficient level of "control" for a relationship to attract vicarious liability. As Giliker has explained, the control test asks "whether ultimate authority over the person in the performance of the work resided in the employer so that the worker was subject to the latter's orders and directions".<sup>315</sup> Even though the Bishop did not have a legally enforceable power to control Coffey pursuant to a contract of employment, it cannot be disputed that Coffey was bound to follow the Bishop's orders when carrying out his role.

### *Dependence*

170 Coffey's livelihood was provided for by the Diocese.<sup>316</sup> He had no other vocation and the Diocese provided him with accommodation.<sup>317</sup> Coffey's reliance upon the Diocese for his livelihood reinforced his situation as integrated in, and not independent from, the Diocese.

171 A particular justification for treating the appointment as akin to employment for the purposes of vicarious liability is that the terms of Coffey's appointment as assistant parish priest were inconsistent with any practical ability on Coffey's part to bear legal responsibility to third parties for the cost of injury or damage to them arising from the performance by Coffey of activities on behalf of the Diocese. The expectation that a priest devote himself to the purposes of the Diocese, on the basis of complete financial dependence on the Diocese, means that unless there is vicarious liability for a priest's torts, the Diocese will avoid the usual liability of an enterprise by the creation of a relationship that ensures the priest's lack of capacity to compensate third parties for his torts committed in the pursuit of the purposes of the Diocese.

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315 Giliker, "Vicarious Liability", in Sappideen and Vines (eds), *Fleming's The Law of Torts*, 11th ed (2024) 493 at 499 [17.50], citing *Humberstone v Northern Timber Mills* (1949) 79 CLR 389 at 404. See also Kidner, "Vicarious liability: for whom should the 'employer' be liable?" (1995) 15 *Legal Studies* 47 at 63-64.

316 *Bird* (2023) 69 VR 408 at 440 [129].

317 *DP* [2021] VSC 850 at [229].

*Coffey's integration in the Diocese*

172 While there was no legally binding contract between the Diocese and Coffey concerning the terms of Coffey's appointment, the *Decree on the Ministry and Life of Priests*, said to apply to all priests, described Coffey's relationship with other members of the Church in the following terms:<sup>318</sup>

"All priests, in union with bishops, so share in one and the same priesthood and ministry of Christ that the very unity of their consecration and mission requires their hierarchical communion with the order of bishops. ... For above all upon the bishops rests the heavy responsibility for the sanctity of their priests. ...

Priests, never losing sight of the fullness of the priesthood which the bishops enjoy, must respect in them the authority of Christ, the Supreme Shepherd. They must therefore stand by their bishops in sincere charity and obedience. This priestly obedience, imbued with a spirit of cooperation is based on the very sharing in the episcopal ministry which is conferred on priests both through the Sacrament of Orders and the canonical mission.

This union of priests with their bishops is all the more necessary today since in our present age, for various reasons, apostolic undertakings must necessarily not only take on many forms but frequently extend even beyond the boundaries of one parish or diocese. No priest, therefore, can on his own accomplish his mission in a satisfactory way. He can do so only by joining forces with other priests under the direction of the Church authorities.

Priests by virtue of their ordination to the priesthood are united among themselves in an intimate sacramental brotherhood. In individual dioceses, priests form one priesthood under their own bishop. Even though priests are assigned to different duties, nevertheless they carry on one priestly ministry for men. ... Each one ... is united in special bonds of apostolic charity, ministry and brotherhood with the other members of this priesthood. ... Each and every priest ... is united with his fellow priests in a bond of charity, prayer and total cooperation."

173 The *Decree* demonstrates a profound integration between Coffey and the Bishop, and between Coffey and other members of the priesthood within the Diocese. It identifies that priests share the "episcopal ministry" and refers to this as a "union of priests with their bishops".

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318 Pope Paul VI, *Presbyterorum Ordinis* (7 December 1965), Ch II [7]-[8].

174 The Diocese, through the Bishop, gave Coffey the imprimatur to undertake religious care for the spiritual life of the Port Fairy flock including by "visit[ing] parishioners' homes and interact[ing] with the family and the children".<sup>319</sup> The appellant did not dispute that Coffey's role was "integrally interconnected with the fundamental work and function of the Diocese".<sup>320</sup> Coffey's work in providing pastoral care to members of the Port Fairy parish was the purpose for which the Diocese existed. The Court of Appeal found that: Coffey embodied the Diocese in his pastoral role;<sup>321</sup> the Diocese did its work by and through Coffey;<sup>322</sup> Coffey was a servant of the Diocese albeit he was not its employee; and Coffey was an "emanation" of the Diocese in terms of the principles discussed in *Colonial Mutual Life, Hollis and Sweeney*.<sup>323</sup>

175 Moreover, Coffey was clearly identified as a Catholic priest by clerical garb and vestments,<sup>324</sup> which were supplied to him by the Diocese.<sup>325</sup> It was found in the courts below that there was a "general or widely-held expectation by the Port Fairy Catholic community" that "priests stood as representatives of the Church's values and must embody them always"<sup>326</sup> and that "Coffey carried out the work of the Diocese 'in its place'".<sup>327</sup>

### *Conclusion*

176 The relationship between Coffey and the Diocese is fairly described as "akin to employment" by reason of its characteristics that are relevant to the justifications for the imposition of strict liability, and because Coffey cannot be classified as an independent contractor.

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319 *DP* [2021] VSC 850 at [242]; *Bird* (2023) 69 VR 408 at 419 [48].

320 *Bird* (2023) 69 VR 408 at 440 [128].

321 *Bird* (2023) 69 VR 408 at 439-440 [125].

322 *Bird* (2023) 69 VR 408 at 441 [129].

323 *Bird* (2023) 69 VR 408 at 441 [129].

324 *Bird* (2023) 69 VR 408 at 441 [129].

325 *DP* [2021] VSC 850 at [229]

326 *DP* [2021] VSC 850 at [240]; *Bird* (2023) 69 VR 408 at 419 [48].

327 *DP* [2021] VSC 850 at [241]; *Bird* (2023) 69 VR 408 at 419 [48].

**Coffey's sexual misconduct did not occur in the course of his role as an assistant parish priest**

177 The facts concerning Coffey's sexual abuse of DP are set out in the joint judgment.<sup>328</sup> That judgment explains that pastoral visits to the family homes of parishioners (including DP's family home) were an integral part of Coffey's role as assistant parish priest and that those visits afforded opportunities to him to gain unsupervised access to young boys and, consequently, to abuse them.<sup>329</sup>

178 More specifically, the primary judge found that pastoral activities in the private homes of parishioners "might include those specified by scripture, such as administering last rites or marriage sacraments, but also encompassed more vaguely defined activities which Father Dillon described as 'getting to know people': 'sometimes it would be ... by invitation, sometimes it would be just social, and other times it might be that they had a particular ... issue that [they wanted to] discuss and ... they felt much more at home, literally, in doing that in the privacy of their own home ... '".<sup>330</sup> The role of priests included "intimacy ... with the members of their parish for pastoral care and guidance".<sup>331</sup>

179 There were two sexual assaults that were the subject of DP's claim. The first occurred in DP's home when Coffey opportunistically offered to put DP to bed. The second occurred in a tent in the garden of the family home on Boxing Day after DP took Coffey outside to show him the tent that DP had received as a Christmas present.

180 The first incident was permitted to occur because of the trust that DP's parents evidently placed in Coffey to leave him alone with their child. The primary judge found that this trust arose from Coffey's role as assistant parish priest and Coffey's affinity with DP's family. The second incident apparently occurred in a similar context of trust, or because of DP's trust in Coffey that arose from his parents' trust.

181 The courts below erred in finding that because Coffey's role as assistant parish priest placed him in a position of trust and authority vis-à-vis DP and his family, and it was in this position that he committed the assaults against DP, Coffey's torts were committed in the course of his relationship with the Diocese. The fact that Coffey's role placed him in a position of trust in the provision of

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328 Joint judgment at [11]-[20].

329 Joint judgment at [16].

330 *DP* [2021] VSC 850 at [234].

331 *DP* [2021] VSC 850 at [245].

pastoral care is insufficient to support a conclusion that the sexual assaults occurred in the course of Coffey's role.

182 Coffey's role did not involve providing domestic assistance; although, no doubt, there might have been occasions when domestic assistance might have been included in the provision of pastoral care. On the factual findings made by the courts below, there is nothing to suggest that Coffey's role justified him being alone with DP, a five-year-old boy. Coffey's role gave him neither authority nor power to insist on being alone with DP, nor any capacity to control DP's parents in relation to decisions about allowing DP to be in Coffey's sole care. There is no evidence to think that Coffey's role in providing pastoral care to DP's family enabled him to achieve intimacy with DP beyond the incidents in which DP was assaulted. That role did not involve, for example, providing religious instruction to DP alone or securing DP's participation with Coffey in religious activities alone together, such as preparation for masses in which DP might have been Coffey's altar boy. Accordingly, Coffey's role gave him the opportunity to harm DP, but it was not the occasion for that harm in the sense explained in *Prince Alfred College*.

183 For these reasons, although the relationship between the Diocese and Coffey attracted vicarious liability, Coffey's torts were not committed in the course of that relationship.

JAGOT J.

### The appeal

184 The questions to which this appeal gives rise should be understood as:

- (1) did the conclusion of the Courts below, that the appellant (as the nominated proper defendant on behalf of the Diocese of Ballarat<sup>332</sup>) was vicariously liable for the conduct of an assistant priest appointed to a parish within the Diocese in sexually abusing the respondent, a child, in 1971, involve an extension, rather than application, of the common law principle of vicarious liability in circumstances where it was found that the assistant priest was not an employee of the Diocese and it was not found that, in committing the tortious conduct, the assistant priest was a true "agent" of the Diocese or was directly authorised by the Diocese to commit such acts;
- (2) if the conclusion of vicarious liability was an extension and not an application of the common law, should that extension be adopted and become part of the common law of Australia; and
- (3) should the respondent be permitted in this appeal to claim that the Diocese was liable as it owed to the respondent a personal or non-delegable duty of care to protect the respondent from the risk of sexual abuse by its priests, despite the respondent's claim for damages before the Courts below being based only on the Diocese's own negligence (that is, the Diocese being in breach of a duty of care which it owed to the respondent) or the Diocese being vicariously liable for the tortious conduct of the assistant priest (that is, the Diocese being liable for a breach of a duty of care which the assistant priest owed to the respondent).

