IN THE SUPREME COURT OF VICTORIA
AT MELBOURNE
COMMON LAW DIVISION
INSTITUTIONAL LIABILITY LIST

Not Restricted

S ECI 2021 2370

THE ESTATE OF THE LATE BERNARD LESLIE HEALY
SANDRA JOY PORTER
LUKE HEALY-PORTER
NIKI JAYNE PORTER

Plaintiffs

v

BISHOP PAUL BERNARD BIRD
THE TRUSTEES OF THE SISTERS OF ST JOSEPH

Defendants

JUDGE:	Keogh J
WHERE HELD:	Melbourne
DATE OF HEARING:	15 December 2022
DATE OF RULING:	28 December 2022
CASE MAY BE CITED AS:	Healy & Ors v Bird & Anor
MEDIUM NEUTRAL CITATION:	[2022] VSC 823

INSTITUTIONAL LIABILITY — Strike out application — Whether fiduciary relationship between Diocese and child parishioner — Claim for damages for personal injury by the first plaintiff — Whether pleaded fiduciary duty claim certain to fail — Content of duty alleged — Whether compensation for personal injury available for breach of fiduciary duty — *Hospital Products Ltd v United States Surgical Corp* (1984) 156 CLR 41 — *Williams v Minister, Aboriginal Land Rights Act 1983* (1994) 35 NSWLR 497 — *Breen v Williams* (1996) 186 CLR 71 — *Paramasivam v Flynn* (1998) 90 FCR 489 — *Williams v Minister, Aboriginal Land Rights Act 1983* [1999] NSWSC 843 — *Cubillo v Commonwealth of Australia* (2001) 112 FCR 455 — Duty of care to secondary victims — No relationship with secondary victims at time of allegedly tortious act — Availability of aggravated damages — Availability of exemplary damages — *Tame v New South Wales* (2002) 211 CLR 317 *Caltex Refineries (Qld) Pty Limited v Stavar* (2009) 75 NSWLR 649 — *King v Philcox* (2015) 255 CLR 304 — *Supreme Court (General Civil Procedure) Rules 2015* (Vic) rr 4.02, 23.02.

PRACTICE AND PROCEDURE — Trial of preliminary questions relating to duty owed to secondary victims — Where finding of facts necessary — Overlap in evidence to be led — Interests of justice — *Supreme Court (General Civil Procedure) Rules 2015* (Vic) r 47.04 — *Civil Procedure Act 2010* (Vic) s 49.

APPEARANCES:	Counsel	Solicitors
For the Plaintiffs	S Brenker	Ken Cush & Associates
For the First Defendant	R Annesley KC C Morshead	Colin Biggers & Paisley
For the Second Defendant	B House	Carroll & O'Dea Lawyers

HIS HONOUR:

1 The plaintiffs allege that in the mid-1970s, Bernard Healy was sexually assaulted on multiple occasions by Bryan Coffey ('abuse'). At the time of the alleged abuse, Healy was a student at St Joseph's Primary School, Ouyen and an altar boy at the local Catholic Church, and Coffey was the parish priest.

2 Healy died in 2018. His estate is named as first plaintiff. The second plaintiff was Healy's partner from the mid-1980s. The third and fourth plaintiffs are the children of Healy and the second plaintiff, who were born in 1989 and 1990 respectively.

3 Ouyen is in the Catholic Diocese of Ballarat ('Diocese'). Coffey was appointed to the position of parish priest by then Bishop of Ballarat, Ronald Mulkearns. The Sisters of St Joseph of the Sacred Heart ('Sisters') had a role in operating the school. The Diocese and the Sisters are unincorporated associations. The first and second defendants are named as proper defendants under the *Legal Identity of Defendants (Organisational Child Abuse) Act 2018* (Vic) ('*Legal Identity Act*').

4 The plaintiffs allege there was negligence by the Sisters, and negligence and breach of fiduciary duty by the Diocese that was a cause of the abuse and the resulting injury, loss and damage suffered by Healy, and that both organisations are vicariously liable for the acts perpetrated by Coffey. The second to fourth plaintiffs ('family plaintiffs') allege that the Diocese and the Sisters breached duties owed to them as secondary victims of the abuse, and as a result they have suffered loss and damage.

5 The proceeding is currently fixed for trial on 28 February 2023 before a judge and jury on an estimate by the parties that it will occupy ten sitting days.

6 The first defendant has applied, pursuant to r 23.02 of the *Supreme Court (General Civil Procedure) Rules 2015* ('Rules') to strike out paragraphs of the plaintiffs' amended statement of claim that plead the fiduciary duty claim made by the first plaintiff, the negligence claims made by the family plaintiffs and claims for aggravated and exemplary damages. In the alternative, the first defendant applied pursuant to r 4.02 and 47.04 of the Rules and/or s 49 of the *Civil Procedure Act 2010* (Vic) ('Act') for the

following questions to be heard and determined as preliminary questions before the trial of the proceeding:

(a) Did the Diocese of Ballarat owe a "*parishioner fiduciary duty*" to parishioners, including the first plaintiff, in the terms alleged at paragraphs 48 and 50 of the Amended Statement of Claim?

(b) Did the Diocese of Ballarat owe a "*child parishioner fiduciary duty*" to child parishioners, including the first plaintiff, in the terms alleged at paragraphs 49 and 50 of the Amended Statement of Claim?

(c) Did the first defendant owe the second plaintiff, the third plaintiff and/or the fourth plaintiff any duty of care, either at common law or pursuant to the *Wrongs Act 1958* (Vic), in the terms alleged at paragraphs 63 to 68 of the Amended Statement of Claim?

The second defendant supports the application by the first defendant. The application is opposed by the plaintiffs.

Pleaded case

7 The following facts are pleaded in the plaintiffs' amended statement of claim.

8 Healy was born in 1962 and attended the school from 1967 to 1976. He was an altar boy at St Joseph's Church for three or four years, and a parishioner in the Parish of Ouyen until his mid to late teenage years.

9 Coffey was ordained as a priest in the Diocese in around 1960. He was appointed parish priest at Ouyen by the Bishop of the Diocese in around May 1972 and remained in that position until July 1978. The Diocese was responsible for Coffey being the parish priest, appointed Coffey to or placed him at the school, and was Coffey's employer, overseer, supervisor and/or the body otherwise in control of Coffey in respect of the exercise by him of his responsibilities.

10 Members of the Sisters occupied the positions of principal and teachers at the school, had the care, control and management of the school, engaged or permitted Coffey to provide pastoral care, education and sports coaching to students at the school, or alternatively, delegated those functions to Coffey, and were the supervisor or otherwise in control of Coffey in respect of the exercise by him of his responsibilities.

11 Coffey lived in the Ouyen presbytery on premises also occupied by the school and the church.

12 Coffey was in a relationship of authority, power and trust with the students at the school, including Healy.

13 Between 1960 and 1975, in four parishes in the Diocese, Coffey indecently assaulted at least nine children.

14 Coffey conducted cross-country running practice for children during lunchtimes at the school which involved students changing into and out of their running attire and showering in the presbytery in Coffey's presence.

15 Between 1975 and 1976, in the course of conducting cross-country running practice, in the playground at the school oval, and in the sacristy of the church, Coffey intentionally physically and sexually abused Healy. The plaintiffs allege the abuse was committed by Coffey while he was carrying out, or purportedly carrying out his responsibilities and priestly duties at the church and the school while a servant, agent or otherwise under the control of the Diocese and the Sisters.

16 The plaintiffs allege that the defendants knew, suspected or ought to have known that Coffey was capable of abusing his position as parish priest at Ouyen to commit, or alternatively attempt to commit child abuse.

History of proceedings

17 The plaintiffs commenced the proceeding by filing a writ and statement of claim on 2 July 2021.

18 Defences were filed by the first defendant on 20 September 2021 and by the second defendant on 5 November 2021.

19 Orders were made on 9 November 2021 setting a timetable to a trial listed to commence on 28 February 2023.

20 The plaintiffs filed an amended statement of claim and replies to both defences on 3

December 2021. The amendments to the statement of claim are not material to the first defendant's strike out application.

