SUPREME COURT OF VICTORIA
COURT OF APPEAL

S EAPCI 2022 0023

BISHOP PAUL BERNARD BIRD — Applicant

v

DP (A PSEUDONYM) — Respondent

S EAPCI 2022 0033

DP (A PSEUDONYM) — Cross-Applicant

v

BISHOP PAUL BERNARD BIRD — Cross-Respondent

JUDGES:	BEACH, NIALL and KAYE JJA
WHERE HELD:	Melbourne
DATE OF HEARING:	17 March 2023
DATE OF JUDGMENT:	3 April 2023
MEDIUM NEUTRAL CITATION:	[2023] VSCA 66
JUDGMENT APPEALED FROM:	[2021] VSC 850 (J Forrest J)

TORTS – Personal Injury – Assault – Vicarious liability – Assistant priest appointed to Diocese – Whether Diocese vicariously liable for sexual abuse by assistant priest of five year old son of parishioners – Abuse committed in home of parishioners – Assistant priest not an employee or independent contractor of Diocese – Whether principle of vicarious liability may apply to relationship between Diocese and assistant priest – Whether abuse sufficiently connected with the role and functions of assistant priest so as to be the occasion for the abuse – Appeal dismissed.

CROSS-APPEAL – Damages – Whether trial judge erred in concluding that the respondent did not suffer psychiatric symptoms until memory reawakened after he read notice seeking victims of abuse – Cross appeal dismissed.

Legal Identity of Defendants (Organisational Child Abuse) Act 2018, s 7.

Colonial Mutual Life Assurance Society Ltd v The Producers and Citizens Co-operative Assurance Company of Australia Ltd (1931) 46 CLR 41; *Sweeney v Boylan Nominees Pty Ltd* (2006) 226 CLR 161; *Hollis v Vabu Pty Ltd* (2001) 207 CLR 21;*Various Claimants v Catholic*

Child Welfare Society & Ors [2013] 2 AC 1; *Prince Alfred College Inc v ADC* (2016) 258 CLR 134; *Scott v Davis* (2000) 204 CLR 333; *Construction, Forestry, Maritime, Mining and Energy Union v Personnel Contracting Pty Ltd* (2022) 96 ALJR 89; *Deatons Pty Ltd v Flew* (1949) 79 CLR 370; *State of New South Wales v Lepore* (2003) 212 CLR 511; *Stevens v Brodribb Sawmilling Company Pty Ltd (1986) 160 CLR 16* considered.

Counsel

Applicant/Cross-Respondent:	Ms RN Annesley KC and Mr AM Dinelli SC with Mr A James-Martin
Respondent/Cross-Applicant:	Mr D Campbell SC with Dr G Boas and Dr E Kelly

Solicitors

Applicant/Cross-Respondent:	Colin Biggers & Paisley
Respondent/Cross-Applicant:	Ken Cush and Associates

BEACH JA
KAYE JA
NIALL JA:

1 In 2020, the respondent commenced a proceeding in the Supreme Court in which he claimed damages for psychological injuries which he alleged he sustained as a result of assaults committed by a Catholic priest, Father Bryan Coffey ('Coffey') at the home of his parents in Port Fairy in 1971.

2 The respondent instituted the proceeding against the Diocese of Ballarat (the 'Diocese') through the current Bishop, 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*. The respondent's claim was made on two bases. First, the respondent maintained that the Diocese was vicariously liable for the assaults committed by Coffey. Secondly, he contended that the Diocese was directly liable in negligence as a result of the failure by the then Bishop of the Diocese to exercise reasonable care in his authority, supervision and control of the conduct of Coffey.

3 After a trial lasting fourteen days, the judge, in a reserved decision,[1] concluded that Coffey had committed the assaults which DP had alleged. His Honour held that the Diocese was vicariously liable for those assaults, but that the respondent had not established that the Diocese was directly liable to him in negligence. The judge assessed the respondent's total damages in the sum of $230,000.

4 The applicant originally sought leave to appeal the decision of the judge on the following grounds:

> 1. In circumstances where Coffey was found not to be an employee of the Diocese, the learned trial judge erred in finding that the applicant was vicariously liable for his conduct.
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> 2. Further or alternatively to Ground (1), the learned trial judge erred in holding that the Diocese could be vicariously liable for the conduct of another.
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> 3. Alternatively to Grounds (2) and (3), and assuming that the relationship between the Diocese and Coffey gave rise to a relationship of vicarious liability (which is denied), the learned trial judge erred in concluding that that relationship was such as to found a conclusion that the Diocese was so liable.
>
> **Particulars**
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> As part of this ground of appeal, the appeal [sic], the applicant challenges the subordinate findings of fact that:
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> (a) the Diocese was "all powerful in the management of clergy within a diocese" and that activities of an assistant parish priest were under the "direct control" of the priest, who reported to the

[1] *DP (a pseudonym) v Bishop Paul Bernard Bird* [2021] VSC 850 ('Reasons').

Bishop; and

(b) the visits to DP's home were part of Coffey's pastoral role,

each of which formed part of the erroneous conclusion of law that the Diocese was vicariously liable.

5 Before the hearing of the appeal, the applicant advised the Court and the respondent that he no longer intended to rely on ground 2.

6 The respondent, by application for leave to cross-appeal, seeks to appeal the award of damages on the following ground:

1. The trial judge erred in concluding that the Cross-Applicant did not suffer compensable loss until he read the Notice.

Background circumstances

7 Before considering the issues relating to liability, it is convenient, first, to summarise the background circumstances relating to the respondent's claim against the applicant. This summary is largely derived from the outline of the circumstances of the case contained in the judge's reasons.

8 The applicant was born in Port Fairy in February 1966. He was raised in a strict Catholic family. The local Catholic primary school, St Patrick's, and the parish church, also St Patrick's, were located close to the applicant's home. The church and school were each within the Ballarat Diocese. At the relevant time, Bishop Ronald Mulkearns was the appointed bishop in charge of the Diocese. Coffey, who was ordained in July 1960, was appointed to St Patrick's as an assistant priest in 1966.

9 In early 1971, DP commenced at the preparatory level at St Patrick's Primary School. At that time, Coffey was the assistant parish priest to Father Patrick O'Dowd, and he taught at the school. In his evidence, DP described two separate occasions in 1971 in which he was assaulted by Coffey. The applicant did not admit those assaults took place, but the judge was satisfied on the balance of probabilities that Coffey did assault DP in the manner alleged.

10 Subsequently, in 1975 and 1976, when DP was in the final two years of his primary school education, he was taught by a female teacher, who, he alleged, physically abused him by striking him over the head and dragging him by the ear. After the applicant completed his primary school education, he commenced secondary studies at the Warrnambool Technical School where he was a student for the next three years. He then moved to Warrnambool Community School for Years 9 to 11. He completed his education in 1983. From that time, and for several years, he was employed, mainly on a casual basis, in businesses in Port Fairy and Warrnambool.

11 In the meantime, in the early 1980s, DP formed a sexual relationship with an older boy, Danny. DP was about 15 years of age at that time. The relationship lasted for a number of years. In 1985, Danny suffered severe injuries in a motor vehicle collision. A few months later he committed suicide while he was an inpatient at a rehabilitation centre. In the same year, in March 1985, DP's parents were killed in an horrific motor vehicle

accident in New South Wales. Following an extensive police investigation, the Coroner concluded that the accident had been caused by the driver of another vehicle falling asleep, as a result of which his vehicle crossed onto the incorrect side of the roadway. However, DP harboured the firm suspicion that his father had deliberately caused the collision.

12 At some point during the 1980s, DP commenced using hard drugs, including heroin and cocaine. In 1988, he moved to Melbourne and obtained employment with the Melbourne and Metropolitan Tramways Board, initially as a tram conductor, and then subsequently as a driver. In 1993, he moved to Sydney, where he had several 'agency' jobs. In 1995, he obtained employment in a customer service role with Canon. In 1996, while living in Sydney, DP met his partner, Peter, and they have remained partners since then.

13 In 1999, DP suffered a workplace injury to his back. As a result, he was awarded a lump sum compensation payment of $45,000. Following that he had intermittent employment on modified duties, and after one or two years his employment was ultimately terminated.

14 In August 2000, DP commenced receiving the Commonwealth carer payment and a carer allowance on the basis that he was then the carer of his partner, Peter. At the time of the trial, he had remained on that payment. In 2001, DP and Peter moved to Melbourne and purchased a house in Melton South where they remained living.

15 Between 2001 and 2006, DP operated and managed two café businesses. In 2006, he was declared bankrupt.

16 In the meantime, from 2003 until the present time, DP suffered symptoms of depression, anxiety, panic disorder and agoraphobia. In histories, which he gave to his general practitioner and treating psychologists, he attributed a number of causes to those emotional states. They included: his relationship with Peter, his father's treatment of himself and his siblings when he was a child, his financial problems, the death of his parents, and the physical abuse to which he had been subjected by the female teacher at school.

17 From 2006, DP was treated with anti-depressants by his general practitioner, Dr Watson. Subsequently, in January 2011, he consulted Mr Simon Lush, a clinical psychologist at Western Psychological Services ('WPS'). DP had eleven sessions of treatment with Mr Lush, the last of which was in August 2012. In the following year, in May 2013, DP consulted another clinical psychologist at that service, Ms Kim Marr, and he was treated by her on twenty occasions up to and including September 2014. In October 2014, DP was referred to Dr Angelo Pagano, also a clinical psychologist at WPS, and he continued to consult Dr Pagano since that time.

18 In March 2014, DP's sister, K[2], died as a result of a brain tumour. DP had been close to K. In the same year, he commenced to investigate the circumstances of the deaths of his parents, and that process lasted for another three or four years. During that period, he spent a substantial amount of time and effort communicating with individuals and

[2] A pseudonym.

organisations in Victoria and New South Wales concerning the facts relating to their deaths, including whether he was entitled to compensation.

19 In November 2014, DP made a complaint to the Towards Healing organisation, which was a redress body established by the Catholic Church. The complaint was based on the mental and physical abuse to which he alleged he had been subjected by the teacher at St Patrick's Primary School. In March 2015, Dr Pagano provided a report to DP's then solicitors commenting on the effects of that abuse. In 2016, DP's claim for compensation in relation to the school abuse was rejected by the Towards Healing organisation.

20 In 2016, DP instituted a claim against the Transport Accident Commission ('TAC') for payments under the *Transport Accident Act 1986* in relation to the death of his parents. In June 2016, that claim was rejected by TAC, and his subsequent appeal to the Victorian Civil and Administrative Appeal was dismissed.

21 In 2016, DP sought an ex gratia payment of $780,000 from the New South Wales government as a result of the psychological trauma, which he had sustained as a result of the death of his parents. Dr Pagano wrote a letter to the then Opposition Spokesperson in the New South Wales Parliament, supporting that claim for 'ill health suffered [by DP] … following the death of his parents in a motor vehicle accident on March 19, 1985'. In September 2016, the New South Wales government refused DP's request for the ex gratia payment.

22 In late 2018, a friend of DP, by the name of Nicole, sent him a copy of an advertisement in a local Port Fairy newspaper, the 'Moyne Gazette', which sought information about potential victims of Coffey (the judge referred to that advertisement as 'the December advertisement'). That advertisement had been placed in the newspaper by the solicitors who, in the current proceedings, have acted for DP, Messrs Ken Cush & Associates. At that time, DP had not told anyone (apart, on his own account, from his partner Peter) about the fact that Coffey had assaulted him, until he contacted the office of Ken Cush & Associates in January 2019 after reading the advertisement. He spoke to a solicitor, and told him details of the assaults which Coffey committed against him. The present proceeding was issued on 27 March 2020.

Summary of evidence on the issue of liability

23 In his evidence, the applicant said that his mother was a devoted Catholic, that she was 'heavily into' the Catholic church, and she expected her children also to be committed to the religion in that way. His father was also a committed Catholic.

24 DP said that from an early age the relationship between his parents was quite strained, and there was a lot of arguing and bickering between them. During that time, Coffey used to come to talk to his parents about their matrimonial difficulties, and when he did so, DP and his siblings were not permitted to remain in the room. After Coffey had talked to his parents, he would come to DP's room, sit on his bed, hold his hand, and talk to him. This happened on five or six occasions. DP said that at that time he had been raised to trust the 'man of God'. During that time Coffey was present for weekly Masses which DP attended, but Coffey did not officiate at them.

25 DP commenced school in the preparatory grade in 1971. At that time Coffey would come to the classroom and teach religious education. In the meantime, in November 1970, DP's grandmother died. Following that, a 'wake' was held at the family home and Coffey attended it. During the evening, DP became tired and Coffey said that he would put DP to bed. Coffey carried DP over his shoulder, and on the way to the bedroom, Coffey slapped him twice on the buttocks. Coffey then put DP under the sheets, sat on the edge of the bed, and talked to DP. After a short time, DP started to fall asleep. When he woke, he found Father Coffey's hand under the sheets fondling his private parts. DP said that he did not tell his mother at the time, because his mother would tell his father, and he would then be in trouble.

26 The second occasion of abuse occurred on Boxing Day 1971. DP had been given an Indian tent by his parents as a Christmas present. Coffey attended the family home on Boxing Day for a visit. DP went outside with Coffey and showed him the new tent. They both entered the tent, and then Coffey again indecently assaulted DP for about three minutes.

27 Father Kevin Dillon gave evidence as to the role and function of a Catholic priest. Father Dillon was ordained in 1969. In the following sixteen years, he performed different roles as an assistant priest and as an administrator. From 1985 until 2001, he served as the parish priest at St John's Catholic church in Mitcham, and between 2001 and 2017 he was the parish priest at St Mary's Catholic church in Geelong. Since then, Father Dillon had performed the role of parish priest at St Simon's church in Rowville.

28 Father Dillon commenced his training at the Corpus Christi seminary in Werribee in 1962. That seminary was operated under the authority of the Bishops of Melbourne, Ballarat, Sandhurst, Sale and Hobart. The education at the seminary included instruction as to the roles, duties and functions of a priest. The focus of the training concerned providing service to the ordinary person in the parish. Father Dillon stated that he had always considered that the work of a priest within the context of the parish is the fundamental expression of priesthood. He said that the focus of the teaching was to be a minister in the best sense of providing pastoral care to the people in the parish.

29 Father Dillon said that in his training he was taught Canon law. That law was contained in a code that was originally formulated in the 16th century, but which had been the subject of a major revision in 1983. He said that Canon law applies throughout the world.

30 Father Dillon explained that all parish priests are appointed by the Bishop, who has the authority to make the appointments. The rights and responsibilities of a priest who has been appointed are prescribed by the code of Canon law. For example, a parish priest is required to celebrate a Mass each Sunday. The position of assistant priest is different to that of a parish priest, and the relationship between the two was essentially that of 'a master and apprentice'.

31 Father Dillon then gave evidence about the number of specific Canons that were tendered in evidence. He noted that one particular Canon (Canon 465) had the effect that any clergy who was to serve in the Diocese had to be appointed and directed by the Bishop. The Bishop has authority over all the priests in the Diocese. Further, under

Canon 476, an assistant priest acts under the direction of the parish priest. Thus, the parish priest exercised a degree of control over the assistant priest and had power to give him directions and instructions. That Canon also provides that the assistant priest should undertake the same duties and responsibilities of the parish priest in the pastoral care of the people. Father Dillon explained that there was a chain of command, and the assistant priest would take his instructions and directions from the priest.

32 Father Dillon further stated that the fundamental work of a priest involved visiting the sick, and officiating at baptisms and funerals and the like. One of the tasks was to conduct the ceremony of the blessing of a home. Father Dillon said that it was part of his role as a parish priest to visit people in their homes, in order to get to know them. In doing so, he would wear his clerical attire. He said that throughout the 1970s the assistant priest did not need to obtain the approval of the parish priest to make home visits. Such a function would have been regarded as one which the assistant priest was instructed to do. The visiting of homes was seen as an integral part of parish pastoral care. It was usual to visit parishioners in their homes, so that the priest could get to know them in their place of comfort, and form a positive relationship with them.

33 In cross-examination, Father Dillon said that in permitting the parish priest to have the care and management of the parish, the Bishop would allow him some authority. He also said that some of the visits that he made as a priest were to old friends, and to the families of fellow priests.

34 At the trial, the judge admitted in evidence extracts of statements of nine witnesses who were indecently assaulted by Father Coffey when they were young boys. That evidence was admitted as tendency evidence pursuant to s 97 of the *Evidence Act 2008*. The evidence demonstrated that four of those boys were sexually abused by Coffey in their own homes during visits to that home by Coffey.

35 In February 1999, Coffey was convicted at the Ballarat County Court of 12 counts of indecent assault on a male person under the age of 16 years, one count of indecent assault on a girl under the age of 16 years and one count of false imprisonment. He was sentenced to 3 years' imprisonment which was wholly suspended.

Judge's reasons on the issue of liability

36 The judge commenced by addressing the question whether the respondent had established that Coffey had abused him on the two occasions referred to in his evidence. His Honour was satisfied that the first assault, alleged by the respondent, occurred, save that he was not satisfied that that assault took place at a wake for the respondent's grandmother. He considered that it was more probable that the assault took place at a social gathering at the respondent's family home that was attended by Coffey.[3] The judge accepted the evidence of the respondent as to the circumstances in which the second assault occurred and concluded that that assault was also proven on the balance of probabilities.[4]

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3 Ibid [109].