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**332** Section 7(1) of the *Legal Identity of Defendants (Organisational Child Abuse) Act 2018* (Vic) provides that a non-government organisation that is an unincorporated association or body ("NGO") may nominate an entity that is capable of being sued to act as a proper defendant to the claim and to incur any liability arising from the claim on behalf of the NGO with the consent of the nominee in relation to any claim founded on or arising from child abuse. The Diocese is an NGO and the appellant, the current Bishop of Ballarat, is the nominated entity under this provision in relation to the respondent's claim. In these reasons, I refer to the appellant as "the Diocese" for convenience.

185 For the following reasons these questions should be answered:

- (1) "yes";
- (2) "no"; and
- (3) "no".

186 Consequently, the appeal should be allowed, the substantive orders of the Courts below should be set aside, and the proceeding should be dismissed, with costs.

### **Background**

187 The respondent sued the Diocese for harm suffered as a result of two assaults perpetrated on him by Father Coffey, an assistant priest of the parish of Port Fairy in the Diocese of Ballarat, in 1971 when he was five years old. The respondent's claim was made on two bases: first, that the Diocese was negligent in breaching a duty of care that it owed to the respondent in respect of its authority over, and supervision and control of the conduct of, Father Coffey; and second, that the Diocese was vicariously liable for the conduct of Father Coffey.

188 The primary judge in the Supreme Court of Victoria (J Forrest J)<sup>333</sup> found that Father Coffey assaulted the respondent on two occasions. On the first occasion, Father Coffey slapped the respondent on the bottom and fondled the respondent's penis and testicles when putting the respondent to bed in the respondent's home when Father Coffey visited the home for a social gathering in 1971. On the second occasion, Father Coffey lifted the respondent's shirt and tickled the respondent's belly below his belly button and towards the region of the respondent's genitals while in a tent with the respondent in the backyard of the respondent's home. This continued for about three minutes until the respondent called out for his mother who was outside the tent. When his mother asked what was wrong the respondent asked if he could get out of the tent. This occurred on Boxing Day in 1971, the respondent having received the tent as a Christmas present.

189 Although the Diocese did not ultimately dispute that that it owed a duty of care in relation to the conduct of priests towards parishioners of parishes within the Diocese, the primary judge rejected the respondent's claim based on the negligence of the Diocese. The primary judge found that the Diocese had not breached its duty of care in the appointment of Father Coffey, or supervision of him in performing his functions as an assistant priest, because, in 1971, it was not

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333 *DP (a pseudonym) v Bird* [2021] VSC 850.

reasonably foreseeable that in doing so Father Coffey would cause harm to a child parishioner of the kind suffered by the respondent.

190 In respect of the vicarious liability claim, the primary judge found that Father Coffey was not an employee of the Diocese despite "many ... features of the employment relationship" being present. Further, the primary judge did not find that Father Coffey was an agent of the Diocese (in a relevant legal sense) when visiting the home of the respondent's parents, despite accepting that Father Coffey was performing a pastoral function as an assistant priest of the parish on those visits. The primary judge concluded, however, that the Diocese was vicariously liable for the tortious conduct that Father Coffey inflicted on the respondent by reason of the "totality of the relationship" between the Diocese and Father Coffey, as well as Father Coffey's role within the Port Fairy Catholic community, including his relationship with the respondent and his parents.

191 The Court of Appeal of the Supreme Court of Victoria (Beach, Niall and Kaye JJA)<sup>334</sup> dismissed the Diocese's appeal against the finding that it was vicariously liable for Father Coffey's conduct. Although the respondent cross-appealed on a ground concerning the damages he was awarded (a cross-appeal which was dismissed), he did not cross-appeal on a ground that the primary judge erred in rejecting his claim that the Diocese was liable to him in negligence. Further, the respondent did not contend before the Court of Appeal that the Diocese owed him a personal or non-delegable duty of care which it breached.

192 In respect of the Diocese's appeal against the finding that it was vicariously liable for Father Coffey's conduct, the Court of Appeal concluded that the relationship between a diocese and priest (including assistant priest) is "*sui generis*" (that is, "of its own kind"). The Court of Appeal concluded that, in terms of the principles discussed in *Colonial Mutual Life Assurance Society Ltd v Producers and Citizens Co-operative Assurance Co of Australia Ltd*<sup>335</sup> ("*Colonial Mutual*"), *Hollis v Vabu Pty Ltd*,<sup>336</sup> and *Sweeney v Boylan Nominees Pty Ltd*,<sup>337</sup> "by virtue of his role as an assistant priest appointed by the Diocese, Coffey was an emanation of the Diocese" making the Diocese vicariously liable for Father Coffey's tortious assaults on the respondent.<sup>338</sup>

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334 *Bird v DP (a pseudonym)* (2023) 69 VR 408.

335 (1931) 46 CLR 41.

336 (2001) 207 CLR 21.

337 (2006) 226 CLR 161.

338 *Bird v DP (a pseudonym)* (2023) 69 VR 408 at 441 [129]-[130].

## Employees, independent contractors, and agents

### *The uncertainties*

193 The doctrine of vicarious liability is the subject of frequently expressed judicial lamentations. It has been said, for example, that vicarious liability is based on a maxim, "*respondeat superior*" (that is, "let the master answer"), "adopted not by way of an exercise in analytical jurisprudence but as a matter of policy, which did not really need to be juristically rationalised, but might perhaps be justified (however illogically) as an extension of the notion of agency as a ground of liability".<sup>339</sup> Further, and worse, the maxim "*respondeat superior*" ceased to have any connection with social reality after the end of feudalism in England and, with it, the associated "medieval notions of headship of a household which in turn depended upon the application of analogies drawn from Roman law" in which a master had to keep his slaves in order.<sup>340</sup> Contemporary judicial discourse, accordingly, recognises that "the law has so far departed from its root that 'it is as hopeless to reconcile the differences [between tradition and the instinct for justice] by logic as to square the circle'".<sup>341</sup>

194 To the extent that the doctrine of vicarious liability is justified as an extension of the notion of agency, it has been said that "difficulties ... arise from the many senses in which the word 'agent' is employed".<sup>342</sup> Similarly, "the expressions 'for', 'on behalf of', 'for the benefit of' and even 'authorize' are often used in relation to services which, although done for the advantage of a person who requests them, involve no representation".<sup>343</sup> This Court has cautioned against the use of words such as "representative", "delegate", or "agent" to describe a relationship in which one person seeks to gain a benefit or advantage from engaging another person to perform a task, on the basis that such descriptions "obscure the need to examine what exactly are the relationships between the

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339 *Darling Island Stevedoring and Lighterage Co Ltd v Long* (1957) 97 CLR 36 at 57.

340 *Sweeney v Boylan Nominees Pty Ltd* (2006) 226 CLR 161 at 170 [20] (footnote omitted).

341 *Sweeney v Boylan Nominees Pty Ltd* (2006) 226 CLR 161 at 170 [20], quoting Holmes, *The Common Law* (1881) at 231. See also *Hollis v Vabu Pty Ltd* (2001) 207 CLR 21 at 37 [33]-[34].

342 *Colonial Mutual Life Assurance Society Ltd v Producers and Citizens Co-operative Assurance Co of Australia Ltd* (1931) 46 CLR 41 at 50, quoted in *Sweeney v Boylan Nominees Pty Ltd* (2006) 226 CLR 161 at 168 [17].

343 *Colonial Mutual Life Assurance Society Ltd v Producers and Citizens Co-operative Assurance Co of Australia Ltd* (1931) 46 CLR 41 at 50 (cleaned up).

various actors".<sup>344</sup> These (and similar) words "are statements of conclusion that do not necessarily proceed from an articulated underlying principle that identifies why there should be vicarious liability in one case but not another".<sup>345</sup> To use these terms as a substitute for analysis is to "invert the order of inquiry, and by so doing to beg the question, and allow linguistics to determine legal rights".<sup>346</sup>

195 Further, the term "vicarious liability" has traditionally embraced more than the ordinary meaning of that concept would permit. Fullagar J, for example, referred to a "true vicarious liability" as one in which the liability of a tortfeasor for a breach of the tortfeasor's duty of care is attributed to another person. In such a case, the other person is truly "vicariously liable" by reason of attribution of liability itself.<sup>347</sup> Yet, as will become apparent, the term "vicarious liability" is routinely applied to other kinds of liability which, on analysis, involve direct rather than vicarious liability in the true sense Fullagar J identified.

196 As the following discussion also exposes, the existence of these uncertainties has worked against, rather than in favour of, the expansion of the common law doctrine of vicarious liability.

#### *The certainties*

##### The general rule

197 In this troubled landscape some matters are clear. The "general rule [is] that an employer is vicariously liable for the tortious acts of an employee but that a principal is not liable for the tortious acts of an independent contractor".<sup>348</sup> While the distinction between an employee and an independent contractor may itself not be straightforward, the Court has said that "[w]hatever may be the logical and doctrinal imperfections and difficulties in the origins of the law relating to vicarious liability, the two central conceptions of distinguishing between

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344 *Sweeney v Boylan Nominees Pty Ltd* (2006) 226 CLR 161 at 167 [13].

345 *Sweeney v Boylan Nominees Pty Ltd* (2006) 226 CLR 161 at 169 [19].

346 *Brooks v Burns Philp Trustee Co Ltd* (1969) 121 CLR 432 at 458, quoted in *Hollis v Vabu Pty Ltd* (2001) 207 CLR 21 at 38 [37].

347 *Darling Island Stevedoring and Lighterage Co Ltd v Long* (1957) 97 CLR 36 at 57.

348 *Hollis v Vabu Pty Ltd* (2001) 207 CLR 21 at 36 [32].

independent contractors and employees and attaching determinative significance to course of employment are now too deeply rooted to be pulled out".<sup>349</sup>

198 The additional requirement needed to establish the liability of an employer for acts of their employee, that the tortious act of an employee be "committed in the course or scope of the employment",<sup>350</sup> is a necessary limitation on the general rule (that an employer is vicariously liable for the tortious acts of an employee) because the common law recognises that an "employee" has that status only in consequence of a legal relationship between that person and another (the "employer"), and that this legal relationship has limits, be they temporal, functional, geographical, or otherwise.<sup>351</sup>

199 In respect of this general rule the Court has said:<sup>352</sup>

"the wider proposition that underpinned the argument ... that if A 'represents' B, B is vicariously liable for the conduct of A, is a proposition of such generality that it goes well beyond the bounds set by notions of control ... or set by notions of course of employment.

These bounds should not now be redrawn in the manner asserted ... Hitherto the distinction between independent contractors and employees has been critical to the definition of the ambit of vicarious liability. The view, sometimes expressed, that the distinction should be abandoned in favour of a wider principle, has not commanded the assent of a majority of this Court."