21 On 8 March 2022, the plaintiff's filed further and better particulars in response to requests by both the defendants. The plaintiff's filed a further response to the request by the first defendant on 1 December 2022.

22 As far as I am aware the proceeding remains on track for the trial to commence on the scheduled date.

23 The first defendant's strike out summons was filed on 28 November 2022.

Strike-out application

24 The first defendant relied on r 23.02, which provides:

> Where an indorsement of claim on a writ or originating motion or a pleading or any part of an indorsement of claim or pleading—
>
> (a) does not disclose a cause of action or defence;
>
> …
>
> the Court may order that the whole or part of the indorsement or pleading be struck out or amended.

25 An application under r 23.02 is determined on the pleadings only without reference to evidence. The application proceeds on an assumption that the facts pleaded in the amended statement of claim have been established.

26 Rule 23.02 applies when a party challenges the sufficiency of a pleading as distinct from whether a valid claim is possible.

27 The power to strike out a pleading is discretionary. Where the objection is that no cause of action is disclosed by a pleading, the power should only be exercised if 'the claim is so manifestly hopeless that a trial would be a futility'.[1]

28 An application under r 23.02 to strike out a pleading should be made promptly.

[1] *Opat Decorating Service (Vic) Pty Ltd v Jennings Group Ltd* (Supreme Court of Victoria, Byrne J, 16 September 1994) [5]; *Brinson v Rocla Concrete Pipes Ltd* [1982] 2 NSWLR 937, 942 (Cross J).

Fiduciary claim

29 The plaintiffs plead the following fiduciary duties:

48 At all material times, the Diocese, as a constituent part of the Catholic Church, owed a duty to each parishioner, in each of the parishes comprising the Diocese, to act with undivided loyalty in the interests of that parishioner, including by not promoting the interests of the Diocese (and/or of the Catholic Church) at the expense of the interests of the parishioner (**the Parishioner Fiduciary Duty**).

Particulars

The power and authority exercised by the Diocese over parishioners, and the position of trust occupied by the Diocese, arising from:

(i) clericalism, in that parishioners saw Catholic priests as sacred persons or as God's representatives on Earth with spiritual authority;

(ii) the role of the Diocese (and/or of the Catholic Church) in acting in the spiritual and emotional interests of its parishioners, including through providing sermons, communions, spiritual guidance and absolution to its parishioners, and through receiving confessions in confidence;

(iii) the role of the Diocese (and/or of the Catholic Church) in providing guidance as to matters of sexuality and how and when it accords with the teaching of the Church;

(iv) the trust reposed by parishioners in Catholic priests;

(v) the vulnerability of parishioners to abuse by the Diocese of its position as described herein.

49 Additionally and/or alternatively, at all material times, the Diocese, as a constituent part of the Catholic Church, owed a duty to each child parishioner who was one or more of –

(a) an altar boy,

(b) a student at a Catholic school,

(c) a child attending activities organised by the Diocese,

in each of the parishes comprising the Diocese, to act with undivided loyalty in the interests of that child parishioner, including by not promoting the interests of the Diocese (and/or of the Catholic Church) at the expense of the interests of the parishioner (**the Child Parishioner Fiduciary Duty**).

Particulars

The particulars to par 48 are repeated. Additionally:

(i) the role of Catholic priests as in loco parentis to child parishioners;

(ii) the opportunity of Catholic priests to be alone with child parishioners;

(iii) the revered status of Catholic priests gaining a unique degree of access to child parishioners;

(iv) the special vulnerability of children arising from their lack of emotional and psychological maturity;

(v) the special vulnerability of children to adults in positions of power and authority;

(vi) the special vulnerability of child parishioners to grooming by Catholic priests.

30 The plaintiffs plead the content of the fiduciary duties as follows:

> 50 The content of the Parishioner Fiduciary Duty (in respect of a child) and/or of the Child Parishioner Fiduciary Duty was and is, at a minimum, to:
>
> (a) act at all times in the best interests of the child;
>
> (b) ensure that any member of the clergy, entrusted with the care of the child, will not perpetrate child abuse against that child;
>
> (c) stand aside from the ministry any priest against whom an allegation of child abuse is made, from the moment it is made; and
>
> (d) act on the allegation, not by moving the priest from one parish to the next, but by informing police.

31 The plaintiffs plead that the Diocese breached the fiduciary duties by appointing Coffey parish priest and maintaining him in that appointment, thus enabling him to perpetrate the abuse. The plaintiffs claim damages for the personal injuries allegedly suffered by Healy as a result of the abuse.

32 The first defendant made two complaints about the pleaded fiduciary duties. First, that there is no authority or proper basis for the imposition of the duty. Second, that as the Diocese was an unincorporated association it could not be found capable of owing a fiduciary duty. As the plaintiffs had not identified a specific member of the

Diocese who owed the duty, the claim as pleaded must necessarily fail.

33 The accepted categories of fiduciary relationships, or the circumstances in which a fiduciary duty may be found outside an accepted category, are not closed.[2] In *Hospital Products Ltd v United States Surgical Corp*, Mason J, describing the features of a fiduciary relationship, said:

> The accepted fiduciary relationships are sometimes referred to as relationships of trust and confidence or confidential relations (cf. *Phipps v. Boardman* (25)), viz., trustee and beneficiary, agent and principal, solicitor and client, employee and employer, director and company, and partners. The critical feature of these relationships is that the fiduciary undertakes or agrees to act for or on behalf of or in the interests of another person in the exercise of a power or discretion which will affect the interests of that other person in a legal or practical sense. The relationship between the parties is therefore one which gives the fiduciary a special opportunity to exercise the power or discretion to the detriment of that other person who is accordingly vulnerable to abuse by the fiduciary of his position. The expressions "for", "on behalf of", and "in the interests of" signify that the fiduciary acts in a "representative" character in the exercise of his responsibility, to adopt an expression used by the Court of Appeal.[3]

In *Breen v Williams* ('*Breen*'), Gaudron and McHugh JJ said:

> However, the categories of fiduciary relationship are not closed, and the courts have identified various circumstances that, if present, point towards, but do not determine, the existence of a fiduciary relationship. These circumstances, which are not exhaustive and may overlap, have included: the existence of a relation of confidence; inequality of bargaining power; an undertaking by one party to perform a task or fulfil a duty in the interests of another party; the scope for one party to unilaterally exercise a discretion or power which may affect the rights or interests of another; and a dependency or vulnerability on the part of one party that causes that party to rely on another.[4]

34 The plaintiffs relied on the relationship of priest and penitent, which they submitted existed between the Diocese and Healy and was an accepted category of fiduciary relationship.[5] Further, the plaintiffs submitted the pleaded relationship was analogous to the established fiduciary relationship of guardian and ward.[6] Even if

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2 *Hospital Products Ltd v United States Surgical Corp* (1984) 156 CLR 41, 68 (Gibbs CJ) ('*Hospital Products*').

3 Ibid 96–97 (Mason J).

4 (1996) 186 CLR 71, 107 (Brennan CJ, Dawson, Toohey, Gaudron, McHugh and Gummow JJ) ('*Breen*') (citations omitted).

5 *Brunninghausen v Glavanics* (1999) 46 NSWLR 538, 555 (Handley JA); *Goldie v Getley [No 3]* [2011] WASC 132, [140] (Simmonds J).

6 *Hospital Products* (n 2) 141 (Dawson J); *Bennett v Minister for Community Welfare* (1992) 176 CLR 408, 426 (Mason CJ, Deane, Toohey, Gaudron and McHugh JJ); *Williams v Minister, Aboriginal Land Rights Act 1983* (1994) 35 NSWLR 497, 511 (Kirby P, Priestley JA and Powell JA) ('*Williams*'); *Trevorrow v South Australia (No 5)* (2007) 98 SASR 136, 343 [995] (Gray J).

neither established category applies, the plaintiffs' pleading alleges features of the relationship between the Diocese and child parishioners that the authorities recognise as being consistent with the existence of a fiduciary relationship.