4 Ibid [115].

37 Having reached those conclusions, the judge then addressed the question as to whether the Diocese was vicariously liable for the assaults of the respondent by Coffey. His Honour commenced by considering whether Coffey could be regarded as an employee of the Diocese. He noted that, as the High Court stated in *Stevens v Brodribb Sawmilling Co Pty Ltd,*[5] the existence or absence of control in the relationship was no longer a reliable indicator of an employment relationship; rather, the emphasis was not on the exercise of control, but rather on the right to exercise it.[6]

38 The judge then considered the decision of the High Court in *Hollis v Vabu Pty Ltd.*[7] His Honour noted that the decision of the majority, that the courier in that case was an employee, and not an independent contractor, was due to a number of features including: the unskilled nature of the work; the extent to which Vabu controlled the manner of the courier's work; the importance of that control; the extent to which the courier outwardly represented Vabu; and Vabu's control over the financial arrangements with the courier.[8] The judge also noted that other potential indicia of employment, identified by the courts, have included: the right of the employer to the exclusive services of the employee; the provision of paid holiday or sick leave; the deduction of income tax from the employee's pay; the right to suspend or dismiss the employee; the fact that the employee cannot delegate or subcontract the work without reference to the employer; the fact that the employee does not have a separate place of work and does not advertise their services to the world at large; the fact that the employee does not provide and maintain their own significant tools or equipment; and the fact that the employee is paid regular wages and superannuation payments.[9]

39 The judge then discussed the decisions of the High Court in *Sweeney v Boylan Nominees Pty Ltd,*[10] of the Supreme Court of Canada in *Bazley v Curry,*[11] of the Court of Appeal of the United Kingdom in *Maga v Archbishop of Birmingham & Anor*[12] and of the Supreme Court of the United Kingdom in *Various Claimants v Catholic Child Welfare Society & Ors*.[13]

40 Having traversed those decisions, the judge then turned to the decision of the High Court in *Prince Alfred College Inc v ADC*[14] which was concerned with the question of the liability of a school in respect of sexual assaults committed against a student by a house master employed by the school. The judge considered that the High Court did not endorse a 'confined theory' of vicarious liability restricted solely to the existence of an

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5 (1986) 160 CLR 16 (Mason, Wilson, Brennan, Deane and Dawson JJ); [1986] HCA 1 ('*Stevens*').
6 Reasons, [131].
7 (2001) 207 CLR 1 (Gleeson CJ, McHugh, Gummow, Hayne and Callinan JJ); [2001] HCA 8 ('*Hollis*').
8 Ibid [135].
9 Ibid [136].
10 (2006) 226 CLR 161 (Gleeson CJ, Gummow, Kirby, Hayne, Heydon and Crennan JJ); [2006] HCA 19 ('*Sweeney*').
11 [1999] 2 SCR 534 ('*Bazley*').
12 [2010] 1 WLR 1441 ('*Maga*').
13 [2013] 2 AC 1 (Lord Phillips, Baroness Hale, Lord Kerr, Lord Wilson and Lord Carnwath JJSC) ('*Various Claimants*').
14 (2016) 258 CLR 134 (French CJ, Kiefel, Bell, Gageler, Keane, Nettle and Gordon JJ); [2016] HCA 37 ('*Prince Alfred College*').

employer/employee relationship as contended by the applicant.[15] His Honour, in that respect, stated:

> As has been seen, other jurisdictions have moved away from the position advocated by the Diocese. The statements of the High Court in *Prince Alfred College* demonstrate, I suggest, that there is room for an Australian court to adopt a robust and contemporaneous approach to vicarious liability drawing "heavily on various factors identified in cases involving child sexual abuse" in overseas jurisdictions. In such cases, courts will need to "make and develop the common law, as distinct from discovering and declaring it", which may involve making judgments about "[i]dentification, modification or even clarification of some general principle or test … in the context of, and by reference to, contestable and contested questions".[16]

41 In that respect, the judge rejected the proposition, relied on by the applicant, that vicarious liability is confined solely to the employment situation. His Honour considered that in *Sweeney* the High Court did not lay down an absolute rule to that effect, and that the Court had stated, in relation to independent contractors, that 'the person engaging the contractor will *generally* not be vicariously liable'.[17] In support of that proposition, the judge referred to the decision of the High Court in *Colonial Mutual Life Assurance Society Ltd v Producers and Citizens Cooperative Assurance Company of Australia Ltd.*[18]

42 Thus, the judge considered that the only 'door' that was shut by *Sweeney* was that limited to the relationships between a person engaged, as an independent contractor, to perform work on behalf of another in the context of a commercial or industrial setting.[19] In that respect, the judge further noted that it was not submitted on behalf of the applicant that the relationship between the Diocese and Coffey was one of principal and independent contractor.[20]

43 The judge considered that the question which he was required to address was as follows:

> … whether the wrongs of a person who is clearly not an independent contractor can be imposed on a second person with whom that first person has an ongoing, defined and close relationship with authority vested in the first person, albeit that it is not one of employment (in an industrial or contractual sense).[21]

44 The judge then turned to the facts of the case. Applying the criteria identified by the High Court in *Hollis*, the judge was not satisfied that Coffey could be treated as an employee of the Diocese.[22] His Honour considered that the correct approach to the question, whether the Diocese may be vicariously liable for Coffey's assaults of the

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15 Reasons, [176].
16 Ibid [178].
17 *Sweeney* (2006) 226 CLR 161, 167 [12].
18 (1931) 46 CLR 41 (Gavan Duffy CJ, Rich, Starke, Dixon, Evatt and McTiernan JJ); [1931] HCA 53 ('*Colonial Mutual Life*').
19 Reasons, [190].
20 Ibid [193].
21 Ibid [199].
22 Ibid [211].

respondent, involved an inquiry into: the relationship between the Diocese and Coffey; the roles of the parish priest (Father O'Dowd) and Coffey; Coffey's role within the Port Fairy Catholic community; and Coffey's relationship with the respondent and his family.[23]

45 In considering the relationship between Coffey and the Diocese, the judge took into account that, on the evidence of Father Dillon, the Bishop was 'all powerful' in the management of clergy within a Diocese, and that the activities carried out by an assistant parish priest were under the direct control of the parish priest, who in turn reported to the Bishop. The judge inferred that the Diocese provided accommodation for both Father O'Dowd and Coffey and supplied his clerical garb and vestments.[24]

46 In respect of Coffey's role in the community, the judge noted that the support that he was required to give to the parish priest was not confined to work within the church, but also included pastoral activities in private homes that extended to getting to know the people of the parish and to relate to them in the privacy of their own home.[25]

47 The judge noted that a Bishop exerts limited control over the day-to-day activities of an assistant parish priest, and that he has no direct control over the assistant priest's hours of work and the like. However, Coffey's assignment at St Patrick's was subject to the ultimate authority of the Diocese as exercised by the Bishop to remove any priest, and to exercise discretion over the appointment of priests to parishes. In that respect, the judge noted:

> The Diocese had 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. Despite the day-to-day supervision of Father O'Dowd, it was at the will of the Diocese that Coffey received and maintained the assignment for the entire period.
>
> It can be accepted that, in contrast to *Hollis*, the Diocese or Bishop did not exercise the kind of control over Coffey's work that Vabu did in relation to its couriers. However, the Diocese, as just discussed, had the right to exercise control over certain aspects of a priest's work even if only "incidental or collateral" to his main work. [26]

48 In considering the question of the centrality of Coffey's work to that of the Diocese, the judge noted the evidence of Father Dillon that priests stood as representatives of the church's values, and that they must embody them always as they could be called upon at any time to fulfil their duties. The judge thus considered that Coffey carried out the work of the Diocese 'in its place'.[27] Further, the Diocese, through the Bishop, had given Coffey the *imprimatur* to undertake religious care for the spiritual life of the Port Fairy flock, and in that capacity he was 'out and about' in the community as part of his

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23 Ibid [212].
24 Ibid [228]–[229].
25 Ibid [233]–[234].
26 Ibid [237]–[238].
27 Ibid [240]–[241].

pastoral role, which included visiting parishioners homes and interacting with the family and the children.[28]

49 Finally, the judge noted the evidence of Father Dillon that the training of priests emphasised the role of the confessional and the intimacy of priests with members of the parish for pastoral care and guidance.[29] The judge noted the tendency evidence given by four of the persons who had been abused by Coffey in their homes, and the evidence of the respondent, that Coffey had visited his family home on multiple occasions for the purported purpose of advising the family in the context of the respondent's parents' marital problems.[30] The judge concluded, from the evidence of Father Dillon, the respondent and the other persons who had been abused, that pastoral visits to Catholic family homes were part of Coffey's duties, and that Coffey's pastoral role extended to attending social functions of his parishioners.[31] The judge noted the evidence of the tendency witnesses and of the respondent, that the provision of unsupervised pastoral care to families was part and parcel of Coffey's role, and it placed him in a position in which he was able to take advantage of that role to commit the abuse complained of.[32]

50 In conclusion, the judge was satisfied that on the occasion of the two assaults on the respondent, Coffey was engaged in a pastoral visit, in that his participation in Catholic social life in the community was as much a part of his role as celebrating Mass. The respondent's parents permitted Coffey to be alone with the respondent in his bedroom and in the tent, because of their implicit trust in him as a priest of the church.[33]

51 The judge then summarised his conclusions on the questions, first, whether the relationship between Coffey and the Diocese or the Bishop was such as to give rise to vicarious liability on the part of the Diocese for Coffey's conduct, and, if so, secondly, whether the Diocese or the Bishop were liable for the unlawful conduct of Coffey. His Honour stated:

> By reason of —
>
> (a) the close nature of the relationship between the Bishop, the Diocese and the Catholic community in Port Fairy;
>
> (b) the Diocese's general control over Coffey's role and duties within St Patrick's parish;
>
> (c) Coffey's pastoral role in the Port Fairy Catholic community; and
>
> (d) 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
>
> — the Diocese is vicariously liable for his conduct.

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28 Ibid [242].
29 Ibid [245].
30 Ibid [247].
31 Ibid [261].
32 Ibid [266].
33 Ibid [273]–[277].

> The first question is answered affirmatively.
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> I am also satisfied 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 him to take advantage of DP when alone — just as he did with other boys. This position significantly increased the risk of harm to DP. He misused and took advantage of his position as a confidante and pastor to DP's family; this enabled him to commit the unlawful assaults upon DP.
>
> The second question is also answered affirmatively.
>
> It follows that I hold that, notwithstanding the unlawful nature of Coffey's acts, the Diocese is vicariously liable for his assaults on DP.[34]

52 The judge then turned to the other claim by the respondent that was based on the proposition that the Diocese itself had breached its duty of care to him. His Honour considered that there was insufficient evidence upon which to found a conclusion that the Diocese or the Bishop should have known of the potential misconduct of Coffey. Accordingly, there was insufficient evidence to demonstrate that there was a foreseeable risk in 1971 that Coffey might assault young boys such as the respondent.[35]

Submissions of applicant

Ground 1

53 By ground 1, the applicant has submitted that the acceptance by the judge, that Coffey was not an employee of the Diocese, necessarily precluded a finding that the Diocese could be liable for the wrongdoing of Coffey. The applicant submitted that the existence of a relationship of employer and employee is a necessary foundation for a conclusion that the Diocese was vicariously liable for the wrongs of Coffey. In particular, it was submitted, in Australia, except for some narrowly defined exceptions which are not relevant to this case, vicarious liability requires an employment relationship between the tortfeasor and the defendant.

54 In support of that proposition, counsel relied on the decisions of the High Court in *Sweeney* and in *Scott v Davis*.[36] In that respect, counsel submitted that the judge's analysis of the decision of the High Court in *Sweeney* was wrong, as it overlooked that, in *Sweeney*, the High Court rejected the proposition that the distinction between employee and independent contractor should be abandoned in favour of a wider principle. Further, it was contended, the High Court in *Prince Alfred College*[37] reinforced the proposition that the requirement, that the employee's wrongful act be committed in the course or scope of employment, has remained a touchstone for vicarious liability.

55 Counsel submitted that the test, that must be applied in order to find a principal liable for the actions of a tortfeasor, involves two necessary steps. First, it must be concluded

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34 Ibid [278]–[282].
35 Ibid [305]–[306].
36 (2000) 204 CLR 333.
37 (2016) 258 CLR 134, 149 [44], 150 [46].

that the tortfeasor was an employee of the principal. Secondly, the actions of the tortfeasor must have been committed in the course of the employment relationship. Counsel submitted that, in effect, the judge incorrectly 'collapsed' the first limb of that test into the second limb, and thus applied the principles, stated by the High Court in *Prince Alfred College*, as a single test for a conclusion of vicarious liability. In doing so, it was submitted, the judge incorrectly treated the decisions of the High Court in *Hollis* and *Sweeney*, and the decision of the New South Wales Court of Appeal in *Day v The Ocean Beach Hotel Shellharbour Pty Ltd*[38] as a subset of cases in which a principal may be found to be vicariously liable for the wrong of a tortfeasor.

56 Counsel for the applicant further submitted that the broader approach to vicarious liability, discussed by McHugh J in *Hollis*,[39] has been specifically not embraced by the High Court in subsequent decisions such as *Sweeney*. Further, counsel submitted that the decision by the High Court in *Colonial Mutual Life*, which extended vicarious liability to an 'agent' of the principal, did not avail the respondent in this case, because, it was contended, that decision was limited to a 'true agent' who had the ability to enter into legal relations on behalf of the principal. In support of that proposition counsel relied on the subsequent discussion concerning *Colonial Mutual Life* in *Sweeney*[40] and *Scott v Davis*.[41] Counsel submitted that the relationship between Coffey and the Diocese was not that of principal and agent in the sense discussed in those cases. Counsel further submitted that the authorities have made it clear that, in that respect, the High Court has made it clear that the fact that a tortfeasor might represent a principal is an insufficient basis, on its own, for a finding of vicarious liability on the part of the principal.[42]

57 Counsel further noted that the High Court, to date, has declined to follow decisions in foreign jurisdictions, which have expanded the circumstances in which vicarious liability applies beyond that of an employment relationship. In that respect, counsel noted that in England and Wales, the decision in *Various Claimants*, expanded the concept of vicarious liability to encompass a wider set of relationships which are analogous to that of employment. Counsel also referred to the Canadian decisions of *Bazley* and *Jacobi v Griffiths*.[43] It was submitted that that approach has not been adopted in Australia, and is one which the High Court, in *Prince Alfred College*, specifically rejected. Further, it was contended, the approach in the United Kingdom and in Canada is contrary to the principle, which is established in Australian authorities, that the question whether vicarious liability exists in a particular case involves a two-step enquiry which must not be conflated. In that respect, counsel submitted, the judge further erred by treating those two steps as being closely interrelated, an approach which, it was contended, was contrary to the principles stated by the High Court in *Construction, Forestry, Maritime Mining and Energy Union v Personnel Contracting Pty Ltd*.[44]

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38 (2013) 85 NSWLR 335 ('*Day*').
39 (2000) 207 CLR 21, 50–61 [72]–[102].
40 (2006) 226 CLR 161, 170–2 [21]–[27].
41 (2000) 204 CLR 333, 423–4 [269]–[273] (Gummow J), 435 [299] (Hayne J).
42 *Sweeney* (2006) 226 CLR 161, 172 [29]; *Leighton Contractors Pty Ltd v Fox* (2009) 240 CLR 1, 12–13 [21]–[22]; [2009] HCA 35.
43 [1999] 2 SCR 570 ('*Jacobi*').
44 (2022) 96 ALJR 89 ('*Personnel Contracting*').

Ground 3

58 Under ground 3, counsel submitted that, if the Court rejects ground 1, and concludes that the relationship between the Diocese and Coffey was one which might give rise to a relationship of vicarious liability, nevertheless the judge erred in determining that, in the circumstances of the case, that relationship was such as to found a conclusion that the Diocese is liable for the two assaults committed by Coffey against the respondent. Counsel noted that the applicable test is whether the employment (or other relationship) provided both the opportunity and the occasion for the commission of the tortious conduct. In the present case, it was submitted, there was an insufficient basis for the Court to have been satisfied the Diocese provided Coffey with that opportunity and occasion for the conduct in which he engaged.

59 First, it was submitted, the evidence did not support the proposition stated by the judge that the Diocese was 'all powerful' in the management of clergy within the Diocese and the activities of an assistant parish priest who is under the 'direct control' of the priest. In that respect, counsel relied on the evidence of Father Dillon that the priest exercised a lot of discretion in the manner in which he conducted his duties, and as such was given a significant degree of autonomy in the care, management and responsibility of the parish.

60 Secondly, counsel submitted that the evidence precluded a conclusion that Coffey's priestly duties provided the opportunity or occasion for the wrongful conduct. In his evidence, Father Dillon said that the parish priests and assistant priests did not work regular hours, they were normal people, who, outside their particular roles, also participated in social outings and the like. It was submitted the evidence demonstrated that Coffey had developed a friendship with the respondent's family and the connection between Coffey and that family was social, and was not connected with his role as the assistant priest. In respect of the first incident, the abuse was committed by Coffey at a party, which was not attended by him by reason of his position as assistant priest. The fact that Coffey was at a parishioner's home did not itself establish the requisite connection between his role as an assistant priest and the opportunity and occasion that he took advantage of to abuse the respondent.

61 Thirdly, it was submitted, the judge's analysis of Coffey's role as an assistant priest failed to take into account a number of matters, including: the evidence that Canon law did not designate any special function to an assistant priest; the absence of any evidence as to what was required of Coffey as an assistant priest following his appointment in 1966; and the absence of evidence of any special role performed by Coffey, in his capacity as an assistant priest, in respect of his attendance in parishioner's homes.