200 This Court has consistently refused to abandon the distinction between, on the one hand, employees for whose tortious acts in the course of employment an employer is vicariously liable and, on the other hand, independent contractors for whose tortious acts in the course of carrying out a task for a principal the principal is not vicariously liable. For example, in: (a) *Scott v Davis*,<sup>353</sup> an "argument that 'a

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**349** *Sweeney v Boylan Nominees Pty Ltd* (2006) 226 CLR 161 at 173 [33]. See also *CCIG Investments Pty Ltd v Schokman* (2023) 97 ALJR 551 at 555-556 [12]-[14]; 410 ALR 479 at 482-483.

**350** See, eg, *CCIG Investments Pty Ltd v Schokman* (2023) 97 ALJR 551 at 555 [12]; 410 ALR 479 at 482.

**351** See, eg, *Bugge v Brown* (1919) 26 CLR 110 at 118; *CCIG Investments Pty Ltd v Schokman* (2023) 97 ALJR 551 at 555 [12]; 410 ALR 479 at 482.

**352** *Sweeney v Boylan Nominees Pty Ltd* (2006) 226 CLR 161 at 171-172 [26]-[27] (footnote omitted).

**353** (2000) 204 CLR 333.

new species of actor, one who is not an employee, nor an independent contractor, but an "agent" in a non-technical sense' should be identified as relevant to determining vicarious liability, was rejected";<sup>354</sup> and (b) *Hollis v Vabu Pty Ltd*, in which the general rule was not challenged,<sup>355</sup> the imposition of vicarious liability on the employer depended on the characterisation of the legal relationship between the bicycle couriers and the company that engaged them as one of employee and employer.<sup>356</sup>

201 A statement in *Hollis v Vabu Pty Ltd* that "[i]n general, under contemporary Australian conditions, the conduct by the defendant of an enterprise in which persons are identified as representing that enterprise should carry an obligation to third persons to bear the cost of injury or damage to them which may fairly be said to be characteristic of the conduct of that enterprise"<sup>357</sup> is not to be misunderstood. The statement was made in the context of that case in which the general rule was not challenged. As a result, their Honours (Gleeson CJ, Gaudron, Gummow, Kirby and Hayne JJ) were not "contemplating the reformulation of basic doctrine" but, rather, were applying "existing principle in a way that is informed by a recognition of the fundamental purposes of vicarious liability and the operation of that principle in the context of one of the many particular relationships that has developed in contemporary Australian society".<sup>358</sup> In this context, the statement is to be understood as referring to the fact that it was a characteristic of the enterprise in which the bicycle couriers were employed that the couriers would frequently disobey traffic rules (eg, riding on footpaths) and thereby pose a danger to pedestrians.<sup>359</sup> The Court described this as an "important" finding because the employed bicycle courier of the defendant had struck the plaintiff on the footpath, and it was illegal for the courier to ride the bicycle on the footpath.<sup>360</sup> The point the Court was making is that it did not matter that the employed bicycle courier had committed the tortious act while riding the bicycle illegally because such illegal acts were a characteristic of the enterprise in which the couriers were employed.

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354 *Sweeney v Boylan Nominees Pty Ltd* (2006) 226 CLR 161 at 172 [28], quoting *Scott v Davis* (2000) 204 CLR 333 at 423 [269].

355 *Hollis v Vabu Pty Ltd* (2001) 207 CLR 21 at 36 [32].

356 *Hollis v Vabu Pty Ltd* (2001) 207 CLR 21 at 45 [57], 46 [61].

357 *Hollis v Vabu Pty Ltd* (2001) 207 CLR 21 at 40 [42].

358 *Hollis v Vabu Pty Ltd* (2001) 207 CLR 21 at 46 [59].

359 See, eg, *Hollis v Vabu Pty Ltd* (2001) 207 CLR 21 at 26 [3], 35 [28].

360 *Hollis v Vabu Pty Ltd* (2001) 207 CLR 21 at 26 [3].

202 Another observation in *Hollis v Vabu Pty Ltd*, that "[v]icarious liability may also flow (and indeed more usually flows) from a relationship of employment", must also be understood in context.<sup>361</sup> One part of that context is that, as noted, there was no challenge to the general rule in that case. Another part of the context is that the general rule is "general" because it is subject to exceptions. As explained below, vicarious liability can arise in circumstances other than an employment relationship, but those circumstances are closely confined.

203 A further observation which should be made about *Hollis v Vabu Pty Ltd* is that when their Honours said that "guidance for the outcome is provided by various matters which are expressive of the fundamental concerns underlying the doctrine of vicarious liability [which] include, but are not confined to, what now is considered 'control'",<sup>362</sup> they were not suggesting that vicarious liability depended on a finding of control by one person of another person acting on the first-mentioned person's behalf. Nor were they saying that if a court can divine that the circumstances accord with the policy underpinnings of the doctrine of vicarious liability, the court is free to impose vicarious liability. They were saying only that one important indicator of an employment relationship which is central to the doctrine of vicarious liability is control.

204 Similarly, when Gleeson CJ, Gummow, Hayne, Heydon and Crennan JJ said in *Sweeney v Boylan Nominees Pty Ltd* that the tortfeasor in that case was "not presented to the public as an emanation of the respondent",<sup>363</sup> they were not saying that the concept of being an "emanation" of another person was relevant other than to the issue they were then considering – that because the tortfeasor was not an employee of the respondent but was an independent contractor, the respondent could not be vicariously liable for the tortfeasor's wrong. Their Honours had already expressly rejected the attempted expansion of principle in saying:<sup>364</sup>

"neither in *Scott* nor in *Hollis*, nor earlier in *Colonial Mutual Life*, was there established the principle that A is vicariously liable for the conduct of B if B 'represents' A (in the sense of B acting for the benefit or advantage of A). On the contrary, *Scott* rejected contentions that, at their roots, were no different from those advanced in this case under the rubric of 'representation' rather than, as in *Scott*, under the rubric 'agency'. As was

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361 (2001) 207 CLR 21 at 35 [29].

362 (2001) 207 CLR 21 at 41 [45].

363 (2006) 226 CLR 161 at 173 [32].

364 (2006) 226 CLR 161 at 172 [29] (footnote omitted).

said in *Scott* of the word 'agent', to use the word 'representative' is to begin but not to end the inquiry."

#### Exceptions to the general rule

205 One exception to the general rule that an employment relationship is necessary to give rise to vicarious liability is that a person can be liable for the conduct of an independent contractor if the person has "directly authorized the doing of the act which amounts to a tort".<sup>365</sup> The question whether this form of liability is direct or vicarious is open to debate on the basis that a person who directs or authorises a tortious act,<sup>366</sup> in law, is taken to have committed the tortious act, but that difficulty need not detain us further.

206 Another exception to the general rule that an employment relationship is necessary to give rise to vicarious liability is that a person can be vicariously liable where the person has held out another person to be their agent and authorised that other person to enter into legal relations on the person's behalf and the tort occurs within the scope of the apparent authority of the agent.<sup>367</sup>

207 The best example in Australia of this second-mentioned class of exception, that a person can be vicariously liable where the person has held out another person to be their agent to enter into legal relations on the person's behalf and the tort occurs within the scope of the apparent authority of the agent, is *Colonial Mutual*. In that case, an insurance company had engaged a canvasser to persuade people to effect insurance with the company. The terms of the engagement provided for the canvasser to be paid partly on a commission basis and precluded him from disparaging any other person or institution.<sup>368</sup> In breach of that stipulation, the canvasser defamed the plaintiff (another insurance company). The plaintiff sued the insurance company who had engaged the canvasser for the defamation. Dixon J (with whom Rich J agreed) explained that:<sup>369</sup>

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**365** *Colonial Mutual Life Assurance Society Ltd v Producers and Citizens Co-operative Assurance Co of Australia Ltd* (1931) 46 CLR 41 at 48, 46. See also *Burnie Port Authority v General Jones Pty Ltd* (1994) 179 CLR 520 at 575; *Scott v Davis* (2000) 204 CLR 333 at 355 [60]-[61].

**366** *Scott v Davis* (2000) 204 CLR 333 at 406 [221].

**367** See, eg, *Colonial Mutual Life Assurance Society Ltd v Producers and Citizens Co-operative Assurance Co of Australia Ltd* (1931) 46 CLR 41.

**368** *Colonial Mutual Life Assurance Society Ltd v Producers and Citizens Co-operative Assurance Co of Australia Ltd* (1931) 46 CLR 41 at 46, 61.

**369** (1931) 46 CLR 41 at 48.

"In most cases in which a tort is committed in the course of the performance of work for the benefit of another person, he cannot be vicariously responsible if the actual tortfeasor is not his servant and he has not directly authorized the doing of the act which amounts to a tort. The work, although done at his request and for his benefit, is considered as the independent function of the person who undertakes it, and not as something which the person obtaining the benefit does by his representative standing in his place and, therefore, identified with him for the purpose of liability arising in the course of its performance. The independent contractor carries out his work, not as a representative but as a principal."

208 Dixon J continued, however, explaining that, in contrast to most cases:<sup>370</sup>

"[A] difficulty arises when the function entrusted is that of representing the person who requests its performance in a transaction with others, so that the very service to be performed consists in standing in his place and assuming to act in his right and not in an independent capacity. In this very case the 'agent' has authority to obtain proposals for and on behalf of the appellant; and he has ... authority to accept premiums. When a proposal is made and a premium paid to him, the Company then and there receives them, because it has put him in its place for the purpose ... [I]n performing these services for the Company, he does not act independently, but as a representative of the Company, which accordingly must be considered as itself conducting the negotiation in his person."

209 Dixon J recognised the lack of any case "which distinctly decides that a principal is liable generally for wrongful acts which he did not directly authorize, committed in the course of carrying out his agency by an agent who is not the principal's servant or partner, except, perhaps, in some special relations, such as solicitor and client, and then within limitations".<sup>371</sup> His Honour considered that a finding of vicarious liability on the facts of the case was within the existing principles because, in respect of the canvassing, the canvasser was an agent who represented the insurance company. This characterisation of the relationship between the insurance company as principal and the canvasser as agent followed from the company's vesting of legal authority in the canvasser (to obtain proposals for and on behalf of the company and to accept premiums).<sup>372</sup> Further, the company had directly authorised the defamatory statements because it had confided to the

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370 (1931) 46 CLR 41 at 48-49.

371 *Colonial Mutual Life Assurance Society Ltd v Producers and Citizens Co-operative Assurance Co of Australia Ltd* (1931) 46 CLR 41 at 49.