35 The duty of the fiduciary is to avoid conflict between the relevant interests of the beneficiary and their personal interest, and not to profit from their position as fiduciary.[7] The plaintiffs' pleading relies on the potential for conflict between the interests of child parishioners in being free of the risk of sexual abuse by members of the clergy, and the interests of the Diocese. However, the current pleading is deficient in that it does not set out the particular interests of the Diocese that are relevant, or how those interests were potentially in conflict with the interests of child parishioners. This is relevant to the content of the duty as it is currently pleaded, about which I will say more shortly.

36 The plaintiffs relied on two decisions in support of a submission that compensation for breach of fiduciary duty could extend to the personal injury and loss allegedly suffered by Healy. The first case, *Williams v Minister, Aboriginal Land Rights Act 1983* ('*Williams*'),[8] concerned an application to extend the time to sue by an Aboriginal plaintiff claiming injury by reason of negligence, wrongful detention and breach of fiduciary duty in relation to the conduct of the Aboriginal Welfare Board in removing him from his family when he was a child. The appeal against the trial judge's refusal to extend time was allowed by Kirby P and Priestley JA on the basis of the negligence and wrongful detention causes of action. In respect of the fiduciary duty claim, Kirby P said:

> But can it be said that the action for breach of fiduciary duty is so hopeless that this established legal error matters not? I do not believe that it can. The Board was in the nature of a statutory guardian of Ms Williams. The relationship of guardian and ward is one of the established fiduciary categories: see *Hospital Products Ltd v United States Surgical Corporation Inc* (1984) 156 CLR 41 at 141f; *Bennett v Minister for Community Welfare* (1992) 176 CLR 408 at 426f. The Board was, in my view, arguable obliged to Ms Williams to act in her interest and in a way that truly provided, in a manner apt for a fiduciary, for her "custody, maintenance and education". I consider that it is distinctly arguable that a

7 *Breen* (n 4) 92–93; *Paramasivam v Flynn* (1998) 90 FCR 489, 504 (Miles, Lehane and Weinberg JJ) ('*Paramasivam*').

8 *Williams* (n 6).

> person who suffers as a result of a want of proper care on the part of a fiduciary, may recover equitable compensation from the fiduciary for the losses occasioned by the want of proper care: cf *Norberg v Wynrib* [1992] 4 WWR 577 at 606; (1992) 92 DLR (4th) 499. In other jurisdictions, compensation for breach of fiduciary duty has been held to include recompense for the injury suffered to the plaintiff's feelings: see, eg, *Szarfer v Chodos* (1986) 27 DLR (4th) 388; *McKaskell v Benseman* [1989] 3 NZLR 75.[9]

37 The second case relied on by the plaintiffs was *Illuzzi v Edwards* ('*Illuzzi*'),[10] which concerned a claim against a respondent church in respect of the loss to the appellant on sale of a property she offered as security for the indebtedness of a church member. The appellant claimed the church was 'vicariously liable' for the misconduct of the church member. Direct fiduciary duty was not pleaded. The appellant's claim against the church was dismissed at trial and on appeal. On appeal, Williams J discussed the fiduciary relationship of 'priest and penitent':

> Numerous authorities establish that the relationship between "priest and penitent" will in appropriate circumstances give rise to a fiduciary relationship which may well call into play the rules regarding undue influence. But, as I pointed out in *Clark v. The Corporation of the Trustees of the Roman Catholic Archdiocese of Brisbane and Rush* (unreported, No 1007 of 1994, judgment delivered 20 December 1996) the mere relationship of church and communicant does not automatically in all circumstances give rise to a fiduciary relationship or impose on the church a duty to protect the communicant from foreseeable risks of harm. Nothing said in the course of argument in this case has caused me to alter the views therein expressed.
>
> This case can readily be distinguished from situations where the church authority knew of the improper conduct on the part of its servant and by failing to take appropriate action breached the fiduciary relationship which existed between it and the member of its congregation. The New South Wales Court of Appeal was only concerned with procedural matters in delivering judgment in *Archbishop of Perth v. "AA" to "JC" Inclusive* (1995) 18 ACSR 333, but nevertheless there are statements in the judgments which indicate that the plaintiffs arguably had a viable cause of action. In that case the relevant claim was that the church breached its fiduciary duty "in failing to respond resolutely to the reports and complaints of sexual and other abuse which ... the church's hierarchy ignored" (337). That situation is similar to that considered by the Supreme Court of Colorado in *Moses v. The Diocese of Colorado* 863 P. 2d 310 (Colo 1993). The allegation there was that a priest established a sexual relationship with a mentally disturbed woman whom he was counselling. The local bishop became aware of the relationship, became involved in the controversy, and prohibited the victim from discussing the relationship with anyone other than another priest or counsellor. There was also an allegation that the bishop failed to help the victim even though he knew that she was very vulnerable. The appellate court found that there was evidence on which the

9 *Williams* (n 6) 511.

10 (1997) Q Conv R 54–490 (Fitzgerald P, Williams and Lee JJ).

> jury could have returned its verdict that there had been a breach of fiduciary duty owed to the parishioner.
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> Perhaps the high water mark is represented by the decision of Goodfellow J of the Nova Scotia Supreme Court in *FWM v. Mombourquette and Roman Catholic and Episcopal Corporation of Antigonish* (1995) 28 CCLT (2d) 157. That was a claim for damages against both a priest and the church with respect to the sexual assaults upon a young boy committed by the priest. The evidence did not disclose any actual knowledge by the diocese nor circumstances in which the diocese ought to have known that the priest was engaging in criminal sexual assaults. Nevertheless it was held that a fiduciary relationship existed between the "diocese by its servant or agent, the parish priest and the parishioners." The judgment went on to hold at 180 that the "Diocese, through its servants and agents, has a fiduciary or trust duty to care for and protect the child from any abuse by the power the priest holds over the child." It may well be of significance that that case was concerned with a child because the learned judge referred to the fact that the dependency and control in question exceeded that of parent and child. However the decision is of no relevance for present purposes because such a relationship was not directly pleaded or relied on at trial in this particular case.[11]

38 Further, the plaintiffs relied on what they submitted were the indications from the High Court of a willingness to recognise fiduciary duties in the context of non-economic loss. In *Tame v New South Wales* ('*Tame*'), McHugh J said:

> Arguably, the employer also owed a fiduciary duty to Mr and Mrs Annetts as well as to their son. But that duty, like the contractual duty, was not pleaded. Nevertheless, the facts pleaded were "sufficient, at law, to give rise to an independent tortious duty of care owed by [the respondent] to [the applicants] to exercise reasonable care and skill to avoid causing them psychiatric injury".[12]

The plaintiffs submitted that they should be permitted to make arguments at trial that fiduciary duties can be recognised to protect non-economic interests, and for this important question of law to be finally determined.

39 There was no further explanation by McHugh J of what he meant when referring to the possibility of a fiduciary duty in *Tame*, or what claim by the Annetts that may found. The fiduciary duty discussions by Kirby P in *Williams,* Williams J in *Illuzzi*, and the comments by McHugh J in *Tame* are dicta. There is, on the other hand, a clear line of authority commencing with *Breen*, and more particularly in relation to the nature

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11 Ibid [9]–[11].

12 (2002) 211 CLR 317, 367 [146] (Gleeson CJ, Gaudron, McHugh, Gummow, Kirby, Hayne and Callinan JJ). See also *Mabo v Queensland (No 2)* (1992) 175 CLR 1, 199 and 205 (Toohey J); *Secretary, Department of Health and Community Services v JWB and SMB* (1992) 175 CLR 218, 317 (McHugh J).

of the plaintiffs' proposed claim, *Paramasivam v Flynn*[13] ('*Paramasivam*') that highlight the difficulty faced by the plaintiffs in maintaining the fiduciary duty claim as pleaded.

40 There are three hurdles or barriers faced by the plaintiffs in relation to the pleaded fiduciary duty claim. There is overlap between these barriers. The first relates to the content of the alleged duty and the nature of the alleged breach. The plaintiffs' pleading alleges that the Diocese owed Healy a broad fiduciary duty to act in his best interests, and that this involved an obligation on the Diocese to take certain positive steps in relation to the appointment of parish priests. The content of the fiduciary duties pleaded by the plaintiffs are prescriptive or positive duties to act in the best interests of child parishioners rather than proscriptive or negative duties not to act in conflict with the interests of child parishioners protected by the fiduciary relationship. The authorities support the principle that fiduciary duties are largely proscriptive in nature.