Submissions of respondent

Ground 1

62 In response to ground 1, counsel for the respondent submitted that properly analysed the decisions of the High Court in *Sweeney* and *Hollis* do not preclude a finding of vicarious liability in a case to which the employment/independent contract dichotomy is inapplicable. In that respect, counsel submitted that the decision of the High Court in

Colonial Mutual Life is particularly relevant because it supports the application of vicarious liability to a person who stands in the place of and represents a defendant, that is neither an independent contractor nor an employee. Counsel noted that in both *Hollis* and *Sweeney* the High Court accepted that vicarious liability might apply to a relationship other than that of employment. In particular, it was submitted, vicarious liability extends beyond an employer/employee relationship to a context in which an agent is held out as having the authority of a principal. It was submitted that in such a case, where the 'agent' is not an independent contractor, there was appropriate scope for the imposition of vicarious liability in respect of the actions of that agent.

63 Counsel further submitted that the judge did not inappropriately conflate the 'two-step process' for the assessment of vicarious liability that was endorsed by the High Court in *Construction, Forestry, Maritime, Mining and Energy Union v Personnel Contracting Pty Ltd*.[45] First, it was submitted, the two-step approach which was endorsed by the High Court in *Personnel Contracting* applies in cases where the issues are whether the relationship is that of employment or independent contractor. Secondly, in any event, it was submitted that the judge's reasons did not conflate the two issues. The judge did consider the same factors in determining each of the two issues, but he did so separately, for different purposes, and by according the various factors different weights.

Ground 3

64 In response to ground 3, counsel submitted that the evidence of Father Dillon provided a substantial basis for the finding by the judge that the Bishop was 'all powerful' in the management of clergy within the Diocese.[46] In that respect, counsel referred to the evidence of Father Dillon, and the findings by the judge, as concerning the overall control exercised by the Diocese (or the Bishop) over Coffey in his role as an assistant parish priest.

65 Counsel further submitted that the second contention made by the applicant — that there was insufficient evidence to connect Coffey's pastoral duties with the visits that he made to the respondent's home — was based on selective fragments of the evidence of Father Dillon. In that respect counsel referred to the evidence of Father Dillon as to the particular importance of the involvement by a priest in the personal lives of parishioners as part of the priest's pastoral role. In that respect, counsel noted that the applicant did not challenge the evidence given by Father Dillon, nor did it call any evidence in rebuttal of his testimony. In those circumstances it was submitted that it was appropriate for the judge to apply the evidence given by Father Dillon to the circumstances in which Coffey became involved in the lives of the respondent's family.

66 Counsel further submitted that the third contention made by the applicant under ground 3 — as to the role of an assistant priest — involved a selective approach by the applicant to aspects of the evidence, without taking that evidence into account, and ignoring the consideration by the judge of the evidence as a whole. In particular, counsel referred to the evidence given by Father Dillon about the role of an assistant priest under the

45 (2022) 96 ALJR 89.
46 Reasons, [228].

authority of the bishop and the parish priest, which included: the obligation of the assistant priest under Canon law to perform the same duties as the parish priest; and the role of the assistant priest in visiting individual homes, and becoming acquainted with parishioners, as an integral part of the pastoral care role of the assistant priest in the context of the parish.

Preliminary consideration — legal status of the applicant

67 As we have indicated, before the hearing of the appeal, the applicant abandoned reliance on ground 2. Nevertheless, as a prelude to considering grounds 1 and 3, it is relevant first to say something about the legal status of the applicant.

68 In effect, the applicant was sued as a nominated defendant pursuant to the *Legal Identity of Defendants (Organisational Child Abuse) Act 2018* (the '2018 Act'). It was necessary to institute proceedings against the defendant pursuant to that Act, because at all material times the Catholic Diocese of Ballarat, which was an ecclesiastical province of Melbourne, was an unincorporated association. As such, its status as an unincorporated association presented particular difficulties to the institution in litigation in cases such as the present.

69 Those difficulties were specifically exposed by the decision of the New South Wales Court of Appeal in *Trustees of the Roman Catholic Church v Ellis*.[47] In that case, the plaintiff, in 2004, commenced proceedings for damages alleging that he had been sexually assaulted by an assistant priest of the church in the Archdiocese of Sydney between 1974 and 1979. The first defendant in the proceeding was the then current Archbishop of the Archdiocese of Sydney, who had been appointed to that position in 2001. The second defendant consisted of the Trustees of the Roman Catholic Church for the Archdiocese of Sydney. The plaintiff made an application for an extension of time. Patten AJ dismissed the proceeding against the first defendant, but extended the limitation period against the second defendant (the Trustees).[48] The second defendant appealed against the decision, and the plaintiff in turn cross-appealed against the decision dismissing the proceeding against the first defendant. The Court of Appeal upheld the appeal of the second defendant, and dismissed the plaintiff's cross-appeal.

70 In considering the cross-appeal, Mason P commenced by noting that the inability to sue an unincorporated association in tort arises because the principles of vicarious liability are not engaged if a plaintiff can do no more than point to a direct tortfeasor who was a fellow member of the association.[49] His Honour considered that the relationship between the members of a church such as the Roman Catholic Church and individual office holders in the church to be far remote from any category that has been found to entail vicarious liability. In that respect he observed:

> The relationship between an assistant parish priest and the 'members' as a whole is too slender and diffuse to establish agency in contract or vicarious liability in tort.[50]

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47 (2007) 70 NSWLR 565 ('*Ellis*').
48 *Ellis v Pell* [2006] NSWSC 109.
49 *Ellis* (2007) 70 NSWLR 565, 577 [52].
50 Ibid 578 [54].

71 Having made those remarks, Mason P noted that the basal requirement in respect to such a representative proceeding was that the members of the association must have the 'same liability' in respect of the cause of action that was asserted by the plaintiff. That requirement presented particular difficulty in the case of an association such as the first defendant that had a fluctuating membership.[51] Mason P concluded:

> The nature of the episcopacy in the Roman Catholic Church is, to my understanding, arguably sufficient to ground a finding that the Archbishop has the capacity to control most activities conducted in the name of the Church in the Archdiocese. My point is that this alone does not translate automatically into a basis for establishing some species of vicarious liability in every member of the Church at any point of time or a basis for finding that the Archbishop is a corporation sole.[52]

72 Accordingly, it was held that a representative order was not available, so that the first defendant (the Archbishop) was properly dismissed by Patten AJ as a party to the proceedings.[53]

73 The decision in *Ellis* is the relevant context to the introduction of the 2018 Act. The explanatory memorandum, the Second Reading Speech of the Attorney-General, and indeed the specific provisions of that Act, make it clear that the central purpose of the Act was to address the underlying issue which precluded the institution of representative proceedings in cases such as *Ellis*.

74 Section 1 of the 2018 Act specifies the purpose of the Act as follows:

> The main purpose of this Act is to provide for child abuse plaintiffs to sue an organisational defendant in respect of unincorporated non-Government organisations which use trusts to conduct their activities.

75 Section 5 of the Act defines a 'non-government organisation that is an unincorporated association or body' as an 'NGO'. Section 4(2)(b) provides that the Act applies to that NGO if, but for being unincorporated, the NGO would otherwise have been capable of being sued and found liable for a claim founded on or arising from child abuse. Section 7(2) provides that an 'entity' that is nominated under sub-s 1 incurs any liability from the claim on behalf of the NGO 'as if the NGO had been incorporated and capable of being sued and found liable for child abuse'. That is, in this case, s 7(2) provides that the appellant, having been nominated, incurred any liability arising from the respondent's claim on behalf of the NGO as if the NGO had been a corporate entity and capable of being sued or found liable for child abuse. Section 7(4) thus provides that in such a case, the court may determine a claim founded on or arising from child abuse 'as if the NGO itself had been incorporated.' Substantively Section 10 is, in effect, the corollary of those provisions. It provides that, equally, a nominated defendant may rely on any defence or immunity that would otherwise have been available to the NGO as a defendant to the claim had the NGO been incorporated.

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51 Ibid 579–80 [63]–[67].
52 Ibid 583 [78].
53 Ibid 586 [93].

76 It is evident that the combined effect of those provisions is not only to ensure the proper nomination of a representative party to an NGO, but, importantly, to provide that the NGO bear the same legal liabilities to an abused claimant, and have the same defences to a claim for such abuse, as if the NGO were an incorporated entity. In that way, as we have stated, the effect of the provisions that we have discussed is to convert an unincorporated association (an NGO) to a fictitious incorporated entity, for the purpose, not only of the nomination of an appropriate defendant, but also to impose on the entity the same liabilities that would have applied had the entity been incorporated at the time of the abuse.

Analysis and conclusion – ground 1

77 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. The first issue, which is thus raised by ground 1, is whether the particular relationship between Coffey and the Diocese was one to which the principles of vicarious liability may, in an appropriate case, apply. Ground 3 is relevant if the applicant does not succeed on the first ground, so that it is concluded that the relationship between the Diocese and Coffey was one which might give rise to vicarious liability. Ground 3 raises the issue whether the criminal assaults committed by Coffey against the respondent were sufficiently related to that relationship so as to give rise to a liability of the Diocese in respect of them.

78 Ordinarily, 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. In such a case, the first question which arises is whether the tortfeasor was an employee, as distinct from an independent contractor, engaged by the principal. The second question, which may arise, is whether, at the time the tort was committed, the employee was acting in the course of the employment of the principal. As has been discussed in the authorities,[54] in that context of such a relationship, those two questions are separate and should not be conflated.

79 The central contention, by the applicant under ground 1, is that vicarious liability is confined solely to cases in which there is a relationship of employment, and to other defined exceptions which do not apply in the present case.

80 In Victoria, there is a division of opinion, in decisions at first instance, as to whether vicarious liability may apply outside an employment relationship. In *PCB v Geelong College*,[55] the Court was concerned with a case in which a person, who was not an employee of the defendant college, purported to assist students in the woodwork facility maintained by the college, and in doing so sexually abused the plaintiff. O'Meara J held that the presence of a relationship of employer and employee is a necessary intermediate step or foundation for the application of vicarious liability.[56] On the other hand, in *O'Connor v Comensoli*,[57] Keogh J, following the decision of J Forrest J in the present case, held that the defendant Archbishop was vicariously liable for the sexual abuse of

54 See, for example, *Personnel Contracting* (2022) 96 ALJR 89, 136 [191] (Gordon J).
55 [2021] VSC 633 ('*PCB*').
56 Ibid [303].
57 [2022] VSC 313.

the plaintiff that had been perpetrated by a priest appointed as assistant priest in the Kilmore Parish.

81 It is evident that the question, whether vicarious liability is confined only to cases involving a relationship with employment, may not be resolved by the first seeking to identify the underlying rationale for the imposition of vicarious liability in such a relationship. As the High Court observed in *Hollis*,[58] 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'.[59] The court also noted that the identification of a fully satisfactory rationale for the imposition of vicarious liability in the employment relationship has proven to be quite elusive.[60]

82 Nevertheless, two important points do emerge from an examination of the cases, which we will discuss. First, it is evident that 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. In particular, it has been recognised in the authorities that, in certain circumstances, vicarious liability may apply in respect of a relationship which is not that of employment. Secondly, the cases reveal, in large measure, 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.

83 The first point is based on the decision of the High Court in *Colonial Mutual Life Assurance Society Ltd v The Producers and Citizens Cooperative Assurance Company of Australia Ltd*,[61] and, in particular, the landmark judgment of Dixon J.

84 In *Colonial Mutual Life*, the appellant, an assurance company, engaged one Ridley to act as a canvasser and agent in respect of its life insurance policies. The engagement was contained in an agreement which provided (*inter alia*) that the duties of the agent might be performed by himself or by his clients or servants, and that nothing in the agreement should be construed to prevent the agent from engaging in any other business or occupation provided that the agent should not act for any other life assurance or accident insurance society. The agreement further provided that the agent must not use language which might reflect on the character, integrity or conduct of any other person or institution.

85 While attempting to obtain business for the appellant, the agent made defamatory statements concerning the respondent, which was another assurance company. The respondent issued proceedings for defamation against both Ridley and the appellant. The trial judge found in favour of the respondent and entered judgment for damages against Ridley and the appellant. On appeal, the High Court, by majority (Evatt and McTiernan JJ dissenting) held that, in performing canvassing duties under the agreement, Ridley was not acting independently, but was acting as the representative of

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58 *Hollis* (2001) 207 CLR 21.

59 Ibid 37 [34].

60 Ibid 37 [35]; see also *Sweeney* (2006) 226 CLR 161, 166 [11]; *State of New South Wales v Lepore* (2003) 212 CLR 511, 580 [196] (Gummow and Hayne JJ); [2003] HCA 4 ('*Lepore*').

61 (1931) 46 CLR 41; [1931] HCA 53 ('*Colonial Mutual Life*').

the appellant, and, accordingly, the appellant was liable for the slanders spoken by Ridley.

86 Gavan Duffy CJ and Starke J, in their joint judgment, noted that the nature of the appellant's engagement of Ridley gave the appellant significant power to control and direct Ridley's actions. Further, the class of acts, which Ridley was engaged to do, involved the use of arguments and statements to persuade the public to effect policies of insurance with the appellant, so that he spoke 'with the voice of' the appellant. Accordingly, the appellant was liable for Ridley's defamatory statements made about the respondent.[62]

87 Dixon J, with whom Rich J agreed, commenced by noting that Ridley was not the servant of the appellant. Nevertheless, Dixon J considered that the role performed by Ridley was such as to give rise to a vicarious liability in the appellant for the wrongs committed by Ridley. His Honour stated his reasons for that conclusion in the following terms:

> In my opinion, the liability of a master for the torts committed by his servant in the course of his employment is not imposed upon the appellant by the agency agreement, but I do not think that it follows that the appellant incurs no responsibility for the defamation published by the 'agent' in the course of his attempts to obtain proposals.
>
> 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. But 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, I have no doubt, 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. This does not mean that he may conclude a contract of insurance which binds the Company. It may be, and probably is, outside his province to go beyond soliciting and obtaining proposals and receiving premiums; but I think that in 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.[63]

88 Dixon J then concluded:

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62 Ibid 46-47.

63 Ibid 48-49.

> If the view be right which I have already expressed, that the 'agent' represented the Company in soliciting proposals so that he was acting in right of the Company with its authority, it follows that the Company in confiding to his judgment, within the limits of relevance and of reasonableness, the choice of inducements and arguments, authorized him on its behalf to address to prospective proponents such observations as appeared to him appropriate. The undertaking contained in his contract not to disparage other institutions is not a limitation of his authority but a promise as to the manner of its exercise. In these circumstances, I do not think it is any extension of principle to hold the Company liable for the slanders which he thought proper to include in his apparatus of persuasion.
>
> The wrong committed arose from the mistaken or erroneous manner in which the actual authority committed to him was exercised when acting as a true agent representing his principal in dealing with third persons. I do not think a distinction can be maintained between breaches of duty towards third persons with whom the agent is authorized to deal and breaches of duty towards strangers, committed in exercising that authority. If what he does is done as the representative of his principal, it cannot matter, apart from questions of estoppel and of apparent as opposed to real authority, whether the injury which it inflicts is a wrong to one rather than another person.[64]

89 In considering the decision in *Colonial Mutual Life*, it is important to keep in mind the admonition in the authorities that no term has been more misused in legal discourse then the word 'agent'.[65] In the context of the concept of vicarious liability discussed by Dixon J, the term 'agent' is confined to a person who represented the principal by 'acting in right of' the principal with its authority. Thus, as the plurality of the High Court subsequently observed in *Sweeney*,[66] the cases, including, *Colonial Mutual Life*, do not establish a principle that A may be vicariously liable for the conduct of B if B does no more than 'represent' A (in the sense of acting for the benefit or advantage of A).[67]

90 In *Hollis*, the appellant was injured when struck on a footpath by a courier riding a bicycle. The courier was engaged by the respondent, which operated a courier business delivering articles to customers. The courier was unable to be identified personally, but at the time of the accident, he was wearing a uniform which indicated he was engaged by the respondent. The couriers engaged by the respondent were paid fixed rates per job. A certain amount was deducted from their remuneration to contribute to the cost of insurance. They were required to wear the uniform of the respondent, and to act in accordance with specific instructions concerning their dress, appearance, language, delivery procedure and dealing with clients. The couriers were required to use their own bicycles. On appeal, the High Court held (Callinan J dissenting) that the respondent was vicariously liable for the negligent actions of the courier.

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64 Ibid 50.

65 *Kennedy v De Trafford* [1897] AC 180, 188 (Lord Hershell); *Colonial Mutual Life* (1931) 46 CLR 41, 50 (Dixon J); *Scott v Davis* (2000) 204 CLR 333, 435 [299] (Hayne J).

66 (2006) 226 CLR 161.