372 *Colonial Mutual Life Assurance Society Ltd v Producers and Citizens Co-operative Assurance Co of Australia Ltd* (1931) 46 CLR 41 at 49.

judgment of the agent "within the limits of relevance and of reasonableness, the choice of inducements and arguments, [and] authorized him on its behalf to address to prospective proponents such observations as appeared to him appropriate".<sup>373</sup> As such, the undertaking in the contract that the canvasser not disparage others was "not a limitation of his authority but a promise as to the manner of its exercise".<sup>374</sup>

210 Dixon J's reasoning in *Colonial Mutual* was not only expressed to involve no "extension of principle",<sup>375</sup> but has also been understood to involve no such extension in subsequent decisions of this Court.

211 In *Scott v Davis*, Gummow J (with whom Gleeson CJ relevantly agreed in respect of the relevance of the authorities concerning agency<sup>376</sup>), referring to *Colonial Mutual*, identified the "considerable terminological confusion in this area" and said that "'agency' is best used ... 'to connote an authority or capacity in one person to create legal relations between a person occupying the position of principal and third parties'".<sup>377</sup> Gummow J also said that, in this area of discourse, legal content has been given to concepts (including that of "agency") "over a long period", one result of which is the "contrast ... drawn between 'true' agency", as in *Colonial Mutual*, and "a new species of actor, one who is not an employee, nor an independent contractor, but an 'agent' in a non-technical sense".<sup>378</sup> His Honour rejected the recognition of this new species of actor, noting that it involved indeterminacy in the imposition of liability in circumstances where there was no call to "fill what otherwise are perceived to be 'gaps' in what should be one coherent system of law" and therefore no need for an "extension of concepts of agency and vicarious liability".<sup>379</sup>

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373 *Colonial Mutual Life Assurance Society Ltd v Producers and Citizens Co-operative Assurance Co of Australia Ltd* (1931) 46 CLR 41 at 50.

374 *Colonial Mutual Life Assurance Society Ltd v Producers and Citizens Co-operative Assurance Co of Australia Ltd* (1931) 46 CLR 41 at 50.

375 *Colonial Mutual Life Assurance Society Ltd v Producers and Citizens Co-operative Assurance Co of Australia Ltd* (1931) 46 CLR 41 at 50.

376 (2000) 204 CLR 333 at 342 [18]

377 *Scott v Davis* (2000) 204 CLR 333 at 408 [227], quoting *International Harvester Co of Australia Pty Ltd v Carrigan's Hazeldene Pastoral Co* (1958) 100 CLR 644 at 652.

378 *Scott v Davis* (2000) 204 CLR 333 at 422-423 [268]-[269].

379 *Scott v Davis* (2000) 204 CLR 333 at 424 [273]; see also 423 [268]-[269].

212 In *Sweeney v Boylan Nominees Pty Ltd*, Gleeson CJ, Gummow, Hayne, Heydon and Crennan JJ, in a joint judgment, said that *Colonial Mutual*:<sup>380</sup>

"establishes that if an independent contractor is engaged to solicit the bringing about of legal relations between the principal who engages the contractor and third parties, the principal will be held liable for slanders uttered to persuade the third party to make an agreement with the principal. It is a conclusion that depends directly upon the identification of the independent contractor as the principal's agent (properly so called) and the recognition that the conduct of which complaint is made was conduct undertaken in the course of, and for the purpose of, executing that agency."

213 On this basis, their Honours described *Colonial Mutual* as a decision that "stands wholly within the bounds of the explanations proffered by Pollock for the liability of a master for the tortious acts of a servant. It stands within those bounds because of the closeness of the connection between the principal's business and the conduct of the independent contractor for which it is sought to make the principal liable" – Pollock having considered, as their Honours put it, that "course of employment was not a limitation or an otherwise more general liability of the employer; it was a necessary element of the definition of the extent of liability".<sup>381</sup> By this, their Honours should be understood to mean that there are two ways in which a person might be engaged in conducting the business of another: either as an employee acting in the course of employment or as an independent contractor who is nevertheless a true agent of the principal authorised to bring about legal relations between the principal and a third party. In both cases, the employer and principal respectively may be vicariously liable for the wrongs of the employee or agent.

214 The third and final exception to the general rule that it is an employment relationship which gives rise to vicarious liability is the common law relating to the liability of owners of motor vehicles for harm caused by the vehicle when driven by another person for the owner's purposes.<sup>382</sup> In *Scott v Davis* the question was whether the third class of exception should apply to an owner of a plane who had organised a pilot to take a guest for a joy-ride.<sup>383</sup> Gleeson CJ identified the third class of exception as being within a broader class (ie "an owner or a bailee of a chattel is vicariously liable for the negligence of another person who has the

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380 *Sweeney v Boylan Nominees Pty Ltd* (2006) 226 CLR 161 at 170 [22].

381 *Sweeney v Boylan Nominees Pty Ltd* (2006) 226 CLR 161 at 171 [23]-[24], citing Pollock, *Essays in Jurisprudence and Ethics* (1882) at 126.

382 eg, *Soblusky v Egan* (1960) 103 CLR 215 at 231.

383 *Scott v Davis* (2000) 204 CLR 333 at 343 [19], 379 [135].

temporary management of the chattel, even when that other person is not an employee of the owner or bailee"<sup>384</sup>) but, whatever its status, the majority of the Court refused to apply the third exception to the facts of that case on the basis that (amongst other things) its application would conflict with the general rule that a person could not be liable for the acts of an independent contractor<sup>385</sup> and that the sole authority in Australia establishing this exception, *Soblusky v Egan*,<sup>386</sup> should not be extended beyond motor vehicles.<sup>387</sup>

### Personal or non-delegable duties of care

#### *The uncertainties*

215 The doctrine of personal or non-delegable duties of care has been described as: a doctrine in which the "purpose and effect of such a characterisation of a duty of care is not always entirely clear";<sup>388</sup> a "disguised form of vicarious liability";<sup>389</sup> "a 'fictitious formula'";<sup>390</sup> a form of allocation of liability in which "the defendant becomes, in effect, the insurer of some activity even when it is performed by another";<sup>391</sup> lacking "any unifying and clear principle";<sup>392</sup> and an area in which, in common with the doctrine of vicarious liability, "[c]ommentators and judges have strived unsuccessfully for uniformity of language and meaning".<sup>393</sup>

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**384** *Scott v Davis* (2000) 204 CLR 333 at 339 [6].

**385** eg, *Scott v Davis* (2000) 204 CLR 333 at 342 [18].

**386** (1960) 103 CLR 215.

**387** eg, *Scott v Davis* (2000) 204 CLR 333 at 420 [256], 440 [311], 460 [359].

**388** *New South Wales v Lepore* (2003) 212 CLR 511 at 527 [19].

**389** *New South Wales v Lepore* (2003) 212 CLR 511 at 568 [152], citing Fleming, *The Law of Torts*, 9th ed (1998) at 434.

**390** *New South Wales v Lepore* (2003) 212 CLR 511 at 568-569 [152], quoting Glanville Williams, "Liability for Independent Contractors" [1956] *Cambridge Law Journal* 180 at 183.

**391** *Scott v Davis* (2000) 204 CLR 333 at 416 [248].

**392** *Scott v Davis* (2000) 204 CLR 333 at 456 [352], citing Fleming, *The Law of Torts*, 7th ed (1987) at 362.

**393** *Scott v Davis* (2000) 204 CLR 333 at 457 [353].

216 Mason J explained the doctrine of personal or non-delegable duties of care as in part an artefact of the common employment rule, now consigned to the archives, by which one employee could not maintain a claim against the employer for the negligence of another employee.<sup>394</sup> His Honour also recorded the criticism of the doctrine that it rested on "little more than assertion".<sup>395</sup>

217 Lord Sumption JSC recently observed that:<sup>396</sup>

"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. The difference between an ordinary duty of care and a non-delegable duty must therefore be more than a question of degree."

218 This observation is apt in circumstances where several cases list examples of relationships in which a personal or non-delegable duty of care has been found including: an employer ensuring a safe system of work for all engaged on its behalf in the work (be they employees or independent contractors); a hospital avoiding harm to its patients that would not have been suffered if reasonable care had been provided; a school avoiding harm to its pupils that would not have been suffered if reasonable care had been provided; or an invitor or landlord avoiding harm to its invitees or tenants by unsafe premises.<sup>397</sup> As Gleeson CJ said, "[i]t is significant that the duty of care is personal or non-delegable; but it is always necessary to ascertain its content".<sup>398</sup> The significance lies "not in the extent of the responsibility undertaken ... but in the inability to discharge that responsibility by delegating the task of providing care to a third party or third parties".<sup>399</sup>

219 Further, and in common with the term "vicarious liability", the notion of a duty of care being "non-delegable" is itself potentially misleading. It is not that a person is unable to entrust the performance of a personal or non-delegable duty of care to another. In this context, what is meant is only that the person subject to the personal or non-delegable duty may exercise reasonable care in the selection of the

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**394** *Kondis v State Transport Authority* (1984) 154 CLR 672 at 678-679; see also 691.

**395** *Kondis v State Transport Authority* (1984) 154 CLR 672 at 684.

**396** *Woodland v Swimming Teachers Association* [2014] AC 537 at 582-583 [22].

**397** See, eg, *Kondis v State Transport Authority* (1984) 154 CLR 672 at 685-686, 688.

**398** *New South Wales v Lepore* (2003) 212 CLR 511 at 529 [23].

**399** *New South Wales v Lepore* (2003) 212 CLR 511 at 530 [26].

person entrusted to perform the task but that reasonable care will not protect the person the subject of the duty from liability.<sup>400</sup>

*The certainties*

220 Again, whatever the doctrinal inadequacy, some things are clear. Some duties of care have been characterised as personal or non-delegable. In such a case, the person subject to the personal or non-delegable duty of care may be liable for the act or omission of another person as that act or omission may constitute a breach of the first-mentioned person's personal or non-delegable duty of care. Such liability is not vicarious, but direct, because it does not involve an attribution of liability for the acts of the other person to the first-mentioned person but depends on the acts of the other person directly breaching the duty of care the first-mentioned person owed to whomever was harmed by the acts.<sup>401</sup>

221 If a duty of care is personal or non-delegable, the person subject to the duty cannot escape liability by taking reasonable care to ensure that the person engaged to perform the task on behalf of the first-mentioned person is competent and suitable for the performance of the task.<sup>402</sup> The imposition of liability on a person subject to a personal or non-delegable duty for the intentional criminal acts of an otherwise reasonably selected delegate raises difficult issues of principle.<sup>403</sup> Generally, however, the duty is not a duty merely to take reasonable care in the engagement of others to perform a task, it is a duty to ensure that in performing the task reasonable care is taken.<sup>404</sup> Accordingly, if an employer is subject to a personal or non-delegable duty of care (eg, to provide a safe system of work), the distinction between the acts of an employee and the acts of an independent contractor does not determine the employer's liability.<sup>405</sup>

222 Mason J explained the justification for the doctrine as emerging from the nature of the relationship between the parties, particularly the peculiar vulnerability of the one party to harm by reason of a lack of care by or on behalf

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**400** *New South Wales v Lepore* (2003) 212 CLR 511 at 528-529 [20]-[21]. See also *The Commonwealth v Introvigne* (1982) 150 CLR 258 at 270.