41 Second, while fiduciary duties may coexist with liability in tort, including negligence[14] they have not been accepted when they are pleaded as simply replicating a claim for damages for breach of a common law duty of care. The authorities deprecate pleading fiduciary duties covering the same ground as common law duties of care in order to remedy or perfect a claim that might otherwise be barred, for example because the limitation period has expired, or because some other restriction or difficulty is faced.

42 Third, the harm which the plaintiffs claim Healy suffered and the damages they seek as a result has not been recognised in Australian law as giving rise to an entitlement in equity for breach of fiduciary duties. Fiduciary duties are directed to protection of economic and property interests.

43 The plaintiffs may be able to establish that there was a fiduciary relationship between the Diocese and child parishioners. However, the duty owed by a fiduciary does not

13 *Paramasivam* (n 7).
14 Ibid 507–8.

attach to every aspect of the fiduciary's conduct.[15] In *Breen*, discussing the difference between Australian and Canadian authorities, Gaudron and McHugh JJ said:

> One significant difference is the tendency of Canadian courts to apply fiduciary principles in an expansive manner so as to supplement tort law and provide a basis for the creation of new forms of civil wrongs. The Canadian cases also reveal a tendency to view fiduciary obligations as both proscriptive and prescriptive. However, Australian courts only recognise proscriptive fiduciary duties. …
>
> In this country, fiduciary obligations arise because a person has come under an obligation to act in another's interests. As a result, equity imposes on the fiduciary proscriptive obligations - not to obtain any unauthorised benefit from the relationship and not to be in a position of conflict. If these obligations are breached, the fiduciary must account for any profits and make good any losses arising from the breach. But the law of this country does not otherwise impose positive legal duties on the fiduciary to act in the interests of the person to whom the duty is owed. If there was a general fiduciary duty to act in the best interests of the patient, it would necessarily follow that a doctor has a duty to inform the patient that he or she has breached their contract or has been guilty of negligence in dealings with the patient. That is not the law of this country.[16]

Similarly, Gummow J said:

> Fiduciary obligations arise (albeit perhaps not exclusively) in various situations where it may be seen that one person is under an obligation to act in the interests of another. Equitable remedies are available where the fiduciary places interest in conflict with duty or derives an unauthorised profit from abuse of duty. It would be to stand established principle on its head to reason that because equity considers the defendant to be a fiduciary, therefore the defendant has a legal obligation to act in the interests of the plaintiff so that failure to fulfil that positive obligation represents a breach of fiduciary duty.[17]

44 *Paramasivam* concerned a claim by the appellant for damages for personal injuries suffered as a result of alleged sexual assaults by the respondent. At the time of the alleged assaults the appellant was a child and the respondent was the appellant's guardian. On appeal, the Court noted the lack of any detailed pleading of material facts of the alleged fiduciary relationship, or that defined the scope of duties arising from it. The Court said the relationship of guardian and ward may give rise to fiduciary duties, but that the claim sought to be advanced by the appellant was novel because of 'the nature of the alleged breach and the kinds of loss or injury which the

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15 *Breen* (n 4) 82 (Brennan CJ).
16 Ibid 113 (Gaudron, McHugh JJ).
17 Ibid 137-138 (Gummow J).

appellant claims to have suffered and for which he seeks equitable compensation.'[18]

The Court noted that in Anglo-Australian law fiduciary duties have been directed to the protection of economic interests, and said:

> Of course, conduct such as that alleged against the respondent in this case can readily be described in terms of abuse of a position of trust or confidence, or even in terms of the undertaking of a role which may in some respects be representative and, within the scope of that role, allowing personal interest (in the form of self-gratification) to displace a duty to protect the appellant's interests. But it should not be concluded, simply because the allegations can be described in those terms, that the appellant should succeed in an action for breach of fiduciary duty if the allegations are made good. What the apparent applicability of the descriptions illustrates is not only the incompleteness but also the imperfection of all the individual formulae which have at various times been suggested as encapsulating fiduciary relationship or duty. The principles can be understood only in the context of the way in which the courts have applied them. In that context the success of the appellant's fiduciary claims, in this case, would indeed be a novelty.[19]

Having noted that any extension of liability to a novel claim must be justifiable in principle, the Court said:

> Here, the conduct complained of is in within the purview of the law of tort, which has worked out and elaborated principles according to which various kinds of loss and damage, resulting from intentional or negligent wrongful conduct, is to be compensated. That is not a field on which there is any obvious need for equity to enter and there is no obvious advantage to be gained from equity's entry upon it. And such an extension would, in our view, involve a leap not easily to be justified in terms of conventional legal reasoning.[20]

45 After considering Canadian authority and what was said by Kirby P on appeal in *Williams*, the Court said:

> All those considerations lead us firmly to the conclusion that a fiduciary claim, such as that made by the plaintiff in this case, is most unlikely to be upheld by Australian courts. Equity, through the principles it has developed about fiduciary duty, protects particular interests which differ from those protected by the law of contract and tort, and protects those interests from a standpoint which is peculiar to those principles. The truth of that is not at all undermined by the undoubted fact that fiduciary duties may arise within a relationship governed by contract or that liability in equity may co-exist with liability in tort. To say, truly, that categories are not closed does not justify so radical a departure from underlying principle. Those propositions, in our view, lie at the heart of the High Court authorities to which we have referred, particularly, perhaps, *Breen*. It follows that Gallop J was justified in concluding that he was

18 *Paramasivam* (n 7) 504.
19 Ibid 505.
20 Ibid 505.

not persuaded that the appellant's claim based on breaches of fiduciary duty owed by the respondent to the appellant had real prospects of success.[21]

46 In the trial in *Williams*, Abadee J observed:

> Indeed, in my view in the circumstances where similar facts could possibly give rise to a claim in negligence and for breach of fiduciary duty, if there is in the circumstances an action available it should be according to the common law and not otherwise. In my opinion fiduciary duties should not be found, additional to common law duties, merely for forensic purposes in order to avoid or circumvent limitation periods which would apply to common law actions (on the same facts), or to fill a "gap" where such common law actions fail or are not available for good and/or valid reasons. Nor in my view should fiduciary duties be imposed to circumvent the non-imposition of a common law duty, which is denied, for example, for policy reasons, or to support a claim for relief where no breach of any common law duty of care has been established on the merits. Indeed, I see no reason why there should be a concurrent fiduciary obligation or duty to enable a plaintiff in a particular case to even avoid or circumvent an obligation to mitigate damage, to avoid common law principles of causation, novus actus intervenes or to circumvent other common law principles.[22]

47 In *Cubillo v Commonwealth of Australia*,[23] the Full Court of the Federal Court considered a claim for breach of fiduciary duty by a ward against their guardian. The Court observed that fiduciary obligations are conceptually distinct from those in contract and tort, and concluded that:

> [465] Insofar as the appellants' case on fiduciary duties is co-extensive with their case on breach of duty of care, it faces two insurmountable obstacles. …
>
> [466] The second obstacle is that, in any event, the appellants' claims are, to use the language of *Paramasivam v Flynn*, within the purview of the law of torts. As the High Court has held, there is no room for the superimposition of fiduciary duties on common law duties simply to improve the nature and extent of the remedies available to an aggrieved party. If it had been the case that the removal and detention of the appellants were not authorised by the *Ordinances* (or otherwise justified by law), those who caused the removal or detention would be guilty of tortious conduct and liable at common law. There would be no occasion to invoke fiduciary principles.[24]

48 *Paramasivam* has been repeatedly applied by senior trial and appellate courts.[25] In

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21 *Williams* (n 6) 507–8.

22 [1999] NSWSC 843, [735].

23 (2001) 112 FCR 455 (Sackville, Weinberg and Hely JJ).