67 Ibid 172 [29].

91 The majority (Gleeson CJ, Gaudron, Gummow, Kirby and Hayne JJ), in their joint judgment, commenced by noting that the parties did not challenge the general rule that an employer is vicariously liable for the acts of an employee, but not for the tortious acts of an independent contractor.[68] In that respect, their Honours noted that in *Colonial Mutual Life*, Dixon J described an independent contractor as one who carries out the work, not as a representative of another, and, in particular, that Dixon J had '…fixed upon the absence of representation and of identification with the alleged employer as indicative of a relationship of principal and independent contractor'.[69]

92 Their Honours then stated:

> 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 parties to bear the cost of injury or damage to them which may fairly be said to be characteristic of the conduct of that enterprise. In delivering the judgment of the Supreme Court of Canada in *Bazley v Curry*, McLachlin J said of such cases that 'the employer's enterprise [has] created the risk that produced the tortious act' and the employer must bear responsibility for it. McLachlin J termed this risk 'enterprise risk' and said that 'where the employee's conduct is closely tied to a risk that the employer's enterprise has placed in the community, the employer may justly be held vicariously liable for the employee's wrong'. Earlier, in *Ira S Bushey & Sons, Inc v United States*, Judge Friendly had said that the doctrine of *respondeat superior* rests 'in 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'.[70]

93 Their Honours then noted seven factors which led to the conclusion that the courier in question was an employee, and not an independent contractor, of the respondent so as to render the respondent liable for the negligent conduct of the courier. Those factors included: the courier was not providing skilled labour or labour which required special qualifications; the courier had little control over the manner of performing the work; the courier was presented to the public and those using the courier services as an emanation of the respondent, he was publicly identified as part of the respondent's working staff;[71] the respondent superintended the courier's finances; and Vabu had not only the right to exercise control in incidental or collateral matters, but also there was considerable scope for the exercise of such control.[72]

94 A number of those factors, of course, are not applicable to the relationship between Coffey and the Diocese. It is for that reason that Coffey could not be considered to be an employee of the Diocese. However, the decision in *Hollis* is important, because it demonstrates the relevance and significance, as a criterion of vicarious liability, of the circumstance that the particular tortfeasor's role was so closely tied with the enterprise of the employer that he or she was presented to the public as carrying out the work of,

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68 *Hollis* (2001) 207 CLR 21, 36 [32].
69 Ibid 39 [39]-[40].
70 Ibid 40 [42] (citations omitted).
71 Ibid 42-3 [50]–[52].
72 Ibid 41-45 [48]–[57].

and representing, the employer. In that respect, their Honours referred with apparent approval to the passage in the judgment of McLachlin J of the Supreme Court of Canada in *Bazley v Curry*[73] that an employer may be held vicariously liable where the employer's enterprise created the risk and where the employee's conduct was closely tied to the risk, which the employer's enterprise placed in the community.

95 In this context it is relevant to note the different approach to vicarious liability that was advanced by McHugh J in his separate judgment in *Hollis*. In essence, his Honour considered that it was not possible to characterise the courier as an employee of the respondent. However, his Honour considered that, rather than confining the question of the application of vicarious liability to the dichotomy of the employee and independent contractor, the better approach was to develop principles concerning vicarious liability that reflect modern social conditions.[74] Specifically in the circumstances, McHugh J considered that the respondent was vicariously liable for the negligence of the courier because it controlled the courier, the courier was acting for its economic benefit, and at the time of the accident the courier was 'on the business' of the respondent.[75]

96 In a number of subsequent decisions, the courts have declined to adopt the broader statement of principle so formulated by McHugh J.[76] Nevertheless, it is apparent that the approach adopted by McHugh J was based on similar factors as those adopted by the majority, namely, the right of the principal to control the work performed by the agent, and the circumstance that the agent was working in, and for the economic benefit of, the business of the principal.

97 It is convenient next to refer, by way of contrast to the decision in *Hollis*, to the decision of the High Court in *Scott v Davis*.[77] That case is an instance of a relationship in a non-commercial context, which was clearly not one to which the principle of vicarious liability applied.

98 In *Scott v Davis*, during a birthday party at a country property, the defendant, who was the owner of a two-seater airplane, permitted it to be used for a joyride by other persons who attended the party. The defendant asked a licensed pilot, who was also a guest at the party, to fly the plane. The plane crashed through the negligence of the pilot, and as a result, a child passenger was injured. The High Court (McHugh J dissenting) held that the defendant was not vicariously liable for the negligence of the pilot. The appellant plaintiff had submitted that the defendant was liable because the pilot had used the plane for the defendant's purposes and, as such, was acting as the 'agent' of the defendant. The majority of the High Court concluded that that factor was an inadequate basis to found vicarious liability on the part of the defendant for the negligence of the pilot. In particular, there was no commercial or contractual relationship between the pilot and the defendant. Rather, the circumstances in which the pilot flew the airplane was a

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73 *Bazley* [1999] 2 SCR 534, 548.
74 *Hollis* (2001) 207 CLR 21, 50 [72].
75 Ibid 57 [91]–[92].
76 *Sweeney* (2006) 226 CLR 161, 167 [12]; *Scott v Davis* (2000) 204 CLR 333; *Leighton Contractors Pty Ltd v Fox* (2009) 240 CLR 1, 12–13 [21]–[22]; *Day* (2013) 85 NSWLR 335, 342–3 [18]–[19] (Leeming JA).
77 *Scott v Davis* (2000) 204 CLR 333 (Gleeson CJ, McHugh, Gummow, Hayne and Callinan JJ).

'social context' in which the defendant had no realistic power to control the conduct of the pilot.[78] There was thus no relevant connection between the 'business' of the defendant and the function performed by the pilot.

99 In *Sweeney v Boylan Nominees Pty Ltd*,[79] the High Court again focussed on the significance of the degree, or absence, of connection between the principal's business and the conduct of the tortfeasor, and, in particular, the degree to which the work of the tortfeasor was identifiable as that of the business of the principal.

100 In *Sweeney,* the manager of the defendant convenience store arranged for a mechanic to fix the defective door of the refrigerator in the store. The mechanic attended and tightened the screws to the door. The plaintiff, who was a customer of the store, was injured when the door of the refrigerator fell and struck her. The trial judge found that the mechanic did not act with reasonable care, and that the defendant was vicariously liable because the mechanic had acted as its servant or agent. The mechanic was not an employee of the defendant, but was a contractor, engaged by the defendant from time to time. The mechanic would invoice the defendant for the hours that he worked. He used his own uniform and tools, maintained his own insurance, and his van advertised his own business. The High Court (Kirby J dissenting) held that the mechanic was not an employee of the defendant, but an independent contractor, so that the defendant was not vicariously liable for his negligence.

101 In reaching that conclusion, the majority (Gleeson CJ, Gummow, Hayne, Heydon and Crennan JJ) noted that in *Colonial Mutual Life*, the agent, in soliciting proposals, had been acting 'in the right of the company and with its authority,' and the service that he performed consisted of standing in the principal's place and assuming to act in its right and not in an independent capacity.[80] Relevantly, their Honours noted that the conclusion in *Colonial Mutual Life*:

> ... depended 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.[81]

102 Their Honours further explained:

> The conclusion reached in *Colonial Mutual Life*, that the party engaging an agent (albeit as an independent contractor) to solicit for the creation of legal relationships between that party and others is liable for the slanders uttered in the course of soliciting proposals, 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. The relevant

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78 Ibid 342 [18] (Gleeson CJ), 423-4 [269]-[273] (Gummow J), 436-7 [301]-[302] (Hayne J), 459 [357]-[358] (Callinan J).

79 *Sweeney* (2006) 226 CLR 161.

80 Ibid 168 [14] – 169 [19].

81 Ibid 170 [22].

> connection is established by 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.[82]

103 Having referred to the previous decisions in *Hollis* and *Scott v Davis*, the majority noted that, in the instant case, the defendant did not control the way in which the mechanic worked, the mechanic supplied his own tools and equipment, and brought his own skills to bear on the work that was done, and that, unlike in *Hollis*, the mechanic 'was not presented to the public as an emanation of the respondent'.[83]

104 In the context of the present case, the significance of *Hollis* and in *Sweeney* is that, in each case, the court specifically applied the approach of Dixon J in *Colonial Mutual Life* in regarding the extent, to which the tortfeasor presented as an emanation of the principal, as a central factor in determining whether the relationship was one in which the principal was vicariously liable for the actions of the tortfeasor.

105 In that respect, an allied consideration, which has been taken into account, is whether the tortfeasor had the right or power to delegate the work for which he or she had been engaged by the principal. The right to delegate is a factor which is related to the question whether the role of the tortfeasor in question was a part or emanation of the principal's business, or whether, on the other hand, the tortfeasor undertook that role in an independent capacity having, as such, the right to select the person or persons who were to perform the tasks for which the tortfeasor was engaged.

106 In *Stevens*,[84] the High Court was concerned with the question whether the respondent sawmilling company was vicariously liable for the negligence of Gray who it had engaged to snig and load logs at the mill. The Court held that the snigger was not an employee of the respondent so that the respondent was not vicariously liable for his negligence. On that issue, the members of the court took into account a number of factors, including the degree of control or right of control by the respondent of the snigger, and also matters pertaining to the engagement, such as the mode of remuneration, the provision of equipment, the hours of work, holidays, deduction of income tax and the like. Relevantly, for the purposes of this case, the court also took into account that the snigger was able to, and did, employ his own son in the actual performance of the cartage operations. In that regard, Mason J (with whom Brennan J and Deane J agreed) noted that the power to delegate is an 'important factor' in deciding whether a worker is an employee or independent contractor.[85] In similar terms, Wilson J and Dawson J noted:

> Apart from anything else, Gray was able to employ his son in the actual performance of his cartage operations. An unlimited power of delegation of this kind was viewed as being almost conclusive against the contract being a contract of service in *AMP Society v Chaplin*.[86]

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82 Ibid 171 [24].
83 Ibid 173 [32].
84 (1986) 160 CLR 16.
85 Ibid 26.
86 Ibid 38 (citation omitted).

107 Finally, in this context, it is also relevant to consider the recent decision of the High Court in *Personnel Contracting*. The question in that case was whether the second appellant, McCourt, was an employee of the respondent for the purposes of the *Fair Work Act 2009 (Cth)*. On the appeal to the High Court, it was accepted that the terms 'employee' and 'employer' in the Act have the same meaning as those accorded to them by the common law. While the case did not involve the issue of vicarious liability, nevertheless, the members of the High Court referred to a number of the authorities which we have discussed, including *Hollis*, *Stevens* and *Colonial Mutual Life*.

108 In *Personnel Contracting*,[87] McCourt, who was a backpacker, entered into an agreement with the respondent, which was a labour hire company. The respondent placed McCourt at a project site that was controlled by a builder, Hanssen Pty Ltd. The appellants commenced proceedings in the Federal Court seeking compensation and penalties pursuant to the *Fair Work Act 2009* for unpaid entitlements to McCourt. The High Court held (Steward J dissenting) that McCourt was an employee of the respondent.

109 In reaching that decision, the members of the court adopted different approaches to the question. There was a division of opinion between members of the court as to whether the issue should be determined solely by reference to the written contract between McCourt and the respondent, or whether it was also permissible to take into account the circumstances in which McCourt performed duties pursuant to the contract. In addition, there was a difference of opinion as to whether it was appropriate to apply the 'multifactorial' approach of the common law, by taking into account the various indicia of employment, such as the mode of remuneration, the provision of maintenance of equipment, the obligation to work, the hours of work and provision of holidays, and the like. Nevertheless, notwithstanding those differences, there was a commonality of approach in respect of two points, which are relevant to the present case, namely, whether the work provided by McCourt was part of, and integrated into the business of the respondent, and whether the respondent had the right to control the work performed by McCourt.

110 In that regard, Kiefel CJ, Keane and Edelman JJ, in their joint judgment, considered that there was some value in the 'own business/employer's business' dichotomy, which had been applied in previous authorities. Their Honours noted that that dichotomy focused on the question whether the employee's work was 'so subordinate to the employer's business' that it could be seen to have been performed as an employee of that business rather than as part of an independent enterprise'.[88] In determining that question, the court took into account that McCourt had no right to exercise control over what work he was to do and how he was to perform that work.[89]

111 Gageler J and Gleeson JJ considered that the 'multifactorial approach' was an appropriate basis to determine the issue. That approach took into account, among other matters, the extent of control of the putative employer, and the extent to which the

87 (2022) 96 ALJR 89.
88 Ibid 104 [39].
89 Ibid 111 [77].

putative employee could be seen to work in his or her own business, as distinct from the business of the putative employer. In that respect, their Honours considered that it was relevant to take into account '… the extent to which the work done by the putative employee can be seen to be integrated into the business of the putative employer'.[90]

112 Gordon J considered that the multifactorial approach was inappropriate. Rather, the critical question was whether, by a construction of the terms of the contract, McCourt was 'contracted to work in the business or enterprise of the purported employer'.[91] Having reviewed the terms of the contract, her Honour concluded that McCourt owed the respondent obligations that enabled the respondent to carry on as a labour hire business, and the discharge of those obligations by McCourt was a necessary condition of the work that he performed. The personal performance by him of that work and his mode of remuneration was consistent with an employment relationship.[92]

113 As we have mentioned, and as the discussion of the foregoing decisions reveals, the quintessential instance of a case involving vicarious liability is that which is grounded in the relationship between an employer and employee. In a commercial context, the relevant distinction ordinarily is between, on the one hand, an employment relationship, and on the other hand, the relationship of the principal with an independent contractor.

114 However, the decision of the High Court in *Colonial Mutual Life*, and in particular the judgment of Dixon J, makes it clear that, in an appropriate case, a relationship may give rise to vicarious liability on the part of a principal, notwithstanding the tortfeasor was not an employee of the principal. In such a case, vicarious liability is imposed on the principal for the actions of the tortfeasor, on the basis that the work performed by the tortfeasor and the business of the principal were so interconnected that the tortfeasor represented the business of and/or the principal, and, by doing so, conducted the business of the principal.[93]

115 Thus, in *Sweeney*, the plurality, in discussing *Colonial Mutual Life*, noted that the conclusion in *Colonial Mutual Life* came within the theory propounded by *Pollock*, because the close connection between the principal's business and the life insurance agent's conduct was established by the capacity of the life insurance agent to bring about legal relationships between the principal and third parties.[94] In similar terms, in *Scott v Davis*, Gummow J confined vicarious liability to a case in which the relationship was such that the 'agent' had authority to bring about a contractual or other legal relations between the principal and third parties.[95] In that context, as we have noted, the authorities have identified two related indicia of a relationship that may give rise to vicarious liability, namely, first, the power of the principal to control the performance of the work by the tortfeasor, and, secondly, the lack of a right by the tortfeasor unilaterally to delegate his or her work to a third person.

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90 Ibid 117 [113].
91 Ibid 132 [183].
92 Ibid 137 [198].
93 *Sweeney* (2006) 226 CLR 161, 171 [24].
94 Ibid 171 [24].
95 *Scott v Davis* (2004) 204 CLR 333, 423 [270].

116 Although identification of the underlying rationale that explains why vicarious liability is imposed in one setting but not another has proven elusive, central to the application of the principle to employees is that, inherent in the relationship, is a contractual right of the employer to control the performance of the duties of the employee. By being subject to such control, the employee necessarily forms part of or represents the enterprise of the employer. By contrast, a hallmark of the independent contractor is independence in the performance of work.

117 The importance of the power of a principal to control and the inability of the tortfeasor to unilaterally delegate is readily demonstrated by those exceptional cases, in which vicarious liability is not imposed on employees who, by virtue of their particular role, exercise independent discretions.[96] Those cases also demonstrate that the so-called rule, that an employer is vicariously liable, does not apply in every case.

118 As Hayne J observed in *Scott v Davis* these principles apply in a 'commercial setting'.[97] That was the setting considered by Leeming JA in *Day*.[98] By contrast, in a social setting, such as that considered in *Scott v Davis*, the parties lack a recognised means for stipulating rights of control: 'because the occasion is social, not a business occasion, it is inappropriate to speak of the parties *stipulating* for a particular level of control'.[99]

119 Nothing that was said by the judge in the present case cast any doubt on the application of those principles in a commercial or social setting. The general rule, that is applicable to those cases, has been authoritatively determined by the High Court.

120 The relationship between a diocese and a priest or assistant priest is, necessarily, *sui generis*. It does not exist in the context of a commercial relationship, such as was the case in *Sweeney*, nor in the context of a purely social relationship, as was the case in *Scott v Davis*. Rather, the relationship is founded in the context of the hierarchical system of a Diocese of the Roman Catholic Church. The decisions to which we have referred, and the principles outlined in them, reveal that that consideration of itself does not necessarily preclude the implication of vicarious liability on the diocese for the wrongful acts of a priest or assistant priest within its domain. Although undoubtedly secular, the law has not always treated religion and religious orders as if they were a form of a club or social organisation. The furtherance of religion is a recognised charitable purpose.[100] The legal nature of the institution of marriage has its genesis in the ecclesiastical courts[101] and the common law courts 'absorbed much Canon law learning'.[102]

121 The question, then, is whether, applying the principles which we have discussed, the evidence in the case reveals that the content of the relationship between the Diocese and Coffey, as an assistant priest within the Diocese, was such as would, in an

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96 *Enever v The King* (1906) 3 CLR 969; *Attorney-General (NSW) v Perpetual Trustee Co Ltd* (1952) 85 CLR 237; *Oceanic Crest Shipping Co v Pilbara Harbour Services Pty Ltd* (1986) 160 CLR 626.

97 *Scott v Davis* (2004) 204 CLR 333, 436 [301].

98 (2013) 85 NSWLR 335.

99 *Scott v Davis* (2000) 204 CLR 333, 436–7 [301]–[302] (Hayne J).

100 *Roman Catholic Archbishop of Melbourne v Lawlor* (1934) 51 CLR 1; [1934] 8 CA 14.

101 *R v L* (1991) 174 CLR 379, 391 (Brennan J); [1991] HCA 48.

102 *PGA v The Queen* (2012) 245 CLR 355 [44] (French CJ, Gummow, Hayne, Crennan and Kiefel JJ); [2012] HCA 21.

appropriate case, attract the principle of vicarious liability by the Diocese for a wrongful act by Coffey in the performance of his work.