**401** eg, *Darling Island Stevedoring and Lighterage Co Ltd v Long* (1957) 97 CLR 36 at 57-58.

**402** *Kondis v State Transport Authority* (1984) 154 CLR 672 at 679-681.

**403** *New South Wales v Lepore* (2003) 212 CLR 511 at 532 [31], 601 [265], 602 [267].

**404** *Kondis v State Transport Authority* (1984) 154 CLR 672 at 686.

**405** *Kondis v State Transport Authority* (1984) 154 CLR 672 at 683.

of the other party entrusted with the care of the first-mentioned party.<sup>406</sup> As his Honour put it, "[i]n 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".<sup>407</sup> Deane J, referring to the employment context, explained the reason for the doctrine as that "in the context of the particular relationship of employer and employee and of the undertaking by the employee of the general obligation to work in the interests of the employer, the content of the employer's duty to take reasonable care to provide a safe system and conditions of work for the employee is not discharged by delegation unless the delegate, be he employee or independent contractor, in fact provides the reasonable care which the employer was under an obligation to bring to bear".<sup>408</sup> It follows from this that the other limiting factor on an employer's vicarious liability, that the employee's act giving rise to the employer's liability be in the course of employment, has no role to play if the employer owes the person harmed a personal or non-delegable duty of care.<sup>409</sup>

223 Subsequently, in *Burnie Port Authority v General Jones Pty Ltd*, Mason CJ, Deane, Dawson, Toohey and Gaudron JJ said that the common element in most cases where a personal or non-delegable duty of care has been found is the undertaking of the provision of care, supervision or control by the defendant for the safety of the plaintiff in circumstances where the plaintiff would reasonably expect the exercise of due care for their safety.<sup>410</sup> Subsequently, however, Gleeson CJ expressed concern about a duty of such potentially wide application.<sup>411</sup> Gummow J also noted that caution is required in respect of any expansion of the classes of personal or non-delegable duties of care as the effect of imposing such a duty is that a "defendant becomes, in effect, the insurer of some activity even when it is performed by another".<sup>412</sup>

224 In the face of the uncertainty underpinning a principled basis on which to expand any doctrine of personal or non-delegable duties of care beyond its

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406 *Kondis v State Transport Authority* (1984) 154 CLR 672 at 687.

407 *Kondis v State Transport Authority* (1984) 154 CLR 672 at 687.

408 *Kondis v State Transport Authority* (1984) 154 CLR 672 at 694.

409 *New South Wales v Lepore* (2003) 212 CLR 511 at 532 [32].

410 (1994) 179 CLR 520 at 551.

411 *New South Wales v Lepore* (2003) 212 CLR 511 at 534 [36]-[38].

412 *Scott v Davis* (2000) 204 CLR 333 at 416 [248].

recognised categories, it must be accepted that caution is required before establishing new cases of personal or non-delegable duties of care. To decide a new category of a personal or non-delegable duty of care, precision in the "nature and content of the particular duty"<sup>413</sup> is also required – the foundation for which must be findings at a level of particularity that enable the reasons for the imposition of the duty to be articulated.

### **Application or extension of principle of vicarious liability?**

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It is apparent that neither the primary judge nor the Court of Appeal considered that the determination of the case to find the Diocese liable for the conduct of Father Coffey involved anything more than the application of the established principles of vicarious liability. For example, the Court of Appeal reasoned that: (a) "the principle of vicarious liability has not been confined solely and exclusively to cases in which the relationship between the tortfeasor and the principal is that of employer and employee"; and (b) "the cases reveal ... a commonality of the factors that are central to the issue whether, in an appropriate case, the relationship is one to which the principle of vicarious liability may apply".<sup>414</sup> Proposition (a) was said to follow from *Colonial Mutual*, in which this Court found that vicarious liability could, in specific circumstances, arise in a relationship of "agency" rather than employment.<sup>415</sup> Proposition (b) was said to follow from the application of *Colonial Mutual* in *Hollis v Vabu Pty Ltd* and *Sweeney v Boylan Nominees Pty Ltd*, in which the Court of Appeal considered that this Court treated as a "central factor" the extent to which the tortfeasor "presented as an emanation of the principal".<sup>416</sup> In view of that reasoning, the Court of Appeal concluded that the primary judge was correct in finding "that the relationship between Coffey ... and the Diocese, was one which, in an appropriate case, would render the Diocese vicariously liable".<sup>417</sup> In light of that conclusion, the Court of Appeal applied *Prince Alfred College Inc v ADC*, amongst other cases, to determine that "the vicarious liability of the Diocese for the conduct of Coffey extended to and encompassed the two indecent assaults"<sup>418</sup> (ie, that this was an "appropriate case") because the primary judge "was well justified in concluding that the position of power and intimacy, invested in Coffey as an assistant priest of

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**413** *Prince Alfred College Inc v ADC* (2016) 258 CLR 134 at 169 [114].

**414** *Bird v DP (a pseudonym)* (2023) 69 VR 408 at 428 [82].

**415** *Bird v DP (a pseudonym)* (2023) 69 VR 408 at 428-429 [83].

**416** *Bird v DP (a pseudonym)* (2023) 69 VR 408 at 435 [104].

**417** *Bird v DP (a pseudonym)* (2023) 69 VR 408 at 441 [130].

**418** *Bird v DP (a pseudonym)* (2023) 69 VR 408 at 441 [132], 449-450 [163].

the parish, provided him not only with the opportunity to sexually abuse the respondent, but also the occasion for the commission of those wrongful acts".<sup>419</sup>

226 The Court of Appeal's conclusions based on propositions (a) and (b) cannot be endorsed. *Colonial Mutual, Hollis v Vabu Pty Ltd*, and *Sweeney v Boylan Nominees Pty Ltd* do not stand for the proposition that a "central factor" of the imposition of vicarious liability is the extent to which the tortfeasor "presented as an emanation of the principal". To the contrary, those cases, and *Scott v Davis*, caution against reasoning by reference to loose concepts such as "agent", "representative", or "emanation" in the context of vicarious liability. The key propositions which emerge from those cases in respect of the doctrine of vicarious liability are that: (a) the paradigm case of vicarious liability is that of an employer for conduct of an employee within the course of the employee's employment; (b) the paradigm case in which there is no vicarious liability is that of an employer for conduct of an independent contractor; (c) there is no general additional species of legal actor – being a person who is neither an employee, nor an independent contractor, nor a true agent in the sense of a person authorised by a principal to create or enter into legal relations (usually contracts) on behalf of the principal – recognised by the common law whose acts can give rise to the vicarious liability of another; (d) this said, a person can be vicariously liable for the tortious conduct of another person, an independent contractor or otherwise, if the first-mentioned person has directly authorised the tortious conduct of that other person,<sup>420</sup> or if the first-mentioned person has held out an independent contractor to be their agent and authorised that agent to enter into legal relations on the person's behalf and the tortious conduct occurs within the scope of the apparent authority of the agent;<sup>421</sup> and (e) the owner of a motor vehicle who authorises another to drive it for the purposes of the owner are taken to be in a relationship of principal and agent so that the former is liable for the tortious conduct of the latter in the driving of the motor vehicle.<sup>422</sup>

227 Other propositions also must be understood from those cases.

228 First, the principles that apply to determining if a person is an employee or an independent contractor are separate and distinct from the principles of vicarious

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419 *Bird v DP (a pseudonym)* (2023) 69 VR 408 at 446 [148].

420 *Colonial Mutual Life Assurance Society Ltd v Producers and Citizens Co-operative Assurance Co of Australia Ltd* (1931) 46 CLR 41 at 48.

421 *Sweeney v Boylan Nominees Pty Ltd* (2006) 226 CLR 161 at 171 [24], referring to *Colonial Mutual Life Assurance Society Ltd v Producers and Citizens Co-operative Assurance Co of Australia Ltd* (1931) 46 CLR 41.

422 *Soblusky v Egan* (1960) 103 CLR 215 at 231.

liability. Put another way, it is necessary first to determine if a person is an employee or an independent contractor in order to determine if the person who has engaged the employee or independent contractor to perform a task can be vicariously liable for tortious conduct in issue. It is not permissible to apply the principles that determine if a person is an employee or an independent contractor to create a new class of legal actor, being neither an employee nor an independent contractor.

229           Second, the principles that apply to determining if a person is an employee or an independent contractor also cannot be applied to determine if the person who is neither an employee nor an independent contractor is some loose and amorphous kind of "agent", "representative" or "emanation" of the person who engaged them to carry out a task. In the context of Australian common law vicarious liability, there is no such relevant legal category. Other than instances of persons directly authorised to commit tortious conduct, the only relevant legal category apart from employee or independent contractor for the purpose of determining common law vicarious liability is true or proper agent (that is, an agent in the strict legal sense and not some more general sense). Other principles apply to determining if a person is a true or proper agent. Leaving aside the driving of motor vehicles, in this context a person is only a true or proper agent if the principal has given that person authority to enter into legal relations on their behalf. If the person so authorised then commits a tort within the scope of their apparent authority, the principal can be vicariously liable for the tortious conduct of the principal's agent.<sup>423</sup>

230           Third, it is only if a person is found to be an employee that the principles relating to the course of the person's employment become relevant to vicarious liability. That is, it is not permissible to use the principles relating to determining if an act or omission occurred within the course of a person's employment to determine if the person is an employee, independent contractor, or true or proper agent.

231           Fourth, the question whether a person is an employee or an independent contractor for the purpose of the application of the principles of vicarious liability is to be answered by reference to the principles relevant to that purpose. It is not to the point that a person may have been characterised as an employee or independent contractor for other purposes, such as taxation purposes.<sup>424</sup>

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423 See, eg, *Colonial Mutual Life Assurance Society Ltd v Producers and Citizens Co-operative Assurance Co of Australia Ltd* (1931) 46 CLR 41 at 46, 50.