24 Ibid 477–478.

25 *Webber v New South Wales* [2003] NSWSC 1263 (Dunford J) ('*Webber*'); *Tusyn v State of Tasmania* (2004) 13 Tas R 51 (Blow J) ('*Tusyn*'); *S.B. v State of NSW* (2004) 13 VR 527 (Redlich J) ('*S.B.*'); *State of South Australia v Lampard-Trevorrow* (2010) 106 SASR 331 (Doyle CJ, Duggan J and White J); *Brown v State of New South Wales* [2008] NSWCA 287 (Spigelman CJ, Beazley JA and Handley AJA); *Pope v Madsen* [2016] 1 Qd R 201 (Holmes JA, Mullins J and Henry J) ('*Pope*').

Webber v New South Wales,[26] Dunford J considered an application to strike out a claim based on breach of fiduciary duty brought by a plaintiff alleging injury resulting from sexual and physical assaults that occurred when he was a ward of the State. After considering the relevant authorities, Dunford J concluded:

> In the light of the foregoing, I am satisfied that even if one person stands in a fiduciary relationship to another, such as guardian and ward, the fiduciary duties which arise from such relationship and breach of which gives rise to a right to equitable compensation:
>
> a) are confined to cases where the fiduciary acts for, or exercises a discretion on behalf of, the other party;
>
> b) concern economic or proprietorial rights only, including possibly confidential information (which is itself really a form of property);
>
> c) are proscriptive and not prescriptive; and
>
> d) are not a substitute or alternative description for breaches of duty owed in tort or contract arising out of the same facts or circumstances.[27]

49 In *Tusyn v State of Tasmania*, when striking out a claim for alleged breach of fiduciary duty on the basis it could not succeed, Blow J observed: 'One needs to distinguish between moral duties, non-fiduciary duties imposed by law, and fiduciary duties.'[28]

50 In *S.B v State of New South Wales*, Redlich J said:

> In the present case the Plaintiff alleges that the Defendant as guardian failed to take reasonable or proper care of her as a ward. That duty of care arises not because the Defendant owed a proscriptive obligation or duty to the Plaintiff but because, as guardian, the Defendant was required to protect and promote the Plaintiff's welfare and interests. It is not possible to characterise any of the conduct of the Defendant as falling within the purview of doctrines of equity. The Defendant has not put itself in a position of either accruing a benefit from or being in conflict with the Plaintiff. Intentional, negligent and/or wrongful conduct may be appropriately compensated by common law principles. It follows that in this case, the claim for equitable compensation as a consequence of a breach of fiduciary duty must fail.[29]

51 Finally, the decision in *Pope v Madsen* ('*Pope*')[30] concerned a claim by the respondent against the applicant who was her biological father and against her biological mother

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26 *Webber* (n 25).
27 Ibid [47].
28 *Tusyn* (n 25) 56 [11].
29 *S.B.* (n 25) 623 [661] (citations omitted).
30 *Pope* (n 25).

for equitable damages for injuries suffered as a result of sexual abuse by her father. On appeal from the trial judge's refusal to strike out the relevant part of the respondent's pleading, Mullins J, having reviewed the authorities, said:

> [32] … The problem for the respondent is that the statements of principle in *Breen*, *Paramasivam* and *Cubillo* are equally applicable where a plaintiff seeks to hold a parent liable for equitable compensation for personal injury suffered as a result of breach of fiduciary duty involving sexual and like abuse which is the usual domain of a claim for damages of personal injury.
>
> [33] … In light of the principled basis on which the High Court in *Breen* distinguished the Canadian approach to the imposition of a fiduciary duty to vindicate non-economic interests that are covered by the law of tort, its application in *Paramasivam* and *Cubillo*, and with no signs otherwise of it being an evolving area of the law, the current state of the Australian law can be expressed definitively in terms that the respondent has no maintainable cause of action against the applicant for breach of fiduciary duty on the basis of the pleaded facts.[31]

52 In most if not all of the above authorities there were issues with the way in which the alleged fiduciary duty was pleaded. In a number of cases it appears that little more was done than to identify the relationship of guardian and ward and attach a fiduciary label to what would otherwise be recognised as a pleading of a breach of a common law duty of care. In a number of the cases it appears a fiduciary claim was pleaded in an attempt to avoid a limitations defence.

53 In this proceeding there is no limitations defence to the common law claim pleaded for Healy's estate. Unlike the pleaded claims in at least some of the authorities to which I have referred, the plaintiffs have pleaded out the relationship between the Diocese and child parishioners, and identified particular aspects of that relationship to which it is alleged fiduciary duties attached.

54 The plaintiffs rely on conflict between the interests of the Diocese and child parishioners. However, they have not identified the particular interests of the Diocese that had the potential to place it in conflict with child parishioners. Nor have the plaintiffs pleaded how the Diocese placed those interests in conflict with the relevant interests of child parishioners. More importantly, the content of the fiduciary duty is

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31 Ibid 208–9.

pleaded as imposing broad, positive or prescriptive duties to act in the best interests of child parishioners.

55 These issues could be resolved by a pleading amendment. It may be that the interests of the Diocese relied on by the plaintiffs were reputational or relevant to some other aspect of advancement of the Catholic faith. The duty might be expressed proscriptively as a duty to not appoint a priest, in respect of whom there was relevant knowledge or suspicion, to a position where he might be entrusted with the care of a child parishioner. The breach might be expressed as acting in conflict with the interest of child parishioners in not being exposed to the risk of sexual abuse by, in advancing the interests of the Diocese, appointing such a priest to a particular position.

56 However, appropriate amendment of the plaintiffs' pleading will not change the essential nature of the claim sought to be made. That is evident from the following paragraph of the plaintiffs' pleading, which sets out the injury, loss and damage sought to be claimed as a result of the alleged breach of fiduciary duty:

> 54 Fr Coffey perpetrating the Abuse resulted in [Healy] suffering loss and damage.
>
> **Particulars**
>
> The matters in pars 22 to 23 above are repeated.
>
> Further, the loss and damage suffered by [Healy] prior to his death comprised of:
>
> (i) physical injury;
>
> (ii) psychiatric injury;
>
> (iii) pain and suffering;
>
> (iv) interference with enjoyment of life;
>
> (v) loss of earnings and/or earning capacity;
>
> (vi) loss of superannuation; and/or
>
> (vii) out of pocket expenses for past medical treatment.

The claim is expressed as being one for damages rather than equitable compensation. More importantly, it is identical to the claim made in negligence for the first plaintiff.

57 The plaintiffs argued that where the law is uncertain or in a state of development, a plaintiff should not be prevented from taking to trial one of a number of causes of action that rely on the same factual matrix.[32] However there is little in the above authorities to suggest that the law is uncertain or developing in a direction that is likely to support the pleaded fiduciary duty.

58 Two questions remain. First, is the result so certain that the fiduciary claim should be struck out without any opportunity to replead? Or do the comments by McHugh J in *Tame*, and the limited equivocation by the Court in *Paramasivam* where it said such a claim was '*mostly unlikely* to be upheld by an Australian court'[33] leave room for sufficient doubt that a properly pleaded claim should be permitted to proceed?

59 The plaintiffs submitted there has been no final determination of policy issues relevant to the potential coexistence of fiduciary duties and duties in tort. The plaintiffs submitted the distinction between economic and non-economic interests is arbitrary and, that as a matter of first principles, economic loss cannot, thus should not, be a determining factor because it is not essential to loyalty nor a mandatory component of the hallmarks of relationships giving rise to fiduciary duties. The plaintiffs submitted further the distinction would illegitimately use the consequences of breach (economic as opposed to non-economic) to determine whether there is a duty in the first place.

60 For reasons expressed in *O'Connor v Comensoli* ('*O'Connor*'),[34] I reject the first defendant's second objection to the pleaded fiduciary claim. On the basis of my reasoning in *O'Connor*, it is clearly arguable that an effect of the *Legal Identity Act* is that liability of an unincorporated association such as the Diocese for damages founded on or arising from child abuse is to be determined as if the unincorporated association was incorporated at the time of the alleged abuse.