122 The principal evidence, concerning the role, duties and function of a priest and assistant priest in a parish, and the relationship between the Diocese and an assistant priest, was given by Father Dillon. It has been submitted on behalf of the applicant that the judge should not have applied that evidence to the particular relationship between the Ballarat Diocese and Coffey, and to the role and duties of Coffey as an assistant priest within the Diocese.

123 In giving his evidence, Father Dillon drew substantially on his own lengthy experience as an assistant priest and priest. Nevertheless, a number of his observations were expressed as having general application. It was not suggested in cross-examination, or by evidence adduced to the contrary on behalf of the applicant, that Father Dillon's evidence did not accurately and properly reflect the fundamental roles and duties of a priest and assistant priest, and the relationship between a Diocese on the one hand and the assistant priest and priest within the Diocese, that applied during the period in which Coffey served in the Diocese of Ballarat. The fact that the applicant chose not to call any such evidence entitled the judge to be more readily confident that the evidence given by Father Dillon reflected, in general terms, the respective roles and relationships of dioceses and priests and assistant priests at the time with which this case is concerned.[103]

124 The starting point, in considering whether the issue raised by ground 1, is 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 the Bishop of the assistant priest within the Diocese. That fundamental point was encapsulated in Canon Law 476 about which Father Dillon gave evidence. As Father Dillon stated, '… the Bishop has authority over all the priests in his Diocese'.

125 The relationship between Father Coffey and the Diocese through the person of the Bishop was governed by a strict set of normative rules that each of them had subscribed to, and which enabled Coffey to embody the Diocese in his pastoral role. Those rules of Canon law also permitted the Bishop to exercise control over Coffey that was at least as great as, if not greater than, that enjoyed by an employer. The formal structures that were in place allowed the Bishop to exercise control over, and to limit the area of independent action on the part of, the priest. The Bishop had the means to do so by providing instruction, supervision, transfer, limitation on authority, and ultimately by seeking sanctions, including expulsion, from church authority. In return the priest was clothed with the authority of the church.

126 It may be acknowledged that, in his day-to-day work, the assistant priest was supervised by, and subject to the direction of, the priest to whose parish he was appointed. Nevertheless, as the judge observed, Coffey's assignment at St Patricks' was subject to the ultimate authority of the Diocese, as exercised by the Bishop, to remove any priest and to exercise discretion over the appointment of priests to parishes. Thus, his Honour appropriately noted:

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103 *Jones v Dunkel* (1959) 101 CLR 298, 312, 319.

> Despite the day-to-day supervision of Father O'Dowd, it was at the will of the Diocese that Coffey received and maintained the assignment for the entire period.[104]

127 In that sense, as the judge noted, the Diocese had the right to exercise control over aspects of the work conducted by Coffey, albeit that the day-to-day supervision and direction was undertaken by the priest under whom Coffey had been placed at any parish. As the judge correctly noted, the Diocese had a general control over Coffey's appointment and over his role and duties in the parish. He was subject to the direction and control of the priest, and, through the priest, the direction and control of the Bishop of the Diocese.

128 Further, it is evident from the evidence given by Father Dillon, that, in his work as assistant priest, Coffey was very much a representative, and conducted the work, of the Diocese. His role, and the work he performed in undertaking that role, was necessarily and integrally interconnected with the fundamental work and function of the Diocese. In discharging his duties in that role, Coffey was not acting independently of the Diocese, but as a representative of it.[105] By his appointment, he was committed exclusively to the work of the Diocese in representing the Catholic Church within the parish to which he had been appointed. In that respect, his duties, involved in that work, were prescribed by Canon law. Coffey had no other vocation, nor did he have the capacity or right to undertake any other vocation. Nor was Coffey's appointment, or his role as an assistant priest, delegable. His duties as an assistant priest, and his appointment to that position, were personal entirely to him.

129 As the judge inferred, Coffey's livelihood was provided for by the Diocese.[106] In performing his work, Coffey wore the uniform of the Roman Catholic priest. Father Dillon described how, in undertaking the pastoral aspect of the work, it was usual for the assistant priest to wear the clerical collar. As assistant priest, duly appointed by the Bishop, Coffey did the work of the Diocese in the parish to which he was appointed, and the Diocese did its work by and through him. In a real and relevant sense, Coffey was the servant of the Diocese, notwithstanding that he was not, in a strict legal sense, an employee of it. In terms of the principles discussed by the High Court in *Colonial Mutual Life*, *Hollis* and *Sweeney*, by virtue of his role as an assistant priest appointed by the Diocese, Coffey was an emanation of the Diocese.

130 In those circumstances, in our view, the judge was correct to conclude that the relationship between Coffey, as assistant priest, and the Diocese, 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.

131 For those reasons, ground 1 is not made out.

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104 Reasons, [237].
105 Cf *Colonial Mutual Life* (1931) 46 CLR 41, 48-'9 (Dixon J); *Hollis* (2001) 207 CLR 21, 40 [42].
106 Reasons, [229].

Analysis and conclusion — ground 3

132 In view of our conclusions under ground 1, the question which is raised by ground 3 is whether the judge erred in concluding that the vicarious liability of the Diocese for the conduct of Coffey extended to and encompassed the two indecent assaults committed by Coffey against the respondent.

133 It has long been accepted that a principal may be vicariously liable for a tort that is committed by an employee or agent, notwithstanding that the tort is constituted by criminal acts committed by that employee.

134 That principle was made clear more than a century ago in the decision of the House of Lords in *Lloyd v Grace, Smith & Co*.[107] In that case, the plaintiff widow consulted the defendant solicitors and was referred to their managing clerk, one Sandles, who conducted the conveyancing work of the firm without supervision. Sandles persuaded the plaintiff to instruct him to sell certain cottages and call in the money she had lent, secured on a mortgage. In doing so, Sandles fraudulently procured the plaintiff to sign two documents, which she did not read, and which were in fact conveyances to Sandles of the cottages and a conveyance to him of the mortgage. The House of Lords unanimously held that the defendant firm was responsible for the fraud thus committed by Sandles.

135 Lord Shaw explained the basis for that conclusion as follows:

> The case is in one respect the not infrequent one of a situation in which each of two parties has been betrayed or injured by the fraudulent conduct of a third. I look upon it as a familiar doctrine as well as a safe general rule, and one making for security instead of uncertainty and insecurity in mercantile dealings, that the loss occasioned by the fault of a third person in such circumstances ought to fall upon the one of the two parties who clothed that third person as agent with the authority by which he was enabled to commit the fraud. Nor do I think it doubtful that it would be quite unsound in law if this result could be avoided by an investigation of the private motives — in the direction of his own, as distinguished from his master's, benefit — which animated an agent in entering into a particular transaction within the scope of his employment. The bulk of mercantile dealings are not direct, but are conducted through agents vested with an ostensible authority to act for their employers. When the authority is of a limited kind, the person transacting with such an agent is bound to assure himself that the limits are not exceeded, — a familiar instance of which is the case of bills signed per procuration. But when the authority does ostensibly include within its scope transactions of a particular character, then quoad a third party dealing in good faith with such an agent, the apparent authority is, as is well settled, equivalent to the real authority and binds the principal.[108]

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107 [1912] AC 716.
108 Ibid 739-40.

136 On the other hand, as would be expected, an employer is not liable for a wrong, criminal or civil, committed by an employee, where it is based on acts performed by the employee for which the employment could not be properly regarded as the occasion.

137 That proposition is illustrated by the well-known decision of the High Court in *Deatons Pty Ltd v Flew*.[109] In that case, the respondent claimed damages in assault arising out of the conduct of the appellant's barmaid who, in response to a polite question addressed to her as to the whereabouts of the licensee, without any cause, threw a glass at the respondent. As a result, the respondent sustained serious injury to his eye that resulted in the loss of his sight in that eye. The jury returned a verdict in favour of the respondent against both the appellant and the barmaid. On appeal, the Full Court directed a new trial. The appellant successfully appealed that decision to the High Court, which allowed the appeal, and directed that the verdict and judgment should be entered for the appellant. In reaching that decision, Dixon J stated:

> The general and somewhat indefinite position was relied upon that the barmaid was there to deal with customers and with situations and this was the manner in which she dealt with the plaintiff and the situation which he caused. It is not a case of a negligent or improper act, due to error or ill judgment, but done in the supposed furtherance of the master's interests. Nor is it one of those wrongful acts done for the servant's own benefit for which the master is liable when they are acts to which the ostensible performance of his master's work gives occasion or which are committed under cover of the authority the servant is held out as possessing or of the position in which he is placed as a representative of his master (see *Lloyd v Grace*, Smith & Co (1); *Uxbridge Permanent Benefit Building Society v Pickard* (2)).
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> The truth is that it was an act of passion and resentment done neither in furtherance of the master's interests nor under his express or implied authority nor as an incident to or in consequence of anything the barmaid was employed to do. It was a spontaneous act of retributive justice. The occasion for administering it and the form it took may have arisen from the fact that she was a barmaid but retribution was not within the course of her employment as a barmaid.[110]

138 Since that decision, a number of cases have been concerned with the question of the liability of a school or other institution for sexual assaults committed by an employee while engaged in work involved in the business of the particular institution. Those cases were considered by the High Court in *Prince Alfred College*.[111] It is convenient first to discuss two of those cases before turning to the decision in *Prince Alfred College*.

139 In *Lister v Hesley Hall Ltd*,[112] the defendants owned and managed a school. Between 1979 and 1982, the warden of the boarding house, employed by the defendants, without their knowledge, systematically abused the claimants, who were residents in the boarding house. The House of Lords, in upholding the appeal by the claimants, held

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109 (1949) 79 CLR 370.
110 Ibid 381–2.
111 (2016) 258 CLR 134.
112 [2002] 1 AC 215.

that there was a sufficient connection between the work, which the warden was employed to do, and the acts of abuse committed by him, as to be regarded as having been committed by him within the scope of his employment. Lord Steyn (with whom Lord Hutton agreed) considered that the sexual abuse was so 'inextricably interwoven' with the carrying out by the warden of his duties in the house as to render the defendants vicariously liable for that conduct.[113] Similarly, Lord Clyde considered that the warden's position, and the close contact he had with the claimants in performing that work, created a sufficient connection between the acts of abuse and the work that he had been employed to do.[114] Lord Millett noted that the school had entrusted to the warden the responsibility for the care and welfare of the claimants. The warden not only took advantage of that opportunity, but he abused the special position which he had been placed in by the school to enable it to discharge its own responsibilities for the care of the claimants.[115]

140 Shortly after the decision in *Lister v Hesley Hall Ltd*, the High Court, in *Lepore*,[116] was concerned with three appeals in cases in which a pupil at a school claimed damages for sexual assaults committed by a school teacher. In separate judgments, the members of the court adopted different approaches to the question whether, in those circumstances, the principles of vicarious liability encompassed the misconduct by the teacher.

141 Gleeson CJ noted that, ordinarily, sexual abuse by a teacher could not be regarded as an incident of the conduct of a school. However, in some circumstances, a teacher or other person, associated with schoolchildren, might have responsibilities 'of a kind that involve an undertaking of personal protection, and the relationship of such power and intimacy, that sexual abuse would properly be regarded as sufficiently connected with their duties to give rise to vicarious liability in their employers'.[117] Thus, his Honour considered that in circumstances in which the relationship was invested with a high degree of power and intimacy, the abuse of that power and intimacy to commit sexual abuse might provide a 'sufficient connection' between the sexual assault and the employment to make it just to treat the conduct as occurring in the course of employment.[118]

142 By contrast, Gaudron J considered that the only principled basis upon which vicarious liability could be imposed in such a case was by reference to the principles of estoppel, the question being whether the employer could be estopped from asserting that the teacher was not acting as his or her employee, agent or representative at the time of the abuse.[119]

143 Gummow and Hayne JJ, in their joint judgment, considered that recovery against an employee should not extend beyond the two elements discussed by Dixon J in *Deatons*

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113 Ibid 230 [28].
114 Ibid 237-8 [50].
115 Ibid 250 [82].
116 (2003) 212 CLR 511.
117 Ibid 544 [67].
118 Ibid 546 [74].
119 Ibid 561 [130]-[131].

Pty Ltd v Flew.[120] Thus, their Honours considered that vicarious liability may exist either if the wrongful act was done in the intended pursuit of the employer's interests, or where the wrongful act was done in ostensible pursuit of the employer's business, or in the apparent execution of the authority with which the employer held out the employee as having.[121]

144 Those two decisions were, then, the legal context for the decision of the High Court in *Prince Alfred College*. In that case, in 1962, the plaintiff, who was then 12 years of age, was sexually abused by Bain, a housemaster at the boarding house in which he was placed. The plaintiff commenced proceedings in 2008 against the College, claiming damages. The Full Court of South Australia held that the school was vicariously liable for Bain's conduct, and granted an extension of time to the plaintiff. On appeal to the High Court, it was held that the plaintiff should not have been granted an extension of time. However, the court then took the opportunity to consider the question of the vicarious liability of the school for the conduct of their housemaster.

145 French CJ, Keifel, Bell, Keane and Nettle JJ, in their joint judgment, commenced by noting that the test, whether the tortious act was committed in the course of employment, while conclusionary, nevertheless remained a touchstone for liability.[122] They then discussed a number of authorities, including *Lloyd v Grace, Smith & Co* and *Deatons v Flew*. In doing so, they noted that the approach taken in the Canadian cases — as to whether there was a significant connection between the creation or enhancement of risk and the wrong that accrues — had found no support in Australian case law.[123] Similarly, their Honours considered that the approach taken by Lord Steyn in *Lister v Hesley Hall Ltd* should not be adopted, because a test of connection does not add to an understanding of the basis of the liability of an employee in a particular case.[124]

146 Having discussed those cases, the plurality concluded that the principles of vicarious liability may apply where the role given to the employee, and the nature of the employee's responsibilities, had the effect that the employment not only provided an opportunity, but also was 'the occasion,' for the commission of the wrongful act by the employee. Their Honours expressed those principles in the following terms:

> In cases of the kind here in question, the fact that a wrongful act is a criminal offence does not preclude the possibility of vicarious liability. As *Lloyd v Grace, Smith & Co* shows, it is possible for a criminal offence to be an act for which the apparent performance of employment provides the occasion. Conversely, the fact that employment affords an opportunity for the commission of a wrongful act is not of itself a sufficient reason to attract vicarious liability. As *Deatons Pty Ltd v Flew* demonstrates, depending on the circumstances, a wrongful act for which employment provides an opportunity may yet be entirely unconnected with the employment. Even so, as Gleeson CJ identified in *New South Wales v Lepore*[125] and the Canadian cases show, the role given to the

120 (1949) 79 CLR 370.
121 Ibid 591-2 [231].
122 *Prince Alfred College* (2016) 258 CLR 134, 149 [41], 150 [46].
123 Ibid 153 [59].
124 Ibid 156 [68].
125 *Lepore* (2003) 212 CLR 511, 544 [67].

> employee and the nature of the employee's responsibilities may justify the conclusion that the employment not only provided an opportunity but also was the occasion for the commission of the wrongful act. By way of example, it may be sufficient to hold an employer vicariously liable for a criminal act committed by an employee where, in the commission of that act, the employee used or took advantage of the position in which the employment placed the employee vis-à-vis the victim.
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> Consequently, in cases of this kind, the relevant approach is to consider any special role that the employer has assigned to the employee and the position in which the employee is thereby placed vis-à-vis the victim. In determining whether the apparent performance of such a role may be said to give the "occasion" for the wrongful act, particular features may be taken into account. They include authority, power, trust, control and the ability to achieve intimacy with the victim. The latter feature may be especially important. Where, in such circumstances, the employee takes advantage of his or her position with respect to the victim, that may suffice to determine that the wrongful act should be regarded as committed in the course or scope of employment and as such render the employer vicariously liable.[126]

147 The plurality then explained how those principles would apply in the case before it in the following terms:

> In the present case, the appropriate enquiry is whether Bain's role as housemaster placed him in a position of power and intimacy vis-à-vis the respondent, such that Bain's apparent performance of his role as housemaster gave the occasion for the wrongful acts, and that because he misused or took advantage of his position, the wrongful acts could be regarded as having been committed in the course or scope of his employment. The relevant approach requires a careful examination of the role that the PAC actually assigned to housemasters and the position in which Bain was thereby placed vis-à-vis the respondent and the other children.[127]

148 Applying those principles to the evidence in the present case, we consider that the judge was well justified in concluding that the position of power and intimacy, invested in Coffey as an assistant priest of 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.

149 The evidence of both the respondent and Father Dillon make it clear that, as an assistant priest appointed by the Bishop, Coffey was invested with an aura of charisma and authority, which commanded the respect of the local parishioners. It was in that capacity that he participated in regular Sunday Masses, and that he became involved in the pastoral duties that were central to his role as an assistant priest. In particular, it is quite clear that the role of Coffey, presenting as a priest to the local parishioners, invested him with a substantial degree of power, authority and respect. As such, that role, in itself, engendered a significant degree of respect and trust in him by his parishioners,

126 Ibid 159-60 [80]-[81].
127 Ibid 161-161 [84].

enabling him to achieve real intimacy with the respondent's family, and with the respondent in particular.

150 The evidence of Father Dillon, which was accepted by the judge, was that a central part of a priest's role involved him visiting parishioners in their homes, and becoming involved quite intimately in the personal issues which confronted them. In the case of the respondent, Coffey regularly visited the family home in order to counsel and mediate between the respondent's parents in respect of their matrimonial issues. It was in that capacity that he gained the trust of the respondent's parents, so much so that he regularly would visit the respondent, then a vulnerable five year old, in his own bedroom and spend time with him there. The degree of that trust extended to permitting Coffey, on the occasion of the first incident, to carry the respondent to his bedroom and put him to bed. The pastoral function performed by Coffey, and his involvement in the marital issues of the respondent's parents, were very much a part and parcel of his role as a priest, as described in evidence by Father Dillon.