424 eg, *Hollis v Vabu Pty Ltd* (2001) 207 CLR 21, cf *Vabu Pty Ltd v Federal Commissioner of Taxation* (1996) 33 ATR 537; *Day v The Ocean Beach Hotel Shellharbour Pty Ltd* (2013) 85 NSWLR 335 at 341-342 [15].

232 Accordingly, in this case, the proper course of inquiry in respect of the question whether the Diocese was vicariously (not directly) liable for the tortious conduct of Father Coffey against the respondent involves the following questions. The first is (a), did the Diocese directly authorise the tortious conduct of Father Coffey.<sup>425</sup> As this was never suggested to be a source of the Diocese's vicarious liability, the next questions are: (b), for the purpose of the doctrine of vicarious liability, was Father Coffey an employee or independent contractor of the Diocese;<sup>426</sup> and (c), if, for the purpose of the doctrine of vicarious liability, Father Coffey was an employee of the Diocese, was his tortious conduct within the course of his employment or not, recognising that criminal and intentional tortious conduct may nevertheless be within the course of an employee's employment.<sup>427</sup> If the answer to question (b) is "Father Coffey was an employee of the Diocese for the purpose of the doctrine of vicarious liability" and the answer to question (c) is that "Father Coffey's tortious conduct was within the course of his employment", then the Diocese can be vicariously liable for that tortious conduct.

233 If, however, the answer to question (a) is that "the Diocese did not directly authorise Father Coffey's tortious conduct" and the answer to question (b) is that "Father Coffey was not an employee of the Diocese", (meaning that question (c) does not arise), then it is necessary to ask question (d), did the Diocese constitute Father Coffey as its agent for the purpose of creating legal relations with others and, if so, did Father Coffey's tortious conduct occur within the scope of his apparent authority from the Diocese.<sup>428</sup> If the answer to question (d) is "yes", then the Diocese can be vicariously liable for that tortious conduct. If the answer to (d) is "no", then there is no other available pathway at common law for the Diocese to be vicariously liable for Father Coffey's tortious conduct. In particular, it is not permissible to take parts of the principles for determining whether a person is an employee or independent contractor, whether an employee's acts or omissions occurred in the course of their employment, and whether a person is a true and proper agent of another person as principal, and from a combination of those parts,

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425 See, eg, *McInnes v Wardle* (1931) 45 CLR 548 at 549-550; *Torette House Pty Ltd v Berkman* (1940) 62 CLR 637 at 647. See also *Day v The Ocean Beach Hotel Shellharbour Pty Ltd* (2013) 85 NSWLR 335 at 341-342 [15]-[16].

426 Applying, eg, *Construction, Forestry, Maritime, Mining and Energy Union v Personnel Contracting Pty Ltd* (2022) 275 CLR 165.

427 eg, *Prince Alfred College Inc v ADC* (2016) 258 CLR 134 at 159 [80].

428 eg, *Sweeney v Boylan Nominees Pty Ltd* (2006) 226 CLR 161 at 171 [24], referring to *Colonial Mutual Life Assurance Society Ltd v Producers and Citizens Co-operative Assurance Co of Australia Ltd* (1931) 46 CLR 41.

create a new species of legal actor – such as a representative, emanation or agent (in a loose sense) – giving rise to the vicarious liability of another person.

234 Against this background it is apparent that the Court of Appeal's analysis involved an extension rather than an application of the common law doctrine of vicarious liability. For example, the Court of Appeal recorded that it was "common ground on this appeal that, at the relevant time, Coffey was neither an employee of the Diocese, nor was he an independent contractor engaged by it".<sup>429</sup> Rather than asking the necessary questions (as set out above), the Court of Appeal reasoned that the legal relationship between Father Coffey and the Diocese was "*sui generis*",<sup>430</sup> thereby enabling a new species of legal actor to be created as the source of vicarious liability.

235 As noted, there was no suggestion that the Diocese had directly authorised Father Coffey's tortious conduct against the respondent. Although the respondent pleaded that Father Coffey was the Diocese's "agent", it was not pleaded and cannot be said that the Diocese constituted Father Coffey as its "agent" for the purpose of creating legal relations with the respondent (or, more to the point, the respondent's parents as his legal guardians) or that Father Coffey's tortious conduct was within the scope of his apparent authority as such an agent.

236 Instead of proceeding in accordance with the questions outlined above, the Court of Appeal referred to two decisions of single judges, the first of which rejected a finding of vicarious liability as the tortfeasor was not an employee, and the second of which imposed vicarious liability despite the tortfeasor not being an employee, applying the reasoning of the primary judge in this case.<sup>431</sup> The Court of Appeal then said it was applying *Colonial Mutual*,<sup>432</sup> but not for the requisite purpose of deciding if Father Coffey was a true and proper agent authorised by the Diocese to create legal relations on behalf of the Diocese and, in committing the torts, was acting within the scope of his apparent authority from the Diocese.<sup>433</sup> The Court of Appeal referred to, amongst other cases, *Hollis v Vabu Pty Ltd*, *Scott v Davis*, *Sweeney v Boylan Nominees Pty Ltd* (as well as *Stevens v Brodribb Sawmilling Co Pty Ltd*<sup>434</sup>), and *Construction, Forestry, Maritime, Mining and*

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429 *Bird v DP (a pseudonym)* (2023) 69 VR 408 at 427 [77].

430 *Bird v DP (a pseudonym)* (2023) 69 VR 408 at 438 [120].

431 *Bird v DP (a pseudonym)* (2023) 69 VR 408 at 428 [80], citing *PCB v Geelong College* [2021] VSC 633 at [303] and *O'Connor v Comensoli* [2022] VSC 313.

432 *Bird v DP (a pseudonym)* (2023) 69 VR 408 at 428 [83], 437 [114].

433 *Bird v DP (a pseudonym)* (2023) 69 VR 408 at 437 [114].

434 (1986) 160 CLR 16.

*Energy Union v Personnel Contracting Pty Ltd*,<sup>435</sup> but not for the requisite purpose of asking if Father Coffey was an employee of, or independent contractor engaged by, the Diocese to perform a task (it being common ground that he was neither<sup>436</sup>). The Court of Appeal also referred to *Lloyd v Grace, Smith & Co*,<sup>437</sup> *Deatons Pty Ltd v Flew*,<sup>438</sup> *Lister v Hesley Hall Ltd*,<sup>439</sup> *New South Wales v Lepore*,<sup>440</sup> and *Prince Alfred College Inc v ADC*,<sup>441</sup> but not for the requisite purpose of deciding if the intentional (indeed, criminal) tortious acts of Father Coffey were within the scope of his employment (Father Coffey not being an employee).

237 In using the authorities for other than their requisite purposes, the Court of Appeal could and did conclude that Father Coffey was subject to the control and direction of the Bishop of the Diocese<sup>442</sup> (which is undoubtedly correct insofar as Father Coffey's religious duties were concerned), and was a "representative" and "emanation" of the Diocese,<sup>443</sup> with the consequence that the Diocese could be vicariously liable for Father Coffey's tortious conduct against the respondent.<sup>444</sup> However, "control" was relevant only to a question that had been answered in the negative in the case: whether Father Coffey was an employee of the Diocese.<sup>445</sup> And being a "representative" or "emanation" of the Diocese could be relevant only to the same question: whether Father Coffey was an employee of the Diocese, on the same basis as discussed in *Hollis v Vabu Pty Ltd* (ie, the fact that the putative employer required the bicycle couriers to wear a uniform bearing the putative employer's logo was a relevant feature weighing in favour of the conclusion that

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435 (2022) 275 CLR 165.

436 *Bird v DP (a pseudonym)* (2023) 69 VR 408 at 427 [77].

437 [1912] AC 716.

438 (1949) 79 CLR 370.

439 [2002] 1 AC 215.

440 (2003) 212 CLR 511.

441 (2016) 258 CLR 134.

442 *Bird v DP (a pseudonym)* (2023) 69 VR 408 at 440 [127].

443 *Bird v DP (a pseudonym)* (2023) 69 VR 408 at 440-441 [128]-[129].

444 *Bird v DP (a pseudonym)* (2023) 69 VR 408 at 441 [130].

445 *Bird v DP (a pseudonym)* (2023) 69 VR 408 at 427 [77]. See, eg, *Scott v Davis* (2000) 204 CLR 333 at 380 [139].

the couriers were employees and not independent contractors).<sup>446</sup> The fact that Father Coffey was a "representative" or "emanation" of the Diocese in the sense described by the Court of Appeal could not be relevant to the application of the principle in *Colonial Mutual*, as there was no suggestion that the Diocese constituted Father Coffey as its true or proper agent for the purpose of creating legal relations between the Diocese and other persons.

238 In thereafter using authorities relevant to the question whether intentional tortious (indeed, criminal) conduct was within the course of employment, the Court of Appeal also could and did conclude that vicarious liability attached to the Diocese because it placed Father Coffey "in a position of authority, power and trust in respect of his parishioners, such that he was able to achieve a substantial degree of intimacy with them and their families".<sup>447</sup> This position, the Court of Appeal said, provided Father Coffey with "'not just the opportunity but also the occasion' for the wrongful acts which he committed against the respondent".<sup>448</sup> But the distinction between the "opportunity" for the commission of a tort and the "occasion" for the commission of a tort is relevant only for the purpose of determining if the tortious conduct occurred in the course of an employee's employment or not. The distinction therefore presupposes that the tortfeasor has been found to be an employee of the person said to be vicariously liable for the tortious conduct.<sup>449</sup> The fact that a person's position provided them with "not just the opportunity but also the occasion" for tortious conduct does not constitute a separate feature enabling vicarious liability to be established in respect of the conduct of a person who is not an employee.

239 For those reasons, the reasoning of the primary judge and the Court of Appeal involve an extension and not an application of the common law. The next question is whether that extension should be endorsed.

### **Should the principles of vicarious liability be extended?**

240 The answer to the question whether the principles of vicarious liability should be extended to enable the liability of the Diocese for Father Coffey's

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446 (2001) 207 CLR 21 at 42 [50].

447 *Bird v DP (a pseudonym)* (2023) 69 VR 408 at 447 [153].

448 *Bird v DP (a pseudonym)* (2023) 69 VR 408 at 447 [153], quoting *Prince Alfred College Inc v ADC* (2016) 258 CLR 134 at 160 [82]. See also *Bird v DP (a pseudonym)* (2023) 69 VR 408 at 449-450 [163], quoting *Prince Alfred College Inc v ADC* (2016) 258 CLR 134 at 159-160 [80]-[81].