61 Second, should I decline to exercise the discretion to strike out the pleading in any

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32 Ibid 203 [10].
33 *Paramasivam* (n 7) 221 (emphasis added).

event because of the late stage at which the application has been made and the fact that it is unlikely that striking out the claim will result in significant saving of costs or court time?

62 In *Pope*, the only claim made by the respondent was for breach of fiduciary duty. Striking out the fiduciary claim resolved the proceeding and led to it being dismissed. In contrast in *Webber*, which involved both common law and fiduciary claims being made by the plaintiff, Dunford J said:

> [18] At the outset I raised with counsel the question whether the application had any practical utility as the evidence in support of the claims for breach of statutory duty and breach of fiduciary duty would be the same as that in support of the claim for breach of the common law duty of care and the legal issues could be better dealt with after the evidence had been taken. After an adjournment to consider their position, counsel returned and asked me to determine only the question of whether the facts alleged could give rise for any remedy for breach of fiduciary duty.
>
> [19] I rather doubt that even the determination of this limited issue is of any value at this stage, but responsible senior counsel assure me that it has practical utility, and accordingly I proceed to determine it. I can only surmise that the parties take the view that if the plaintiff fails to have the limitation period extended, and the claims for common law negligence and breach of statutory duty consequently fail, the plaintiff may still hope to succeed on the claim for equitable damages for breach of fiduciary duty, as in equity the Limitation Act is only generally, and not necessarily, applied by analogy, subject of course to the further defence that has been raised of laches.[35]

In this case claims in negligence and vicarious liability made for the first plaintiff, and in negligence for the family plaintiffs, will proceed to trial to be determined on the same facts as would be relevant to the fiduciary claim.

63 I conclude, because of the very late stage at which the application was made, what may be the merest possibility of uncertainty about the state of the law, the lack of any significant efficiency or saving that would result from striking out the claim, and the benefit, if the novel claim is to be the subject of appeal, of it being properly pleaded and the evidence being heard, that the pleaded fiduciary claim should not be struck out.

64 I will strike out paragraph 50 of the amended statement of claim. I will give the

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35 *Webber* (n 25) 430.

plaintiff's leave to replead as to:

(a) the interests of child parishioners protected by the fiduciary relationship;

(b) the interests of the diocese that potentially conflicted with the child parishioner interests;

(c) the content of the duty not to act in conflict with the interests of child parishioners; and

(d) how the alleged duty was breached.

Family duty of care

65 The plaintiffs plead the following risk of harm relevant to Healy:

> 55 At all material times, there was a risk that –
>
> (a) a failure by the Diocese to exercise reasonable care and skill to protect altar boys from physical, sexual and/or psychological abuse by members of the clergy would cause those children to suffer loss or damage arising from child abuse;
>
> (b) a failure by the Sisters to exercise reasonable care and skill to protect its students from physical, sexual and/or psychological abuse by members of the clergy would cause those students to suffer loss or damage arising from child abuse
>
> (**Abuse Risk of Harm**).

66 The matters relevant to the existence of a duty to the family plaintiffs are pleaded as follows:

> The salient features of the relationship between each of the Diocese and the Sisters, and [Healy]'s immediate family were such that:
>
> (a) each of the Diocese and the Sisters exercised control over the Abuse Risk of Harm;
>
> (b) each of the Diocese and the Sisters knew or ought to have known that, if [Healy] went on to have immediate family:
>
> (i) that family would have a close emotional and interpersonal relationship with [Healy]; and
>
> (ii) that family would be in close physical proximity to [Healy] by virtue of their relationship;
>
> (c) by reason of the matters in subpars (b)(i) to (ii), [Healy]'s immediate

family were vulnerable to the Family Risk of Harm;

(d) by reason of the relationship of school and pupil (in the case of the Sisters), and of Church and altar boy (in the case of the Diocese), [Healy]'s immediate family was reliant on each of the Diocese and the Sisters to protect [Healy] from physical, sexual and/or psychological abuse when he was a child in their care; and

(e) each of the Diocese and the Sisters knew or ought to have known that if the Abuse Risk of Harm eventuated in respect of [Healy], [Healy]'s immediate family would suffer associated harm.

67 The plaintiffs plead they were subject to the following risk of harm:

At all material times, there was a risk that:

(a) exposing [Healy] to the Abuse Risk of Harm, and/or preventing or failing to stop the Abuse, would cause [Healy] to suffer psychiatric harm;

(b) [Healy]'s psychiatric harm would cause [Healy] to act in a violent and/or abusive way towards [Healy]'s future immediate family, causing them loss and damage;

(c) further and alternatively to subpars (a) and (b), preventing or failing to stop the Abuse would cause [Healy]'s future immediate family to suffer nervous shock if and when they learned about the Abuse,

where "**immediate family**" means any future partner and children of [Healy] (**Family Risk of Harm**).

68 As to duty, the plaintiffs plead:

In the premises, each of—

(a) the Diocese;

(b) the Sisters,

owed a duty to each of Sandra Porter, Luke Porter and Niki Porter to take reasonable care to avoid the materialisation of the Family Risk of Harm (Family Duty of Care).

69 Material facts pleaded as relevant to existence of the family risk of harm include:

23 As a further consequence of the Abuse, [Healy]:

(a) suffered chronic post-traumatic stress disorder;

(b) suffered severe substance abuse disorder;

(c) exhibited unpredictable, aggressive and violent behaviour towards others;

(d) exhibited an aversion to authority and a distrust of people;

(e) contracted the Human Immunodeficiency Virus (HIV); and

(f) attempted suicide, as a result of which he was placed in an induced coma.

70 The plaintiffs plead the following material facts as to the eventuation of the risk to the second plaintiff:

25 Between 1985 and 1993, and between 1994 and 1998, [Healy]:

(a) physically abused Sandra Porter;

(b) sexually abused Sandra Porter;

(c) psychologically abused Sandra Porter;

(d) threatened Sandra Porter with violence.

26 On a date prior to or around 1994, [Healy] transmitted HIV to Sandra Porter.

27 In or around 1998, Sandra Porter:

(a) was diagnosed with Acquired Immunodeficiency Syndrome (AIDS);

(b) was told by a specialist in Sale Hospital that she would die from AIDS;

(c) began chemotherapy treatment; and

(d) ended her relationship with [Healy].

28 From in or around 1998 until [Healy]'s death on 6 July 2018, Sandra Porter:

(a) had intermittent contact with [Healy], during which time [Healy] threatened her with violence on multiple occasions;

(b) witnessed [Healy] being violent towards Niki Porter;

(c) witnessed [Healy] in an induced coma following his attempted suicide.

29 Consequently, Sandra Porter has:

(a) acquired HIV from [Healy];

(b) suffered AIDS after having acquired HIV from [Healy];

(c) suffered chronic post-traumatic stress disorder; and

(d) suffered major depressive disorder.

30 On or around 3 April 2019, Sandra Porter read the Police Statement.

31 After reading the Police Statement, Sandra Porter suffered nervous shock.

71 The plaintiffs then plead that the Diocese and the Sisters breached the duty owed to them by negligently causing the abuse and harm suffered by Healy, failing to mitigate that harm by providing appropriate counselling and support to him, and failing to provide counselling and psychological support to the plaintiffs. The plaintiffs plead that as a result, they have each suffered personal injury, loss and damage.

72 The first defendant's application to strike out the family duty of care is essentially based on the fact that at the time of the allegedly tortious acts by the Diocese and perpetration of the abuse by Coffey none of the family plaintiffs were in a close and intimate relationship with Healy. The first defendant's complaint is expressed in a variety of ways. First, that it was not reasonably foreseeable to the Diocese in the circumstances that the family plaintiffs would suffer psychiatric injury. Second, that there was a lack of proximity in both a physical and relational sense between the alleged acts and omissions by the Diocese and the family plaintiffs. Third, that the Diocese had no knowledge, whether actual or constructive, that the alleged acts or omissions in relation to Healy would harm the family plaintiffs. Fourth, that broadening the duty of care to capture unborn children and future partners gives rise to a risk of indeterminacy of liability.