151 The fact that the first incident of assault took place in the respondent's parents' home, on what appeared to be a social occasion, would not, of itself, preclude the imposition of vicarious liability in respect of that tort. Father Dillon explained that an important part of the function of a parish priest was to involve himself in the family and home lives of his parishioners. In evidence, Father Dillon said as follows:

> ... The visiting at homes was seen as an integral part of parish pastoral care within the context of the parish. In fact … at my second parish … was … a very fine priest and … his whole focus was to visit his parishioners and he would find that sitting in … their place of comfort, namely their kitchen or whatever was the way in which he got to know them best and they formed a positive and valuable relationship with him. And that certainly was my experience too.

152 It was submitted on behalf of the applicant that the fact that Coffey was a priest did not preclude him living his own personal life, which involved him making friendships with people such as the parents of the respondent. That proposition may be accepted. However, the evidence in this case demonstrates that Coffey's connection with the respondent derived significantly from the performance by him of his pastoral role as a priest in the local parish. In his evidence, the respondent described how, as a result of the marital problems between his parents, Coffey would visit them in their home and talk to them, and it was on those occasions, and in that capacity, that Coffey started to visit him in his bedroom and sit on his bed. Further, as Father Dillon stated in his evidence, the social life of a priest is very much interwoven with his pastoral duties. Father Dillon explained that that function enables a priest to get to know his parishioners in the privacy of their own homes, which in turn enables the priest to better perform his pastoral duties in the parish.

153 In those circumstances, in terms of the principles stated by the plurality in *Prince Alfred College*, it is evident that, by virtue of his role as assistant priest, Coffey was placed 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. Accordingly, it may be concluded that Coffey was placed in such a position of power, authority and control in relation to the respondent's family, and in particular the

respondent, as to provide him 'not just the opportunity but also the occasion' for the wrongful acts which he committed against the respondent.[128]

154 As we have mentioned, the applicant has submitted, under ground 3, that the judge erred in three respects in concluding that Coffey was placed in such position.

155 First, it was submitted that the evidence did not support the proposition that the Diocese was all-powerful in the management of clergy within the Diocese, and that the priest exercised a significant degree of discretion in the manner in which he conducted his duties. That point may well be acknowledged. Nevertheless, the fact remains that the evidence of Father Dillon was that the Bishop at all times had and retained overriding authority, and thus the capacity to exercise power, over the priests in the Diocese. First and foremost, it was the Bishop who appointed the priest or assistant priest to the Diocese. As Father Dillon said: 'No priest has an appointment in the Diocese except by the appointment of the Bishop'. He also said that if a priest required further assistance in his work, he could not himself enlist that assistance from another priest, but rather the recruitment of any further assistance had to be done through the Bishop. Over and above that, Father Dillon said that the effect of the relevant Canon law was that '… ultimately the Bishop has authority over all the priests in his Diocese'. By appointing and maintaining Coffey as an assistant priest within the parish, the Diocese, by the Bishop, invested him with a degree of power and authority to enable him to achieve such intimacy with the respondent's family that he was able to exploit their trust in him in order to indecently assault the respondent.

156 The second point, made on behalf of the appellant, was that there was evidence in the trial that precluded a conclusion that it was Coffey's priestly duties that provided the opportunity or occasion for his wrongful conduct. In that respect, counsel referred to the evidence of Father Dillon that parish priests and assistant priests, as 'normal people', also had their own personal lives in which they made friendships. Thus, it was submitted, the mere presence of Coffey at the respondent's parents' home did not, in and of itself, establish a necessary connection between any special role he had as assistant priest and the torts that he committed.

157 The short answer to that point is, as we have discussed, the evidence of the respondent demonstrated that Coffey's visits to the respondent's family home were an integral part of his pastoral role as a parish priest. It was in the performance of that role that Coffey became involved in providing advice and conciliation to the respondent's parents in respect of their matrimonial difficulties. Further, as we have discussed, the performance by Coffey of that function engendered the requisite trust in him by the respondent's parents which enabled him to have intimate contact, of an unlawful kind, with the respondent. As Father Dillon said, the pastoral role of the priest, and the relationships, and indeed the friendships, that the priest developed with his parishioners, were an integral part of his role. Father Dillon explained that when he was an assistant priest at Geelong he participated in a video named 'Priests 24/7', which he considered was appropriate because, as he said, 'you're never really off duty in that sense'.

158 In support of the point sought to be made on behalf of the respondent, counsel pointed to evidence that Coffey and a relative named Charlie Coffey played tennis with DP's

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128 *Prince Alfred College* (2016) 258 CLR 134, 160 [82].

family, and that Charlie Coffey and DP's mother would go to the races together. It was submitted that there was a 'clear inference' from that evidence that there was a social connection between DP's family and Coffey that was separate to any role that Coffey had as a priest.

159 The evidence so relied on by the applicant needs to be considered in context. In cross-examination, the respondent recalled that Charlie Coffey was very friendly with his mother and that he would come and pick his mother up and take her to the races. He also recalled that Charlie Coffey played tennis with his family and he was 'pretty sure' that Coffey himself also played tennis. Counsel then put to the respondent that the relationship with Charlie Coffey was one of the reasons why Coffey himself was so friendly with his family. In response the respondent said:

> … I believe so, but not — not to the extreme of — the other reason was because my grandmother was a very Catholicised person and she brought her children up to be Catholicised, Catholicised, I'll put it in words that we were always expected to have, to look up to priests, and look up to priests as seniority in the family.

160 It was then put to the respondent that he had told Dr Pagano that Coffey was a family friend. The respondent (in his evidence) replied in the affirmative and said 'a trusted parishioner from the Catholic Church … as in a priest friend because of Catholicism on the DP side was very high …'.

161 The third point relied on by the appellant concerned Coffey's role as an assistant priest. In particular, it was noted that Canon law does not designate a special function to an assistant priest, and there was no evidence as to what was required of Coffey as an assistant priest following his appointment in 1966.

162 Contrary to that point, the evidence of Father Dillon was to the effect that, in essence, the functions performed by an assistant priest within a parish depended upon the direction given to him by the priest. However, in essence, the functions performed by the assistant priest were an aspect or aspects of those ordinarily performed by a priest. The respondent's evidence was to the effect that Coffey was regarded as the priest. He described Coffey as 'the local parish priest' and was raised to believe that, as such, he was a 'trusting man of God'.

163 Thus, in conclusion on ground 3, it is evident that as a result of the appointment by the Bishop of Coffey as an assistant priest in the Diocese of Ballarat, Coffey was placed and maintained in a position in which he represented and did the work of the Diocese in the parish to which he was appointed. It was through Coffey that the Diocese did its work and performed its role with the parishioners of that parish. The uncontested evidence of Father Dillon was that the pastoral work of the assistant priest was an integral and important part of his role. That work necessarily involved and required the priest to develop personal acquaintances, and indeed friendships, with his parishioners. In performing that work, Coffey, as a duly appointed assistant priest in the parish, was invested with the authority of the Diocese, and as such he gained the trust of, and intimacy with, his parishioners. In the words of the plurality of the High Court in *Prince Alfred College,* Coffey's position as the appointed assistant priest invested in him 'authority, power, trust, control and the ability to achieve intimacy' with his

parishioners, and in particular with DP's family and DP. As such, his appointment and function as an assistant priest in the parish not only gave him the opportunity to abuse DP, but was the 'occasion' for those wrongful acts in the terms discussed by the High Court in *Prince Alfred College*.[129]

164 For those reasons, the judge was correct in concluding that Coffey perpetrated the indecent assaults on the respondent in such circumstances as to render the Diocese vicariously liable to the respondent. It follows that ground 3 does not succeed.

THE CROSS-APPEAL

165 The cross appeal is directed to the judge's assessment of the respondent's damages in respect of the injuries caused by the assaults.

166 The respondent claimed that he had suffered psychiatric injuries as a consequence of the indecent assaults committed by Coffey, and in particular, that he had suffered: complex post-traumatic stress disorder ('PTSD'); chronic anxiety disorders — social and agoraphobic; chronic depressive disorder; and enduring (post-traumatic) personality change. The cross-appeal by the respondent is directed to the conclusion by the judge that he did not suffer symptoms of any psychological injuries that were a result of the assaults committed by Coffey until his memory of the assaults was revived by the advertisement that was placed in the Moyne Gazette Newspaper in December 2018 seeking information about potential victims of sexual assaults committed by Coffey.

167 His Honour expressed that conclusion in the following terms:

> Ultimately, and for reasons I will explain in a moment, I reject DP's case that his symptoms commenced at the time of the Coffey assaults or at any time prior to December 2018. I am, however, satisfied that once he read the December advertisement the memories of the Coffey assaults were revived and have since that time played, along with his other issues, a part in the production of his symptoms of depression and anxiety.[130]

168 The respondent's case on damages was based on his own evidence, the evidence of three acquaintances, and the evidence of a consultant psychiatrist, Associate Professor Carolyn Quadrio, who examined him in February 2020 and July 2021. In response, the applicant relied on the evidence of Dr Alan Jager, a forensic psychiatrist, who examined the respondent in December 2020.

169 The evidence relating to the respondent's claim for damages was summarised in some detail by the judge. No issue has been taken with his Honour's outline of that evidence. For the purposes of this appeal, it is sufficient to draw significantly on the judge's summary in order to outline the evidence that was the basis of the judge's conclusion.

The evidence on damages

170 In his evidence, the respondent stated that, as a result of Coffey's abuse of him, he felt dirty, he was 'untrusting' of other male people, and he felt isolated. He said that he

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129 (2016) 258 CLR 134, 159–60 [80]–[81].

130 Reasons, [401].

thought that he had been taken advantage of, and he wondered what sort of childhood he would have otherwise had if the abuse had not occurred. As a consequence of the assault, he lost all faith in the Catholic Church. He said that the assault was always in the back of the mind, and that it had been with him every day over the last fifty years. As a consequence, he was isolated socially and he had a very limited group of friends.

171 The respondent stated that the assaults had affected his education, because he was always distracted. He had avoided changing in front of his peers at school. His difficulties had continued during his high school years at Warrnambool Technical School. He would deliberately forget to bring his physical education uniform to school so he did not have to use the school change rooms. The respondent said that he performed poorly academically, absented himself from school, and as a consequence he was sent to the Warrnambool Community School, which was more casual, and catered for troublesome children. The respondent said that his distrust of people had impacted his sense of self and his sexuality, including his intimate relationship with his current partner.

172 The respondent said that he had found work difficult because he did not like being physically close to other persons. He had kept to himself and stayed away from his colleagues during breaks and lunch hours. He had found that interaction with his colleagues in his role at Canon was good, because he was situated at his own desk in his own corner of the office, behind a partition.

173 At the time of the trial, the respondent was taking antidepressant medication, Pristiq, and the antipsychotic medication, Zypine. He was also consulting Dr Angelo Pagano for psychological treatment. He said that he continued to have problems socialising with other people, because he was afraid that they would touch him. He felt anxious and uncomfortable in crowds, he experienced panic attacks, and on most days, he felt no pleasure in life.

174 In his evidence, and in cross-examination, the respondent also described other difficult aspects of his upbringing. In cross-examination, he said that his father had been physically violent towards his children, and, in particular, towards himself. He was always scared of his father, because he had a bad temper. In addition, he had been subjected to physical abuse by his teacher in his final two years of primary school education. She would walk up behind him while he was sitting at his desk and crack him over the back of the head for no reason at all. She would also throw blackboard dusters at him, and on occasions she would grab him by the ear, drag him outside, make him sit down on a seat, and stay there until the end of class. On one occasion at a school camp, when the students went for walks, she came up behind him and cracked him over the back of the legs to make him walk faster. He said that that physical abuse by the school teacher was ‘constant’, over two years.

175 In addition to the evidence of the respondent, three witnesses, who were friends of the respondent, gave evidence as to their observations of his emotional state during the periods in which they were acquainted with him.

176 Archibald Cording-Whyte first met the respondent in the early 1990s, and thereafter had regular social contact with him until 2001, when the respondent moved back to

Melbourne. He described the respondent as being socially awkward and withdrawn. Mr Cording-Whyte said that approximately two years previously (that is, two years before giving evidence to the Court in August 2021), the respondent told him by telephone that he had been 'interfered with by the priest or brother'. He told Mr Cording-White that he had been repeatedly assaulted by one of the priests at his school or church, and that the assaults had gone on for some considerable time. Mr Cording-Whyte said that the respondent was crying and emotional when he described the assaults. In addition, the respondent told Mr Cording-Whyte that he had been abused by a school teacher in grades 5 and 6.

177 Christopher Harrison first met the respondent about twenty years previously. He was a frequent customer of the café then operated by the respondent and his partner. Since then, he had become close friends with the respondent. He said that the respondent was a quiet person, who kept to himself. Mr Harrison said that there was a time when the respondent told him that he had been 'touched up' by someone in the Catholic Church. When asked (by counsel) when the respondent told him that, Mr Harrison responded, 'It was a few years ago now, I can't recall exactly …'. In cross-examination, he said, '… it was about roughly five, six years ago, it's, you know hard to remember'. Mr Harrison said that the respondent appeared to be depressed, and he could see that it was 'eating at him'. The respondent also told Mr Harrison that his parents had passed away in an horrific car accident, that he missed them, and that it was 'really hard growing up'. The respondent also told Mr Harrison about the death of his sister and how much she had meant to him.

178 We note, in that respect, that while the judge generally accepted Mr Harrison's evidence, he did not accept his evidence as to when the respondent confided in him about the abuse. Based on the evidence given by the applicant as to that matter, the judge considered that it was probable that the relevant conversation with Mr Harrison occurred in 2019.[131]

179 Margaret Jago had known the respondent since they met at St Patrick's Primary School in Port Fairy when they were in grade 4. She did not have much contact with the respondent after leaving primary school, until her late teenage years or early twenties. Since then, she had been in contact with the respondent except for a period in 2008 to 2009.

180 Ms Jago said that the respondent was a shy and timid child. He did not share interests with other boys of his age, and he had few friends. She said that the respondent had told her that his father had been 'an arsehole and a pig' to his mother in the 1970s, and that his father had threatened to find the mother and 'shoot us all'. The respondent also told Ms Jago about the abuse inflicted on him by the school teacher.

181 In about 2018, the respondent told Ms Jago about Coffey's assault of him. The respondent said that when he was a child, Coffey had attended his home for his grandmother's wake, Coffey had sat at the end of his bed, and had 'done something to him' when everyone else was in another room. Ms Jago said that the respondent was very distressed and in pain when he spoke about the assault. Since then, the respondent

131 Reasons, [56].

and Ms Jago had discussed the assault 'off and on'. He told her that since the assault, he had never felt quite normal.

182 There was also a substantial body of evidence before the judge relating to the respondent's treatment by a succession of clinical psychologists between 2011 and the current date, and claims that he had made for compensation arising from the abuse perpetrated by the primary school teacher, and from the circumstances of his parents' death in a motor vehicle accident in New South Wales.

183 As mentioned, from 2006, the respondent was treated with antidepressant medication by his general practitioner, Dr Watson. In January 2011, the respondent consulted Mr Simon Lush, a clinical psychologist at WPS and attended him on 11 occasions until August 2012. Subsequently, in May 2013, the respondent consulted Ms Kim Marr, a clinical psychologist at WPS, and he saw her on 20 occasions between that date and September 2014. In October 2014, Ms Marr commenced maternity leave. The respondent was then referred to another clinical psychologist at WPS, Dr Angelo Pagano, and he continued to attend Dr Pagano from that date until the time of the trial. In evidence, the respondent conceded that he did not inform any of those three psychologists, or his general practitioner, Dr Watson (who had treated him since 2001), of the assaults committed on him by Coffey until after he had contacted his solicitors in January 2019 in response to the December advertisement.

184 In November 2014, the respondent made a complaint to Towards Healing in relation to the abuse to which he had been subjected by the primary school teacher at St Patrick's school. He made a statement in support of that complaint. In that statement, he said that he had been subjected, by the teacher, to 'corporal and psychological abuse'. He said otherwise, his childhood had been 'straightforward and quite normal'. In the statement, he described the incidents of physical and psychological abuse by the teacher. He then said: 'Ever since this time, my life has not been the same and I feel I have never really recovered and achieved to my fullest potential'. He then described how he had finished school 'prematurely' at the end of year 10, and gave a brief outline of his work history. He said that he was not coping, he had become depressed and had been diagnosed with depression and anxiety in 2006, for which he took medication. He said: 'I take antidepressant medication. I continue to suffer from low mood and poor motivation, as well as low confidence and self-esteem. I fear confrontation … I also suffer from severe headaches in the lightest bit of stress and have had very bad nerves that cause me to tremble'. He said that he only had a small circle of friends, that he felt that he had potential, but that he had underachieved, '…owing to my negative experiences at primary school'. He concluded by requesting a formal apology, an acknowledgment as to what had occurred, funding for ongoing psychological treatment, and a payment of appropriate restitution and compensation.

185 In support of that application, Dr Pagano provided a report to the respondent's then solicitors, commenting on the effects of the 'abuse that occurred between 1975 and 1976', while the respondent was a student at St Patrick's Primary School in Port Fairy, and the psychological and lifestyle effects of that abuse. As we have noted, in 2016, that claim for compensation was rejected by the Towards Healing organisation.