449 eg, *Prince Alfred College Inc v ADC* (2016) 258 CLR 134 at 151-153 [51]-[56], 159-161 [80]-[84].

tortious conduct against the respondent to be sustained is "no". There are two primary reasons why no such extension should be endorsed.

241 First, the proposed extension of the principles of vicarious liability would need to confront the reasoning in *Hollis v Vabu Pty Ltd*, *Scott v Davis*, and *Sweeney v Boylan Nominees Pty Ltd* – reasoning which stands firmly against any such extension on grounds that may be inferred to include that the degree of uncertainty in the existing common law doctrine (as to the distinction between an employee and an independent contractor, as to the course of employment, and as to personal or non-delegable duties of care) should not be exacerbated on a vague and unprincipled basis, the consequences of which might be indeterminacy and incoherence in the law.<sup>450</sup> If, as is the case, the distinction between employees and independent contractors is now "too deeply rooted to be pulled out"<sup>451</sup> and, as is the case, *Colonial Mutual* is to be understood as a case in which an independent contractor was constituted as the agent of a principal for the purpose of creating legal relations with others so that torts committed by the agent within the scope of the agent's apparent authority could be brought home to the principal, there is no scope for the extension of principle which underlies the conclusion of the primary judge and the Court of Appeal in the present case.

242 Second, the Victorian Parliament enacted the *Legal Identity of Defendants (Organisational Child Abuse) Act 2018* (Vic) and amended the *Wrongs Act 1958* (Vic) in response to the *Redress and Civil Litigation Report* of the Royal Commission into Institutional Responses to Child Sexual Abuse (the "Royal Commission report") and, in so doing, adopted the recommendation in the Royal Commission report of the imposition of a new duty of care to operate prospectively only and not retrospectively.<sup>452</sup> The new duty of care, in s 91(2) of the *Wrongs Act*, is in these terms:

"A relevant organisation owes a duty to take the care that in all the circumstances of the case is reasonable to prevent the abuse of a child by an individual associated with the relevant organisation while the child is under the care, supervision or authority of the relevant organisation."

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**450** eg, *Hollis v Vabu Pty Ltd* (2001) 207 CLR 21 at 36 [32], 46 [59]-[60]; *Scott v Davis* (2000) 204 CLR 333 at 338-339 [4], 342 [18], 408 [227], 416 [248], 420 [256], 423 [268]-[269], 440 [311], 456 [352]-[353], 460 [359]; *Sweeney v Boylan Nominees Pty Ltd* (2006) 226 CLR 161 at 167 [13], 169-171 [19]-[24], 171-172 [26]-[29], 173 [33].

**451** *Sweeney v Boylan Nominees Pty Ltd* (2006) 226 CLR 161 at 173 [33].

**452** Australia, Royal Commission into Institutional Responses to Child Sexual Abuse, *Redress and Civil Litigation Report* (2015) at 57.

243 Section 91(3) of the *Wrongs Act* provides that:

"In a proceeding on a claim against a relevant organisation for damages in respect of the abuse of a child under its care, supervision or authority, on proof that abuse has occurred and that the abuse was committed by an individual associated with the relevant organisation, the relevant organisation is presumed to have breached the duty of care referred to in subsection (2) unless the relevant organisation proves on the balance of probabilities that it took reasonable precautions to prevent the abuse in question."

244 A "relevant organisation" is relevantly defined in s 88 of the *Wrongs Act* to include an NGO within the meaning of the *Legal Identity of Defendants (Organisational Child Abuse) Act* which is capable of being sued in accordance with that Act. "[A]buse" is defined to mean physical abuse or sexual abuse. Section 90(1)(b) of the *Wrongs Act* provides, in part, that an individual associated with a relevant organisation, if the relevant organisation is a religious organisation, includes but is not limited to a minister of religion, a religious leader, an officer or a member of the personnel of the religious organisation. Section 93 of the *Wrongs Act* provides that Pt XIII of that Act, in which the foregoing provisions are included, "applies to abuse of a child that occurs on or after the day on which the *Wrongs Amendment (Organisational Child Abuse) Act 2017* comes into operation". The day on which the *Wrongs Amendment (Organisational Child Abuse) Act 2017* (Vic) came into operation is 1 July 2017.

245 The relevance of this is that the Royal Commission and the Victorian Parliament had a range of options available to determine what should be done to "address, or alleviate the impact of, past and future child sexual abuse and related matters in institutional contexts".<sup>453</sup> The Royal Commission concluded that "the current civil litigation systems and past and current redress processes have not provided justice for many survivors".<sup>454</sup> In dealing with the duty of institutions it dealt with both direct and vicarious liability of institutions, and non-delegable duties of care.<sup>455</sup> In so doing, it considered approaches overseas, namely in Canada

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453 Australia, Royal Commission into Institutional Responses to Child Sexual Abuse, *Redress and Civil Litigation Report* (2015) at 2.

454 Australia, Royal Commission into Institutional Responses to Child Sexual Abuse, *Redress and Civil Litigation Report* (2015) at 5.

455 Australia, Royal Commission into Institutional Responses to Child Sexual Abuse, *Redress and Civil Litigation Report* (2015) at 460.

and the United Kingdom.<sup>456</sup> It considered a range of options for legislative reform.<sup>457</sup> In that process it issued a Consultation Paper and consulted broadly with governments, organisations, and many representative bodies, and held a public hearing.<sup>458</sup> It ultimately recommended State and Territory legislative reform in which an institution would be subject to a new statutory non-delegable duty to take reasonable care to prevent the sexual abuse of a child with the onus of proof to be reversed so that, on the plaintiff establishing that the abuse occurred, an institution would be liable for child sexual abuse by its members or employees unless the institution proved it took reasonable steps to prevent abuse.<sup>459</sup> It specifically recommended that the new statutory duty of care apply prospectively and not retrospectively.<sup>460</sup> It also recommended legislative reform to ensure the existence of a proper defendant for all claims of institutional child sexual abuse.<sup>461</sup> The Royal Commission did not recommend, for example, that there be national (or any) legislative reform amending or extending the common law doctrine of vicarious liability to relationships other than the employment relationship or that the relationship between a relevant organisation and a member of that organisation be deemed to be either an employment relationship or that of principal and agent in the sense that gives rise to vicarious liability (either prospectively or retrospectively).

246 The enactment of the *Legal Identity of Defendants (Organisational Child Abuse) Act* and the *Wrongs Amendment (Organisational Child Abuse) Act* reflect part of the Victorian Parliament's response to the Royal Commission report, as well as the Family and Community Development Committee report, *Betrayal of*

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456 Australia, Royal Commission into Institutional Responses to Child Sexual Abuse, *Redress and Civil Litigation Report* (2015), Ch 15.3.

457 Australia, Royal Commission into Institutional Responses to Child Sexual Abuse, *Redress and Civil Litigation Report* (2015), Ch 15.4.

458 Australia, Royal Commission into Institutional Responses to Child Sexual Abuse, *Redress and Civil Litigation Report* (2015), Ch 15.5.

459 Australia, Royal Commission into Institutional Responses to Child Sexual Abuse, *Redress and Civil Litigation Report* (2015) at 489-493.

460 Australia, Royal Commission into Institutional Responses to Child Sexual Abuse, *Redress and Civil Litigation Report* (2015), Ch 15.6, particularly recommendations 89-93 at 495.

461 Australia, Royal Commission into Institutional Responses to Child Sexual Abuse, *Redress and Civil Litigation Report* (2015), Ch 16, specifically recommendation 94 at 511.

*Trust*.<sup>462</sup> In the Second Reading Speech relating to the *Wrongs Amendment (Organisational Child Abuse) Act*, the Attorney-General said that the Act "implements recommendation 26.4 of *Betrayal of Trust*, and addresses recommendation 91 of the Royal Commission (and that recommendation's scoping guidance in recommendations 92 and 93)".<sup>463</sup> The Attorney-General added that in "recognition of the uncertainties that exist in the current common law, the bill creates a new duty via statute",<sup>464</sup> a response which "balances the interests of plaintiffs and defendants".<sup>465</sup> The Attorney-General contrasted the new statutory duty resulting from this balancing of considerations with "the law of vicarious liability, where liability can be imposed upon an organisation even if that organisation is free from fault".<sup>466</sup> The Attorney-General also said that "[f]inally, the bill is prospective in operation. To enable organisations to be educated about the meaning and impact of the bill prior to it coming into effect, the bill will only apply to child abuse that occurs on or after the proposed default commencement date, being 1 July 2017. Prospective application of the reform is in line with the recommendations of both *Betrayal of Trust* and the Royal Commission. In saying this, it is important to note that the common law, in particular the law of vicarious liability, will still be available ... as an avenue for organisational child abuse plaintiffs alongside the bill. When the common law changes, it does so with retrospective effect. If the Australian common law develops as it has overseas, survivors of organisational child abuse will be able to utilise that avenue accordingly."<sup>467</sup>

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Taken as a whole, the terms of the Victorian Parliament's legislative reforms responsive to the Royal Commission report and to *Betrayal of Trust* weigh heavily against any expansion of the common law doctrine of vicarious liability. The

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**462** Victoria, Family and Community Development Committee, *Betrayal of Trust: Inquiry into the Handling of Child Abuse by Religious and Other Non-Government Organisations* (2013), vol 2 at 551. See, eg, Victoria, *Legal Identity of Defendants (Organisational Child Abuse) Bill 2018*, Explanatory Memorandum at 1.

**463** Victoria, Legislative Assembly, *Parliamentary Debates* (Hansard) 23 November 2016 at 4537.

**464** Victoria, Legislative Assembly, *Parliamentary Debates* (Hansard) 23 November 2016 at 4537.

**465** Victoria, Legislative Assembly, *Parliamentary Debates* (Hansard) 23 November 2016 at 4537.

**466** Victoria, Legislative Assembly, *Parliamentary Debates* (Hansard) 23 November 2016 at 4537.

**467** Victoria, Legislative Assembly, *Parliamentary Debates* (Hansard) 23 November 2016 at 4539.

"genius of the common law" includes that "the first statement of a common law rule or principle is not its final statement",<sup>468</sup> but its genius also includes many self-imposed checks and balances against "unprincipled, social engineering on the part of the common law judges".<sup>469</sup> It is one thing to accept that the common law should not stand still merely "because the legislature has not moved" to adapt to changing social conditions,<sup>470</sup> but another to change a common law principle in circumstances where the legislature has responded to a comprehensive review of the common law's inadequacies by the enactment of statutory provisions which make no change to that common law principle. The contemplation in the Attorney-General's Second Reading Speech that the common law may develop in Australia as it has overseas<sup>471</sup> (to expand the doctrine of vicarious liability to apply to relationships akin to employment if it is fair, just, and reasonable as a matter of policy that vicarious liability be imposed<sup>472</sup>) is not to be understood as an invitation to do so. In particular, and as noted, the Royal Commission report considered the development of vicarious liability overseas, including in *Various Claimants v Catholic Child Welfare Society*,<sup>473</sup> and recommended a response that did not expand the doctrine of vicarious liability,<sup>474</sup> but instead imposed a new statutory personal or non-delegable duty of care which was to be prospective only, not retrospective.