73 The first defendant also relied on ss 72 and 73 of the *Wrongs Act 1958* (Vic) ('*Wrongs Act*'). Section 72 provides:

> (1) A person (the defendant) does not owe a duty to another person (the plaintiff) to take care not to cause the plaintiff pure mental harm unless the defendant foresaw or ought to have foreseen that a person of normal fortitude might, in the circumstances of the case, suffer a recognised psychiatric illness if reasonable care were not taken.
>
> (2) For the purposes of the application of this section, the circumstances of the case include the following—
>
> > (a) whether or not the mental harm was suffered as the result of a sudden shock;
> >
> > (b) whether the plaintiff witnessed, at the scene, a person being killed,

injured or put in danger;

(c) the nature of the relationship between the plaintiff and any person killed, injured or put in danger;

(d) whether or not there was a pre-existing relationship between the plaintiff and the defendant.

(3) This section does not affect the duty of care of a person (the defendant) to another (the plaintiff) if the defendant knows, or ought to know, that the plaintiff is a person of less than normal fortitude.

Section 73 of the *Wrongs Act* provides:

(1) This section applies to the liability of a person (the **defendant**) for pure mental harm to a person (the **plaintiff**) arising wholly or partly from mental or nervous shock in connection with another person (the **victim**) being killed, injured or put in danger by the act or omission of the defendant.

(2) The plaintiff is not entitled to recover damages for pure mental harm unless—

(a) the plaintiff witnessed, at the scene, the victim being killed, injured or put in danger; or

(b) the plaintiff is or was in a close relationship with the victim.

74 It is uncontroversial that a tortfeasor, whose act or omission is a cause of injury or death to a primary victim, may thereby breach a duty of care owed to an immediate family member of the primary victim who suffers psychiatric injury as a result.[36]

75 A feature of this case which makes the pleaded family duty of care novel is that the family plaintiffs were not in a relationship with Healy when the abuse was perpetrated and he was injured.

76 This application is to be determined on the pleadings without reference to evidence. A simple answer to the first defendant's application is to acknowledge the difficulty of determining the existence of a novel duty to take reasonable care without considering all of the evidence. In *Caltex Refineries (Qld) Pty Limited v Stavar* ('*Stavar*'), Allsop P, with whom the other members of the Court agreed, considered the enquiry that was necessary when a novel duty was pleaded.

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[36] *Jaensch v Coffey* (1984) 155 CLR 549 (Gibbs CJ, Murphy, Brennan, Deane, and Dawson JJ) ('*Jaensch*'); *Gifford v Strang Patrick Stevedoring Pty Ltd* (2003) 214 CLR 269 (Gleeson CJ, McHugh, Gummow, Kirby, Hayne and Callinan JJ) ('*Gifford*'); *King v Philcox* (2015) 255 CLR 304 ('*King*').

> [102] If the circumstances fall within an accepted category of duty, little or no difficulty arises. If, however, the posited duty is a novel one, the proper approach is to undertake a close analysis of the facts bearing on the relationship between the plaintiff and the putative tortfeasor by references to the "salient features" or factors affecting the appropriateness of imputing a legal duty to take reasonable care to avoid harm or injury.
>
> [105] The task of imputation has been expressed as one not involving policy, but a search for principle: see especially *Sullivan v Moody* at 579 [49]. The assessment of the facts in order to decide whether the law will impute a duty, and if so its extent, involves an evaluative judgment which includes normative considerations as to the appropriateness of the imputation of legal responsibility and the extent of thereof. Some of the salient features require an attendance to legal considerations within the evaluative judgment.
>
> [106] I have described "foreseeability" as a salient feature; it is perhaps better expressed that the use of salient features operates as a control measure on foreseeability employed at the level of abstraction earlier discussed, for example by Glass JA in *Shirt* as the foundation for the imputation of duty of care. In a novel area, reasonable foreseeability of harm is inadequate alone to found a conclusion of duty. Close analysis of the facts and a consideration of these kinds of factors will assist in a reasoned evaluative decision whether to impute a duty. Whilst simple formulae such as "proximity" or "fairness" do not encapsulate the task, they fall within it as part of the evaluative judgment of the appropriateness of legal imputation of responsibility.[37]

77 The analysis contemplated by Allsop P requires careful consideration of all of the evidence relevant to the salient features in order to establish whether or not a duty existed. In cases such as *Stavar* and *King v Philcox* ('*King*'),[38] that analysis occurred at trial after all of the evidence was heard. In other cases such as *Agar v Hyde* ('*Agar*'),[39] *Tame*, and *Homsi v The Estate of Mahmoud Homsi* ('*Homsi*'),[40] courts have been able to determine whether a novel duty exists on the basis of agreed statements of fact, or evidence that was not contested.

78 In *Agar*, the majority said:

> It may be difficult for a court to say from the pleadings that a claim by a plaintiff that the defendant is liable in negligence is bound to fail because it is not arguable that the defendant owed the plaintiff a duty of care. Such cases do arise. In *Esanda Finance Corp Ltd v Peat Marwick Hungerfords*, this court held that the statement of claim did not disclose a cause of action in negligence against the defendant auditors. In *Mutual Life & Citizens' Assurance Co Ltd v Evatt*, the Privy Council held that the declaration in that case was demurrable because it did not describe a relationship which imposed upon the defendants a duty of

37 (2009) 75 NSWLR 649, 676 [102], [105]–[106].
38 *King* (n 36).
39 (2000) 201 CLR 552 (Gleeson CJ, Gaudron, McHugh, Gummow, Hayne and Callinan JJ).
40 (2016) 51 VR 694 (J Forrest J).

care in giving advice to the plaintiff. However, as Barwick CJ observed in *Philip Morris Inc v Adam P Brown Male Fashions Pty Ltd*:

> [In] fact pleading as it was introduced in the judicature system, there is no necessity to assert or identify a legal category of action or suit which the facts asserted may illustrate, involve or demonstrate and on which the particular relief claimed is based or to which it is relevant.

The result is that frequently the conventional form of pleading in an action of negligence will not reveal the alleged duty with sufficient clarity for a court considering an application for summary termination of the proceeding to be sure that all of the possible nuances of the plaintiff's case are revealed by the pleading. Further, and no less importantly, any finding about duty of care will often depend upon the evidence which is given at trial. Questions of reliance or knowledge of risk are two obvious examples of the kinds of question in which the evidence given at trial may take on considerable importance in determining whether a defendant owed the plaintiff a duty of care.[41]

79 In *King*, Nettle J, considering the central issue of reasonable foreseeability and the enquiry necessary to determine whether a novel duty exists, said:

> [79] Foreseeability alone, however, is not enough. Section 33(1) does not displace the common law imperative that "reasonable foreseeability" be understood and applied bearing in mind that it is bound up with the question of whether it is reasonable to require a person to have in contemplation the risk of injury that has eventuated. As Gleeson CJ observed in *Tame v New South Wales*:
>
> > "What a person is capable of foreseeing, what it is reasonable to require a person to have in contemplation, and what kinds of relationship attract a legal obligation to act with reasonable care for the interests of another, are related aspects of the one problem. The concept of reasonable foreseeability of harm, and the nature of the relationship between the parties, are both relevant as criteria of responsibility."
>
> [80] This court has not before had to determine whether a duty of care is owed in the circumstances presented by this case. *Wicks* made passing reference to the issue of duty of care owed to those present at the aftermath of an accident but did not deal with it in detail. *Jaensch v Coffey*, *Tame* and *Gifford v Strang* all provide relevant guidance, but the issue cannot be properly decided by reference only to the nature of the relationship between the victim of an accident and the claimant, or the victim and the defendant. As Deane J concluded in *Jaensch*, the question of whether a duty of care is owed in particular circumstances falls to be resolved by a process of legal reasoning, by induction and deduction by reference to the decided cases and, ultimately, by value judgments of matters of policy and degree. Although the concept of "proximity" that Deane J held to be the touchstone of the existence of a duty of care is no longer considered determinative, it none the less "gives focus to the inquiry". It does so by directing attention towards the features of the relationships between the parties and the factual circumstances of the case, and prompting a "judicial evaluation of the factors which tend for or against a

41 *Agar* (n 39) 577 [64] (Gaudron, McHugh, Gummow and Hayne JJ).