186 In the same year, 2016, the respondent made a claim to the Transport Accident Commission ('TAC') for payments under the *Transport Accident Act 1986* in relation to the death of his parents. He also made a request for a review of the statutory time limit for dependency benefits arising from the collision. In support of that request, he relied on a further report of Dr Pagano dated 29 March 2016. In that report, Dr Pagano stated that he assessed that the respondent suffered the following disorders: Major Depressive Disorder; Persistent Depressive Disorder; Panic Disorder; Agoraphobia (chronic), together with substance abuse disorder (alcohol use) and stimulant use disorder (drug abuse).

187 In the report, Dr Pagano noted that, although the respondent had strict parents, otherwise he had a 'relatively normal early childhood without significant trauma' before he suffered physical and psychological abuse at St Patrick's school. He further noted that, following the death of his parents, and the death of his sister K, the respondent had reported that he had suffered mental health issues relating to the tragic events which had 'added to his burdens in relation to an already traumatic history'. Dr Pagano considered that, although the respondent had already developed a depressive disorder before the accident, the death of his parents had 'increased his sensitivity to psychiatric comorbidity particularly for the depressive disorder'. He concluded that the trauma and subsequent symptoms (arising from the car accident) had caused the respondent clinically significant distress and impairment in social, occupational and other important areas of functioning.

188 Further, as already noted, in 2016 the respondent also sought an ex gratia payment of $780,000 from the New South Wales government as a result of the psychological trauma he sustained as a consequence of the death of his parents. In August 2016, at the respondent's request, Dr Pagano wrote a letter to the Opposition Transport Spokesperson in the New South Wales Parliament in support of the claim for benefits as a result of 'ill-health suffered … following the death of his parents in a motor vehicle accident on March 19, 1985'.

The medico-legal evidence

189 Associate Professor Carolyn Quadrio examined the respondent on 28 February 2020, in her rooms over a period of some three hours. She subsequently performed a further examination, via Zoom, on 3 June 2021.

190 In the initial interview, the respondent described to Associate Professor Quadrio the two incidents in which he was sexually assaulted by Coffey. He also told Associate Professor Quadrio about the strict discipline imposed by his father during his childhood, and the physical abuse to which he had been subjected by the school teacher. Associate Professor Quadrio took a detailed history from the respondent, including his attendance on Dr Pagano.

191 Associate Professor Quadrio addressed the question whether the respondent then had, or at any time in the past had, suffered from the psychiatric condition as follows:

> Since the abuse, [DP] has had psychosocial difficulties. In the aftermath he became much preoccupied with the abuse and at school he had difficulties with learning and socialising. These are typical post-traumatic symptoms following

> childhood sexual abuse …
>
> Other factors may have contributed to his learning difficulties, including his asthma, which led to a lot of time off school. There may have been premorbid temperamental factors contributed to his early difficulties with socialising. However, the abuse occurred at the very start of [DP's] school life so there was not an established developmental trajectory that could be compared with his post abuse development …
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> In later childhood and adolescence, [DP] suffered sexual identity issues; again, this is entirely typical: childhood sexual abuse creates a sense of stigmatism … In my view, the abuse was the most critical factor in this, or at least a major factor.

192 Associate Professor Quadrio stated that she diagnosed that the respondent had the following conditions: complex post-traumatic stress disorder; chronic anxiety disorders: social and agoraphobic; chronic depressive disorder; and enduring (post-traumatic) personality change.

193 Having outlined and explained the nature of each of those conditions, Associate Professor Quadrio then addressed the question whether the abuse (by Coffey) had made a material contribution to them. On that issue, she said as follows:

> As has been detailed already, the sexual abuse was a fundamental issue that made a material contribution to [DP's] lifelong difficulties. There was then a cascade of events that served to intensify his symptoms of anxiety and his avoidant behaviour and his difficulties with trust and with interpersonal relationships. Those events included childhood asthma, physical and psychological abuse at school, including peer harassment; the death of his parents and lack of support from his family at that time; and the death of his sexual partner also around that time.

194 In preparing her supplementary report in June 2021, Associate Professor Quadrio was provided with further materials, including a report by Dr Jager, which we will shortly summarise. In the supplementary report, she essentially adhered to the opinion she had expressed in the first report, and commented on Dr Jager's opinion. In doing so, she disagreed with a substantial part of the opinion formed by Dr Jager.

195 Dr Jager examined the respondent via Skype on 30 November 2020 for a period of 43 minutes. He considered that the most probable explanation for the respondent's anxiety and fear of crowds was a Panic Disorder with Agoraphobia, which stemmed from his childhood. In respect of the abuse by Coffey, Dr Jager stated that, based on the nature of the trauma, it was insufficient to cause post-traumatic stress disorder, but it did predispose the respondent to anxiety, so that he attributed one sixth of the respondent's anxiety condition to that abuse. Dr Jager attributed a 'high degree of significance' to the trauma perpetrated by the respondent's father. He considered that the abuse by the school teacher was not sufficient to cause PTSD, and it did not contribute in a significant way to his current anxiety disorder. Dr Jager was of the view that 50 per cent of his anxiety condition was due to genetic and constitutional factors.

196 Dr Jager was further of the view that the abuse by Coffey did not contribute to any failure by the respondent to achieve academically. He considered that the abuse did help to predispose the respondent to experiencing anxiety, so that in some 'small way' it contributed to his history of sporadic employment, but other constitutional and personal factors were of more importance in that respect. Dr Jager did not consider that the panic disorder with agoraphobia had specifically caused the respondent to have an incapacity for work. In that respect, he noted that over the last 20 years, the respondent, in his capacity as a carer, had disengaged from other employment. Dr Jager considered that the respondent was not precluded from returning to other employment, should his carer role cease. In particular, his panic disorder with agoraphobia has been treated and does not cause a significant incapacity for employment.

197 In respect of his prognosis, Dr Jager stated that the respondent was likely to continue to experience the same level of symptoms indefinitely, and he again apportioned ongoing causation of that continuing condition as to one sixth to the abuse by Coffey.

The judge's reasons on damages

198 The judge provided extensive and detailed reasons for his conclusion that DP's symptoms of depression and anxiety did not commence before December 2018 when he read the December advertisement concerning victims of sexual abuse committed by Coffey.

199 Having outlined the background to the respondent's claim and identified the issues in the case, the judge commenced by considering, and making findings in relation to, the credibility of the respondent as a witness. His Honour stated:

> There are multiple reasons (set out below) for not accepting DP's account of the way in which the assaults by Coffey have affected him during the course of his life. I should make it clear, however, that I am not able to conclude that DP deliberately lied when giving evidence. Rather, he appears to be a complex individual who at times reconstructs events to suit his current perception of a particular occurrence.[132]

200 The judge then outlined the 'multiple reasons' why he did not accept the respondent's account of the way in which the assaults committed by Coffey had affected him during his lifetime. The first reason was the failure of the respondent to disclose Coffey's conduct and its effects to any member of his family or friends until after he saw the December advertisement. The respondent himself said that he had not told anyone about the matter, apart from his partner, who was not called to give evidence. In view of the judge's reservations as to the respondent's reliability as a witness, he did not accept that that disclosure occurred. The judge also considered that it was 'extraordinary' that in the process of making the school abuse complaint in 2014 (with the help of two firms of solicitors), the respondent did not then mention the abuse committed by Coffey.[133]

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132 Ibid [55].
133 Ibid [57].

201 The second reason given by the judge was the respondent's concession that he did not inform any of his treating psychologists at WPS — Mr Lush, Ms Marr or Dr Pagano — or his general practitioner, Dr Watson (who had treated him since 2001), of the assaults committed by Coffey until after he had contacted his solicitors in January 2019.[134] The judge noted that in his 2014 statement concerning the school abuse, and in the history that he gave to Dr Pagano, the respondent had said that until the time of the school abuse committed by the teacher, he had had a normal and straightforward childhood.[135] The judge did not accept the explanation that the respondent was too embarrassed or disgraced to mention the Coffey abuse to others. His Honour considered that the differing accounts, that the respondent had given over the course of time, had been 'tailored to further the particular wrong which he perceived as the cause of his problems …'.[136]

202 Thirdly, the judge did not accept the evidence by Associate Professor Quadrio that the respondent's delay in disclosing the abuse could be explained by studies of the responses of other victims of sexual abuse in similar settings. The judge, in that respect, noted that Professor Quadrio's opinion was based on one (albeit lengthy) interview with the respondent and the respondent's statement. The respondent's solicitors had not provided Professor Quadrio with any material, such as reports or notes, from the treating general practitioner or the psychologists, or the material that accompanied his claim for compensation from the New South Wales government, TAC and Towards Healing.[137] The judge considered that it was particularly significant that the respondent did not tell Mr Lush, Ms Marr or Dr Pagano of the assaults, in circumstances in which Dr Pagano had, on two separate occasions, provided reports supporting claims for compensation relating to his depression and anxiety arising from the school abuse and the death of his parents.[138]

203 The fourth reason given by the judge was that the respondent had an obsessive personality, which caused him to focus on a particular episode in his life which he perceived at a particular time to be the cause of his problems.[139] Fifthly, the judge had the 'distinct impression' that the respondent was prepared to blame others for what he saw as his life's tragedies or misfortunes. Sixthly, the judge noted that the respondent had failed to call several relevant witnesses who, it could be reasonably expected, would be called to give evidence, in view of the challenge to his account both of the immediate and long-term effects of the assaults. Those witnesses included Dr Pagano (or Mr Lush or Ms Marr) and Dr Watson, neither of whom were called to give evidence. In that respect, the judge noted that there was a 'yawning chasm' in terms of corroborative evidence, in that no family member, no partner, no treating doctor and no treating psychologist was called to give evidence supporting the respondent's claim.[140]

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134 Ibid [58].
135 Ibid [60]-[61].
136 Ibid [63].
137 Ibid [68].
138 Ibid [70].
139 Ibid [72].
140 Ibid [75].

204 In those circumstances, the judge concluded that he had 'considerable reservations to the point of substantial doubt' about most of the evidence of the respondent as to the effects of Coffey's assaults on him.[141]

205 The judge then turned to the issues of liability. Having concluded that the applicant was vicariously liable for the two assaults which his Honour found had been committed by Coffey, the judge then turned to the question of damages. Having summarised the evidence of the respondent and the three supporting witnesses, his Honour stated:

> The end result of the evidence of these witnesses is that it is clear (consistent with the evidence of the psychologists) that DP has suffered psychological issues over the past 20 years. However, none of the witnesses substantiate any relationship between the Coffey assaults and psychological symptoms prior to 2019. It is, however, also apparent that since reading the December advertisement and consulting lawyers in respect of this litigation that the effect of the Coffey assaults has become a major focus of DP's life.[142]

206 The judge then discussed the previous claims that had been made by the respondent in respect of psychological injury that he had sustained as a result of other trauma — in particular, the abuse by the school teacher and the death of his parents. His Honour set out in some detail letters written by Ms Marr, a letter written by Dr Pagano to Dr Watson in April 2016, the letter written by Dr Pagano to TAC in March 2016, and four further letters written by Dr Pagano to Dr Watson between January 2016 and September 2018. Having done so, his Honour noted as follows:

> The end result is that the treating psychologists diagnosed a number of identifiable psychiatric conditions: major and persistent depressive disorder, panic disorder and agoraphobia. None were attributed to the Coffey assaults, as DP did not mention the assaults notwithstanding the number of visits and the confidentiality associated with his attendances. On multiple occasions his symptoms were attributed to a variety of causes — primarily that of the school abuse and the death of his parents.[143]

207 The judge next considered the evidence of the two psychiatrists, Associate Professor Quadrio and Dr Jager. In respect of the differences between the opinions expressed by those doctors, the judge noted, first, that Associate Professor Quadrio has 'far greater' specialist knowledge in the area of institutional and childhood abuse than Dr Jager, and, secondly, that Dr Jager's 43 minute Skype conference with the respondent could not give him a sufficient understanding of the respondent's condition, as compared with the lengthy initial meeting between the Associate Professor and the respondent.[144]

208 The judge then discussed the basis upon which Associate Professor Quadrio had expressed her opinion. He noted that before the initial meeting and her first report, the respondent's solicitors had not provided Associate Professor Quadrio with any material relating to the respondent's past life or treatment, apart from a statement made by the respondent after he had consulted his lawyers. In particular, the solicitors had not

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141 Ibid [76].
142 Ibid [337].
143 Ibid [356].
144 Ibid [366]-[368].

provided Associate Professor Quadrio with material from Dr Watson or WPS. Accordingly, Associate Professor Quadrio simply relied on the respondent's account. In that respect, the judge observed:

> To put it bluntly, this makes her assessment close to impossible to accept in light of the evidence adduced at trial: she had only the account of a witness whom I regard as significantly unreliable, particularly when attributing his psychological symptoms to a particular cause.[145]

209 Having identified further issues relating to the account given by the respondent to Associate Professor Quadrio, his Honour concluded:

> The end result is that my findings of fact are totally out of kilter with those upon which Associate Professor Quadrio relies. I do not accept the diagnosis of complex PTSD, depression, anxiety and/or agoraphobic anxiety connected to the Coffey assaults in the manner described by her.[146]

210 The judge noted that the treating psychologists, who had attributed the respondent's psychological symptoms to other causes, had had a significant advantage in that they had seen the respondent in a clinical setting, without the influence of litigation. His Honour concluded by reiterating that neither Associate Professor Quadrio nor Dr Jager had 'anything like' the picture of the respondent and his life that had emerged in the course of evidence given in the trial.[147] The judge concluded that, with one exception, he was not satisfied that the respondent had established, on the balance of probabilities, the underlying factors which underpinned Associate Professor Quadrio's opinion, attributing his PTSD, depression, anxiety and agoraphobia to the assaults committed by Coffey. That exception consisted of the respondent's psychological symptoms, particularly depression and anxiety, which he had suffered after he had read the December advertisement.[148]

211 The judge further considered an inference, of the kind that was considered in *Jones v Dunkel*,[149] was applicable in respect of the failure of the respondent to call evidence from a number of persons who were not called to give evidence, and who might have been able to give evidence concerning matters relevant to the respondent's claim for damages. His Honour noted that three of the respondent's four siblings were alive and available. He considered that it would have been natural for the respondent to call one or more of them, as they could have shed some light on whether the respondent had experienced the problems that he alleged were the result of the assaults committed by Coffey. Accordingly, his Honour concluded that he could more confidently accept the inference contended for by the applicant, and contrary to the evidence advanced on behalf of the respondent, that his psychological symptoms from an early age were not

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145 Ibid [373].
146 Ibid [379].
147 Ibid [382].
148 Ibid [383].
149 (1959) 101 CLR 298 (Dixon CJ, Kitto, Taylor, Menzies and Windeyer JJ).

due to Coffey's abuse, but were related to the school abuse, or alternatively, occurred at a later time in his life and resulted from other trauma.[150]

212 The judge also considered it would have been natural and expected for the respondent to call both Dr Watson and Dr Pagano, as they had treated the respondent up to and at the time of the trial. In particular, the failure to call the treating practitioner, Dr Watson, was particularly 'stark'.[151] On the other hand, there was a significant body of reports and communications by Dr Pagano and also Ms Marr that was tendered in evidence, which gave some picture of the respondent's psychological problems and their asserted causes. Accordingly, the inference was not as powerful as that which would be drawn in the case of the absence of Dr Watson, but nevertheless, Dr Pagano's opinion as to any causal connection between the Coffey assaults and the development of any psychological symptoms of the respondent would have been of 'real relevance' to a critical issue in the case.[152]

213 The judge then concluded that there were 'multiple problems' with accepting the respondent's case as to both the onset of his psychological symptoms caused by the Coffey assaults, and in determining the relationship of his current symptoms to those assaults.[153] For those reasons, the judge rejected the respondent's case that his symptoms commenced at the time of the assaults committed by Coffey, or at any time before December 2018. He was, however, satisfied that after the respondent read the December advertisement, his memories of the assaults were revived and have since then played a part — along with other issues — in the production of his symptoms of depression and anxiety.[154]

214 The judge acknowledged that there was no expert psychiatric opinion that supported the conclusion that he had reached. However, he noted that neither psychiatrist, who had been called to give evidence, had been provided with the correct factual basis for their conclusions, and that the treating psychiatrist and general practitioner had not been called to give evidence.[155] The judge specifically rejected the opinion of Associate Professor Quadrio that the respondent suffered PTSD as a result of the Coffey assaults. He concluded that since December 2018, the respondent had become fixated with those results, and as a consequence he had suffered anxiety and depression. The judge considered that the other events in the respondent's life had also contributed to his symptoms. The judge also concluded that the symptoms suffered by the respondent as a result of Coffey's assaults would persist indefinitely. On that basis, the judge assessed the appropriate general damages for the respondent's pain and suffering and loss of enjoyment of life in the sum of $200,000.[156] In addition, his Honour awarded a further sum of $20,000 by way of aggravated damages as compensation for the breach of trust

150 Reasons, [394].
151 Ibid [396].
152 Ibid [397].
153 Ibid [401].
154 Ibid [401].
155 Ibid [417].
156 Ibid [424]–[428].

by Coffey in sexually abusing DP in circumstances in which he could not be protected by his parents,[157] and $10,000 for future medical expenses.[158]

Submissions of applicant — damages

215 The central submission, made on behalf of the respondent in support of the cross-appeal, was expressed in the respondent's written case in the following terms:

> It was not properly open to the trial judge to conclude that the tortious injury having occurred in 1971, the plaintiff only suffered compensable damage from December 2018, after seeing the notice …

216 In support of that submission, counsel for the respondent contended that the judge's conclusion was inconsistent with the expert medico-legal evidence given by both Associate Professor Quadrio and Dr Jager. In particular, counsel noted that Dr Jager's conclusion was that the abuse by Coffey predisposed the respondent to anxiety and he attributed 'one sixth' of the respondent's anxiety condition to that abuse. Thus, it was submitted that on the evidence of either expert, the respondent had suffered some damage that was directly attributable to the abuse committed in 1971. It was further submitted that the judge did not find that the respondent had suffered no psychiatric injury before seeing the December advertisement. Rather, the judge focussed on the point in time at which the respondent suffered symptoms of depression and anxiety, but in doing so ignored the actual causes of the psychiatric injury.