248 Further, the terms of the Victorian Parliament's legislative response are irreconcilable with the notion, put forward by the respondent, that the *Legal Identity of Defendants (Organisational Child Abuse) Act* provides a statutory context for facilitating a finding of vicarious liability. According to this argument, because the *Legal Identity of Defendants (Organisational Child Abuse) Act* remedies the circumstance that the Diocese is not a legal entity capable of being

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468 *Burnie Port Authority v General Jones Pty Ltd* (1994) 179 CLR 520 at 585, referred to in *Scott v Davis* (2000) 204 CLR 333 at 370 [109].

469 *Scott v Davis* (2000) 204 CLR 333 at 372 [120].

470 *Hollis v Vabu Pty Ltd* (2001) 207 CLR 21 at 46 [59].

471 Victoria, Legislative Assembly, *Parliamentary Debates* (Hansard) 23 November 2016 at 4539.

472 eg, *Various Claimants v Catholic Child Welfare Society* [2013] 2 AC 1 at 15 [34]. See also *Armes v Nottinghamshire County Council* [2018] AC 355; *Various Claimants v Barclays Bank plc* [2020] AC 973.

473 Australia, Royal Commission into Institutional Responses to Child Sexual Abuse, *Redress and Civil Litigation Report* (2015) at 471-473.

474 See, eg, Australia, Royal Commission into Institutional Responses to Child Sexual Abuse, *Redress and Civil Litigation Report* (2015) at 489-493.

sued, it must be taken that it also remedies the fact that, as an unincorporated association without legal personhood, the Diocese could not and did not employ Father Coffey. On this basis, the respondent submitted that s 7(4) of that Act (which provides that "[a] court may substantively determine a claim in a proceeding founded on or arising from child abuse for which there is a proper defendant under this section as if the NGO itself were incorporated and capable of being sued and found liable for child abuse in respect of the claim"), in effect, bridges the gap between the common law of vicarious liability (dependent on an employment relationship) and the respondent's claim against the Diocese for Father Coffey's tortious conduct against the respondent (the Diocese not being Father Coffey's employer because it has no legal personhood).

249 There is no reasonably open reading of the *Legal Identity of Defendants (Organisational Child Abuse) Act* which could be taken to have that effect. That Act does not have the effect of deeming an NGO to be incorporated. Still less, does it deem an NGO to be an employer of, relevantly, its members. The Act does no more than, relevantly, enable an NGO to nominate a proper defendant and provide a default provision if an NGO does not do so. In this case, the default provision, s 8, is not engaged because the Diocese has nominated its current Bishop to be the proper defendant on its behalf.

250 It is also significant that in the most recent decisions of the Supreme Court of the United Kingdom concerning vicarious liability, the high tide of vicarious liability appears to be in retreat in that country.<sup>475</sup> While the statement made in *Various Claimants v Catholic Child Welfare Society* was that "[t]he law of vicarious liability is on the move",<sup>476</sup> the issue in *Various Claimants v Barclays Bank plc* was "how far that move can take it".<sup>477</sup> In deciding that issue, Baroness Hale of Richmond referred to *Armes v Nottinghamshire County Council* as "[t]he last, and perhaps the most difficult, case".<sup>478</sup> It may be inferred that it was the most difficult case because the reasoning in it is in tension with the immediately succeeding observation that nothing in the earlier cases, including *Armes v Nottinghamshire County Council*, suggested that "the classic distinction between employment and relationships akin or analogous to employment, on the one hand, and the relationship with an independent contractor, on the other hand, has been

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475 See *BXB v Trustees of the Barry Congregation of Jehovah's Witnesses* [2024] AC 567 at 585 [48]; *Various Claimants v Barclays Bank plc* [2020] AC 973.

476 [2013] 2 AC 1 at 11 [19].

477 [2020] AC 973 at 980 [1].

478 [2020] AC 973 at 986 [23].

eroded".<sup>479</sup> The tension is apparent in the fact that the "the classic distinction" is between employment relationships and independent contractor relationships – the "analogous to employment" relationship as a source of vicarious liability being novel.<sup>480</sup> Given that, one way or another, the law of vicarious liability had expanded in scope in the United Kingdom, the control of that expansion arguably reimposed to some extent in *Various Claimants v Barclays Bank plc* was to emphasise that, in considering a relationship "analogous to employment", the question remained if "the tortfeasor is carrying on [their] own independent business" in which event there would be no relationship "analogous to employment".<sup>481</sup> As Lord Burrows JSC observed in *BXB v Trustees of the Barry Congregation of Jehovah's Witnesses*,<sup>482</sup> the case of *Various Claimants v Barclays Bank plc* revealed "an anxiety that the scope of vicarious liability was being widened too far".<sup>483</sup>

251 In summary, there is no proper basis to revisit the reasoning in *Hollis v Vabu Pty Ltd*, *Scott v Davis*, and *Sweeney v Boylan Nominees Pty Ltd*. Nor is there a proper basis to endorse the extension of the common law doctrine of vicarious liability that would be required to enable the Diocese to be found vicariously liable for the tortious conduct of Father Coffey against the respondent. The *Legal Identity of Defendants (Organisational Child Abuse) Act* does not, for the purpose of the application of the doctrine of vicarious liability, remedy the fact that, as an unincorporated association without legal personhood, the Diocese could not and did not employ Father Coffey.

### **The new claim – a non-delegable duty**

252 In a notice of contention, the respondent sought to make a claim not put to the primary judge or the Court of Appeal that the Diocese "is liable to the respondent for breach of a non-delegable duty owed to the respondent to protect him from the risk of sexual abuse by its priests, including Father Bryan Coffey, in the course of Coffey's functions and duties as a priest and as a representative, servant or agent of the Diocese".

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479 [2020] AC 973 at 986 [24].

480 [2020] AC 973 at 986 [25]. See also *Various Claimants v Catholic Child Welfare Society* [2013] 2 AC 1 at 18 [47], citing *E v English Province of Our Lady of Charity* [2013] QB 722; *John Doe v Bennett* [2004] 1 SCR 436 at 449 [27].

481 [2020] AC 973 at 987 [27].

482 [2024] AC 567.

483 *BXB v Trustees of the Barry Congregation of Jehovah's Witnesses* [2024] AC 567 at 585 [48].

253 The Diocese opposed the respondent being granted leave in this appeal to make a new basis for the claim for damages. The basis for the Diocese's opposition was that it would be placed in position of irremediable prejudice in that this personal or non-delegable duty had never been pleaded or identified below and the Diocese therefore had no opportunity to adduce evidence about matters relevant to such a special duty being imposed. The Diocese also submitted that the imposition of such a personal or non-delegable duty would require the re-opening and overruling of *New South Wales v Lepore*,<sup>484</sup> which had not been sought in the Courts below (or, for that matter, argued).

254 The respondent's arguments in support of the grant of leave to raise the new claim that the Diocese owed him a personal or non-delegable duty of care do not confront the insuperable obstacles to the adoption of that course. The respondent argued that the posited personal or non-delegable duty of care arises from the same facts as found by the Courts below and did not require any further factual findings. That argument is untenable. Precision in identifying the context of any duty of care is necessary, but even more so in respect of an asserted personal or non-delegable duty of care.<sup>485</sup> The non-delegable duty of care asserted in the notice of contention is a duty to "protect" the respondent from the risk of sexual abuse by the priests of the Diocese, including Father Coffey in the course of his functions and duties as a priest and as a representative, servant or agent of the Diocese. Even if a personal or non-delegable duty of care of that width and indeterminacy could arise, it should be inferred that the Diocese could have adduced evidence relevant to both the imposition and the alleged breach of that duty of care.

255 For example, the duty sought to be imposed in the notice of contention was reframed in oral argument as a duty "to ensure that the young boy was not exposed to a risk of harm", with the asserted breach of the duty as "causing, or allowing, [Father Coffey] to have unsupervised access to young children without there being any restrictions on supervision". Whether as proposed initially or as reframed, the asserted duty is incoherent and indeterminate. It raises more questions than it answers. What does "its priests" mean in respect of the Diocese – only priests formally assigned to a parish within the Diocese or any priest who happened to be within the area of the Diocese? What are the criteria which distinguished the respondent from any other child – being a parishioner of the parish to which Father Coffey was assigned as assistant priest or being Catholic and the child of Catholic parents? What is the geographical extent of the asserted duty – is it delimited by the boundaries of the Diocese or does it extend to any location in which a priest of a parish within the Diocese is present? What is the functional extent of the asserted duty – does it apply only to children whom the Diocese has placed under the care,

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484 (2003) 212 CLR 511.

485 *New South Wales v Lepore* (2003) 212 CLR 511 at 529 [23]; *Prince Alfred College Inc v ADC* (2016) 258 CLR 134 at 169 [114].

supervision, or authority of one of its priests or to all children with whom one of its priests might interact? What is the temporal extent of the asserted duty – where is the line to be drawn between a priest acting in an independent capacity and the unavoidably nebulous notion of a priest acting in the course of his functions and duties or as a representative, servant or agent of the Diocese?

256 Given the scope of these unanswered questions, it cannot be inferred that the Diocese would have been unable to adduce evidence potentially relevant to the existence of the asserted personal or non-delegable duty of care. In these circumstances, the respondent cannot be permitted to raise the asserted personal or non-delegable duty of care for the first time in this Court.<sup>486</sup> Further observations about the imposition of a personal or non-delegable duty of care on a body such as the Diocese should await a case in which the issue is properly raised and the asserted duty is both identified with precision and has an adequate factual foundation. That is not the present case.

### **Conclusion**

257 For these reasons, the Diocese's appeal must succeed. The orders proposed by Gageler CJ, Gordon, Edelman, Steward and Beech-Jones JJ should be made.

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**486** *Suttor v Gundowda Pty Ltd* (1950) 81 CLR 418 at 438; *Whisprun Pty Ltd v Dixon* (2003) 77 ALJR 1598 at 1608 [51]; 200 ALR 447 at 461.