217 Counsel submitted that against the background of agreement between the two medico legal experts, there was no basis for the judge to conclude that the respondent did not suffer any relevant harm when he was abused in 1971.

218 Counsel further submitted that the judge erred in rejecting the opinion given by Associate Professor Quadrio, because the judge considered that she had not been provided with relevant material. Associate Professor Quadrio was subsequently provided with the information that she lacked when she first saw the respondent, and she provided a further opinion in which she adhered to her initial view. In re-examination, she confirmed that the additional material had not altered her original opinion. Accordingly, it was submitted, there was no basis for the judge to reject the opinion expressed by Associate Professor Quadrio.

219 Counsel further submitted that the finding by the judge that the respondent had been sexually abused by Coffey in 1971 necessitated a conclusion that the respondent was injured by the batteries and assaults committed by Coffey at the time. In those circumstances, it was submitted, it could not logically be concluded that the respondent, having suffered injury by the sexual abuse in 1971, nevertheless suffered no compensable harm until he read the December notice almost 48 years later. It was submitted that the judge's finding to that effect was so unreasonable that no decision maker could have made it. In particular, it was submitted that it was unthinkable that the sexual abuse of a kind engaged in by Coffey did not there and then injure, and cause psychiatric harm to, the respondent. Counsel noted that the abuse by Coffey was the

157 Ibid [455].
158 Ibid [449].

'first intrusion' into DP's psychiatric wellbeing. DP subsequently suffered other insults to his psyche, resulting from the violent conduct of his father, the abuse by his teacher, and the death of his parents. It was submitted that while those further incidents aggravated his injury, they did not exclude the original insult to his psychiatric state. Counsel further submitted that although the later incidents may have been the focus of the respondent's perception of the cause of his symptoms, that did not displace the underlying injury that originally resulted from Coffey's assault.

220 In response, counsel for the applicant submitted that the conclusion by the judge, that the respondent suffered no psychological or other symptoms until he read the December notice, is unimpeachable. In support of that submission counsel noted four points that were made by the judge, each of which, it was submitted, were amply based on the evidence.

221 First, the judge noted the out-of-court statements made by the respondent, and the history that he gave to treating professionals, in which he did not refer to the assaults committed by Coffey, but instead described a normal childhood. Secondly, the judge referred to the material adduced from the treating psychologists, the effect of which was that there was no connection between the Coffey assaults and the respondent's psychological condition. In that respect, the judge noted that the respondent's treating psychologist, Dr Pagano, had expressed the opinion, in a number of reports, that the respondent's complex psychological condition was due to other causes than the assaults committed by Coffey. Thirdly, counsel noted that the judge had concluded that he had 'little confidence' in the opinions formed by the two consultant psychiatrists, because they had received an 'illusory picture' of the effect of the assaults on the respondent. In that respect, the judge having analysed the evidence of Associate Professor Quadrio, concluded that she relied solely on the respondent's word as to the cause of his problems, and that the account given by the respondent to Associate Professor Quadrio was completely inconsistent with the account that he had given to his treating professionals. Fourthly, counsel noted that the judge correctly applied the *Jones v Dunkel* inference which fortified that contrary conclusion, namely, that prior to 4 December 2018 the respondent had not suffered any psychological condition relating to the assaults committed by Coffey.

222 In those circumstances, counsel submitted that the judge's conclusion, that the respondent did not experience any symptoms of depression and anxiety until he read the December 2018 notice, was open to the judge and was not infected by error.

Cross-appeal — analysis and conclusions

223 The cross-appeal, and the submissions advanced on behalf of the respondent, were directed to particular findings of fact by the judge, and specifically to his conclusion that the respondent did not suffer symptoms of injury until the December 2018 notice was brought to his attention.

224 The principles, relating to such a ground of appeal, have been well established by a series of decisions in the High Court.[159] For present purposes, the principles established by those authorities were sufficiently summarised in the decision of this Court in *Southern Colour (Vic) Pty Ltd v Parr*,[160] in the following terms:

> On appeal, the Court is required to undertake a 'real review' of the evidence in respect of the findings made by the judge, and the reasons for the judge's conclusions. Where the finding, that is under review, depended on the acceptance or rejection by the trial judge of the evidence of a particular witness or witnesses, the appellate court should only set aside that finding if, after making due allowance for the advantages enjoyed by the trial judge, that finding is 'glaringly improbable' or 'contrary to compelling inferences'. On the other hand, in general, an appellate court is in as good a position as the trial judge to decide the proper inferences to be drawn from facts which are undisputed, or which have been established by the evidence. In deciding the proper inference to be drawn, the appellate court should, however, give respect and weight to the conclusion of the judge, but, having reached its own conclusion, it must give effect to it.[161]

225 In similar terms, in *Robinson Helicopter*, the High Court stated:

> The fact that the judge and the majority of the Court of Appeal came to different conclusions is in itself unremarkable. A court of appeal conducting an appeal by way of rehearing is bound to conduct a 'real review' of the evidence given at first instance and of the judge's reasons for judgment to determine whether the judge has erred in fact or law. If the court of appeal concludes that the judge has erred in fact, it is required to make its own findings of fact and to formulate its own reasoning based on those findings. But a court of appeal should not interfere with a judge's findings of fact unless they are demonstrated to be wrong by 'incontrovertible facts or uncontested testimony', or they are 'glaringly improbable' or 'contrary to compelling inferences'. In this case, they were not. The judge's findings of fact accorded to the weight of lay and expert evidence and to the range of permissible inferences. The majority of the Court of Appeal should not have overturned them.[162]

226 In essence, the respondent, by the cross-appeal, has sought to establish two errors of fact by the primary judge. First, it was submitted, the judge erred in rejecting the expert evidence of Associate Professor Quadrio that the sexual abuse by Coffey was a fundamental contributor to the respondent's long-term psychiatric issues. Secondly, it was submitted that it was not open to the judge to conclude that the respondent did not suffer any relevant injury when he was abused in 1971, and that he first suffered such injury after his attention was drawn to the 2018 notice.

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159 *Warren v Coombes* (1979) 142 CLR 531, 551; [1979] HCA 9; *Fox v Percy* (2003) 214 CLR 118, 126–7 [25] (Gleeson CJ, Gummow and Kirby JJ); [2003] HCA 22; *Devries v Australian National Railways Commission* (1993) 177 CLR 472, 480 (Deane and Dawson JJ); [1993] HCA 78; *Robinson Helicopter Company Inc v McDermott* (2016) 331 ALR 550, 558–9 [43] (French CJ, Bell, Keane, Nettle and Gordon JJ); [2016] HCA 22 ('*Robinson Helicopter*').

160 [2017] VSCA 301.

161 Ibid [78] (citations omitted) (Santamaria, Kaye and Ashley JJA).

162 *Robinson Helicopter* (2016) 331 ALR 550, 558–9 [43] (citations omitted) (French CJ, Bell, Keane, Nettle and Gordon JJ).

227 In respect of the first submission, there was a substantial basis upon which the judge was entitled not to rely on the evidence of Associate Professor Quadrio.

228 As we have noted, the first interview conducted by the associate professor with the respondent was lengthy and detailed. It is quite clear that the respondent spent some time in the interview outlining to Associate Professor Quadrio the various events in his life and how he said that they affected him. In doing so, the respondent told Associate Professor Quadrio that very soon after the abuse, he was affected by it in a number of different ways, which persisted throughout his lifetime. As the primary judge noted, in that respect, the only information that was then available to Associate Professor Quadrio concerning that matter was the account given to her by the respondent at that interview. Most significantly, the respondent's solicitors had chosen not to provide her with material that was central to that issue, and, in particular reports and material from the long-term general practitioner who had been responsible for the medical and psychological care of the respondent, Dr Watson, or any of the three psychologists who had treated him, on a regular and ongoing basis, during the nine years that had preceded the first interview with Associate Professor Quadrio.

229 In addressing and forming her conclusion as to the possible or probable effects of Coffey's abuse, it would have been most relevant, and indeed critical, for Associate Professor Quadrio to have been provided with the reports of the three treating psychologists, most particularly Dr Pagano. In particular, it would have been relevant for Associate Professor Quadrio to be informed that the respondent had told him that, apart from the fact that his parents were strict Catholics, he had otherwise enjoyed a 'relatively normal early childhood without significant trauma' before he suffered physical and psychological abuse at St Patrick's School, and that since suffering that abuse at school, he had experienced panic attacks. It would also be relevant for Associate Professor Quadrio to have been provided with the report of Dr Pagano in which he stated that the respondent had maintained some anger about his parents not having protected him from the teacher's abuse, that while at school the respondent had experienced 'multiple incidents of victimisation, bullying, being singled out and humiliated'.

230 The respondent, at the first interview, did inform Associate Professor Quadrio that he had been attending Dr Pagano, and that he did not advise Dr Pagano of the abuse, because of his feelings of shame. He told the associate professor that he had to build trust with Dr Pagano before he could speak about it.

231 However, by the time that Associate Professor Quadrio first examined the respondent in February 2020, the respondent had attended multiple treatment sessions with Dr Pagano, in which he had related to Dr Pagano, in some detail, all the other incidents in his life. The respondent did not attend Dr Pagano for the purposes of recounting to him his problems. Rather, those attendances were for the specific purpose of obtaining psychological counselling that would address and treat his emotional and psychological problems and the causes that underlay them.

232 In those circumstances, it would have been particularly relevant to Associate Professor Quadrio to have been provided with reports from Dr Pagano, which made it plain that the respondent had not even mentioned the abuse to him, let alone subjectively

attributed any of his problems to that abuse. Such material, if it had been available to Associate Professor Quadrio, would have provided her with a proper basis upon which to form an expert conclusion as to whether or not the abuse perpetrated by Coffey had made any material contribution to the psychological problems suffered by the respondent up to the time at which he learned of the 2018 notice. The judge was, in our view, entirely correct to conclude that Associate Professor Quadrio did not have 'anything like the picture of DP in his life that emerged in the course of the trial'.[163]

233 It may be acknowledged that at the time at which Associate Professor Quadrio provided her second report (in June 2021) she had been provided with a report by Dr Pagano to the respondent's previous solicitors dated 31 March 2015, as well as with the statement that was made by the respondent in his claim to Towards Healing dated 10 November 2014. However, it would not seem that that material effectively repaired the hiatus in information that was originally available to Associate Professor Quadrio when she formulated the opinion contained in her first report, and which she appears to have repeated in her second report. In the letter written by Dr Pagano dated 31 March 2015, he attributed the respondent's psychological conditions to the circumstances in which his parents died as a result of the motor vehicle accident in March 1985, as well as to the abuse to which he had been subjected at school, and the subsequent death of his sister, K. Relevantly, Associate Professor Quadrio, in her second report, having referred to Dr Pagano's report, stated: 'In essence I would concur with Dr Pagano's assessment of [DP]'. In any event, the judge was entitled to be less persuaded by an opinion adhered to after the provision of an incomplete history, than one formed initially upon the basis of a full and complete history.

234 Further and importantly, the judge, having had the opportunity of observing the respondent in evidence and under cross-examination, concluded that he had 'considerable reservations to the point of substantive doubt' as to the reliability of the evidence given by the respondent as to the effects of the Coffey assaults on him.[164] The judge formed that conclusion, concerning the reliability of that aspect of the respondent's evidence, having had the advantage of observing the respondent give evidence, and be cross-examined in some detail. That conclusion was reinforced by the contemporaneous reports written by Dr Pagano, which attributed the respondent's problems to other incidents and trauma that he had experienced during his life.

235 As the judge observed, the respondent's account of the relationship between the Coffey assaults and the onset of his lifelong symptoms was 'squarely contradicted' by several out-of-court statements which he had made and histories he had given to the treating professionals. The judge further noted that the respondent had not only not made any reference to those assaults in the course of giving those histories and making those statements, but he had described having had a normal childhood up until the time at which he suffered abuse at the hands of the school teacher.[165] The judge's conclusion was further fortified by the *Jones v Dunkel* inference that was available as a result of the failure of the respondent to call in evidence his treating psychologist, and members of his family and friends who had known him when he was younger.

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163 Ibid [382].
164 Ibid [76].
165 Ibid [404].

236 For those reasons, we are not persuaded that the judge erred in not accepting the expert opinion given by Associate Professor Quadrio that there was a causal connection between the Coffey abuse and the psychological issues suffered by the respondent up to the time at which he learned of the 2018 notice.

237 The second point, raised by counsel under the cross-appeal, is that it is inconceivable that the abuse perpetrated by Coffey could not have caused some material psychological harm to the respondent. As counsel put it, that abuse was the 'first intrusion' into the respondent's psychiatric wellbeing. Thus, it was submitted that it was not open to the judge to conclude that the respondent did not suffer any psychological sequelae as a result of the abuse committed by Coffey.

238 In addressing that point, it is important to understand properly the conclusion that the judge formed about the relationship between the assaults by Coffey on the respondent, and the respondent's current psychological condition.

239 It is clear from his reasoning that the judge rejected the case made by the respondent that he suffered injury and symptoms at the time of, and resulting from, the assaults committed by Coffey. However, the judge was satisfied that when the respondent read the December 2018 advertisement, his memories of the assaults were 'revived' and since then had played a material role in the production of his symptoms of anxiety and depression.[166] In that way, the judge was satisfied that since the respondent saw the December 2018 advertisement, his 'psyche had been detrimentally affected by the "reawakened memories" of the two instances of assault'.[167]

240 In reaching that conclusion, the judge stated that while he regarded the opinion of Dr Jager as 'less than satisfactory', he considered that the doctor was right in ascribing some portion of the respondent's current psychological symptoms to the assaults.[168] In that respect, the judge evidently referred to the opinion expressed by Dr Jager that the abuse had predisposed the respondent to anxiety, so that Dr Jager attributed one part (one sixth) of his current anxiety condition to that abuse.

241 In that way, and contrary to the submission advanced on behalf of the respondent, the judge did not conclude that the assaults committed by Coffey did not have any relevant effect on the respondent's psychiatric state. Based on the opinion of Dr Jager, that the assaults had predisposed the respondent to anxiety, the judge concluded that the assaults did have some causative effect, albeit that the symptomatic sequelae of that effect had remained dormant until the respondent's memories of the assaults had been reactivated by the December 2018 notice.[169] As we have already discussed, and for the reasons we have given, we are satisfied that there was a substantial basis for the judge to form that conclusion.

242 That conclusion does leave open one further matter for consideration. The respondent's claim for damages was based on the tort of trespass to the person, which is actionable

166 Ibid [401].
167 Ibid [414].
168 Ibid [418].
169 Compare *March v E & MH Stramare Pty Ltd* (1991) 171 CLR 506, 514 (Mason CJ); [1991] HCA 12.

per se.[170] In the absence of any evidence as to injury at all, the respondent would have been entitled to an award of general damages as compensation for the assaults. In determining the amount of those damages, it was relevant to take into account the nature and circumstances of the particular assaults, and in particular, the insult to the respondent's person, and any feelings of distress occasioned by them.[171] The evidence of the respondent, as to his immediate feelings in respect of the assaults, was quite limited. He did give evidence that, at the time of the second assault in the tent, he reacted by yelling out to his mother, and himself exiting the tent. Nevertheless, it would be indisputable that the reprehensible assaults committed by Coffey on the five year old respondent must have been particularly confronting and unpleasant experiences for him, albeit that he did not suffer any psychological sequelae as a result of them for a number of years.

243 The judge's award of $200,000 damages to compensate the respondent for his pain and suffering and loss of enjoyment of life did not expressly include a specific allowance for the nature and circumstances of the assaults. However, the award of $20,000 of aggravated damages was directed to the circumstances of the indecent assaults, and to the respondent's suffering at the time of them, albeit that the judge focussed on the breach of trust by Coffey in perpetrating of both assaults, and the furtive and clandestine manner in which they were committed.[172] Taking into account the amount of damages awarded to the respondent as general damages and aggravating damages, we are satisfied that they did subsume a sufficient measure of compensation for the immediate injury occasioned to the respondent's person and feelings by the indecent assaults.

244 For those reasons, the respondent does not succeed on the cross-appeal.

Summary of conclusions

245 For the foregoing reasons, the applicant has failed to succeed on either of the two grounds of appeal relied on. We grant the applicant leave to appeal on those grounds, but otherwise dismiss the appeal.

246 Similarly, we grant the respondent leave to appeal the award of damages made by the primary judge, but dismiss that appeal.

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170 *Carter v Walker* (2010) 32 VR 1, 38 [215] (Buchanan, Ashley and Weinberg JJA).

171 *Forde v Skinner* (1830) 4 Car & P 239, 240; 172 ER 687; *Hurst v Picture Theatres Ltd* [1915] 1 KB 1,10 (Buckley LJ); *Loudon v Ryder* [1953] 2 QB 202, 208-9 (Singleton LJ).

172 Reasons, [454] –[455]; cf *Carter v Walker* (2010) 32 VR 1*,* 53 [283]; *De Reus v Gray* (2003) 9 VR 432, 452 [28] (Winneke P).