> conclusion" that it is reasonable (in the sense spoken of by Gleeson CJ in *Tame*) for a duty of care to arise. That these considerations may be tempered or assisted by policy considerations and value judgments is not, however, an invitation to engage in "discretionary decision-making in individual cases". Rather, it reflects the reality that, although "[r]easonableness is judged in the light of current community standards", and the "totality of the relationship[s] between the parties" must be evaluated, it is neither possible nor desirable to state an "ultimate and permanent value" according to which the question of when a duty arises in a particular category of case may be comprehensively answered.[42]

80 Foreseeability does not apply to the particular plaintiff, but to the class of persons of which the plaintiff is a member.[43] In other circumstances the fact that a plaintiff was not in existence at the time of the tortious act has not resulted in them being excluded from membership of the class who the defendant should have foreseen might suffer injury.[44]

81 Reasonable foreseeability, and therefore the existence of a duty, is determined prospectively from the point in time when the relevant events occurred. In the present case, where the events in question took place decades ago, the enquiry will necessarily require evidence of the community standards that applied from time to time against which the question of reasonable foreseeability can be determined.

82 While proximity is no longer the test for existence of a duty, practical considerations of temporal, physical and relational proximity between the harm caused to the primary victim and the mental harm suffered by secondary victims remains important. In *Tame*, the Court found a duty in circumstances where the injury suffered by the plaintiffs was not physically or temporally proximate to their son's death. Gleeson CJ said:

> [37] Here there was a relationship between the applicants and the respondent sufficient, in combination with reasonable foreseeability of harm, to give rise to a duty of care, though the applicants did not directly witness their son's death, and suffer a sudden shock in consequence. …
>
> [41] The respondent's breach of duty consisted in failing properly to care for and supervise the applicants' son, by sending him to work alone, in a remote area. He left his post, became lost in the desert, and died. For reasons already

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42 *King* (n 36) 336 (citations omitted).
43 *Sutherland Shire Council v Heyman* (1985) 157 CLR 424, 487 (Brennan J); *King* (n 36) [82].
44 *X and Y (By Her Tutor X) v Pal* (1991) 23 NSWLR 26 (Mahoney, Clarke and Meagher JJA).

> mentioned, this may not have been likely to result in a sudden sensory perception of anything by the applicants. But it was clearly likely to result in mental anguish of a kind that could give rise to a recognised psychiatric illness.[45]

And in *King*, Nettle J said:

> Second, as has also been noted, where the relationship between a claimant and the victim of physical injuries is close, reasonable foreseeability does not require the same degree of temporal and physical proximity between accident and inception of mental harm as where the relationship is more remote.[46]

83 It is evident from the plaintiffs' pleading that they rely heavily on the relationships that existed in the 1970s between the Diocese, Coffey and Catholic children such as Healy. In *O'Connor*, I determined a claim by the plaintiff against the Archdiocese of Melbourne for damages for sexual abuse by a Catholic priest of the Diocese. In that case very detailed evidence was given by two priests of the Archdiocese, a Canon law expert, lay witnesses and through tendered documents, about similar relationships to those under consideration in this case. Evidence of that nature is likely to be relevant to the assessment of reasonable foreseeability, having regard to the standards which applied within the Catholic community of the Diocese at the time.

84 The facts of this case are very different to those in *Tame*. In order to establish that the family duty of care existed the plaintiffs will need to confront the very substantial physical and temporal distance between the abuse and the harm that they suffered. Whether the plaintiffs can overcome that difficulty may depend on the cause of injury to Healy and the nature of the harm he suffered as a result, all of the features of the relationships between Healy and the family plaintiffs and the aetiology of injuries suffered by them. It is likely that detailed evidence will be led about these matters at trial. It is conceivable that the nature of the relationship between the Diocese, priests and parishioners, and of the abuse and consequent injury to Healy will give rise to different considerations than those that apply where the cause of psychiatric injury to a secondary victim is the injury or death of a worker or road user in a traumatic incident. Whether the plaintiffs succeed in establishing the existence of the novel duty

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45 *Tame* (n 12) 337, 338.

46 *King* (n 36) 341 [95].

on which they rely can only be determined at trial after all of the evidence is heard.

85 There are two answers to the first defendant's submission about the lack of actual or constructive knowledge by the Diocese that the family plaintiffs may suffer harm. First, knowledge is only one consideration in the inclusive list of salient features. Lack of relevant knowledge may not be determinative. Second, while the Diocese could not have known of the family plaintiffs at the time of the abuse, that does not mean they should not have had in contemplation members of Healy's immediate family as a class of persons who might suffer harm if negligence by the Diocese led to the abuse.

86 The first defendant complained that if the duty was found to exist it would permit a wider scope of the types of family members pursuing secondary victim claims, such as grandchildren and great-grandchildren, thus removing any reasonable foreseeability and resulting in indeterminacy. The first defendant did not explain how such an issue would arise in this case, but not on the facts of cases such as *Gifford v Strang Patrick Stevedoring Pty Ltd*,[47] *Jaensch v Coffey*,[48] *Tame* and *King*. The plaintiffs' pleaded case limits consideration of the family duty of care to immediate family defined as any future partner and children of Healy.

87 These reasons should not be understood as concluding that a lack of relevant knowledge by the Diocese and issues as to indeterminacy of liability will not be relevant to determination of the existence of a duty. However, in the absence of evidence consideration of those features does not result in a conclusion that a claim based on the pleaded family duty of care is so hopeless that it is bound to fail.

88 The first defendant made some further complaints about the pleading by the plaintiffs of the family duty of care. It submitted the pleading does not identify any basis or any material facts that support a claim that the abuse would cause Healy to act in a violent and/or abusive way towards his future immediate family. I reject this submission. The pleadings set out at paragraph 69 above allege the injuries and behavioural changes suffered and experienced by Healy as a result of the abuse. In the following

47 *Gifford* (n 36).
48 *Jaensch* (n 36).

paragraphs the plaintiffs plead that Healy behaved violently towards them. At the request of the first defendant, the plaintiffs have provided particulars of Healy's alleged violence. I understand the allegation by the plaintiffs to be that Healy's violence towards them was a sequelae of the psychiatric injuries he suffered caused by the abuse. I conclude this aspect of the pleading puts the defendants sufficiently on notice of the case they must meet.

89 The first defendant complains about a lack of contemporaneity between the family plaintiffs having an immediate and close relationship with Healy and the circumstances in which they allegedly suffered nervous shock. The pleadings allege Healy died in 1998, and that the family plaintiffs suffered nervous shock in 2019 on reading statements of his account of the abuse. This aspect of the case pleaded by the plaintiffs does stretch the temporal connection between the abuse of Healy, and the alleged occurrence of psychiatric injury to the family plaintiffs perhaps beyond breaking point. However, given my conclusion that for other reasons the family duty of care pleading should not be struck out, I would not exercise the discretion to strike out this particular aspect of the pleading. I conclude it is appropriate that all aspects of the pleaded family duty of care be determined at trial.

90 The first defendant's further complaints about the plaintiffs' salient features pleading, and my conclusions, are summarised as follows:

(a) I reject the first defendant's complaint that material facts of the defendants' control over the abuse risk of harm are not pleaded. Those material facts form a substantial part of the pleaded case for the first plaintiff.

(b) I reject the first defendant's submission, for reasons already stated above under the fiduciary duty heading and set out in my judgment in *O'Connor*, that the plaintiffs' pleading has failed to say how a member of the unincorporated association, that was the Diocese, exercised control over the abuse risk of harm. For reasons already stated, the issue of liability is to be assessed against the Diocese as if it were a corporation at the relevant time.

(c) I reject the first defendant's complaint that there is a need to plead further material facts in support of paragraph 65(b) of the amended statement of claim. It is common sense that Healy's immediate family members may have close emotional and interpersonal relationships with him and would at least at times be in close physical proximity to him. These issues are a matter for evidence.

(d) There is merit to the first defendant's complaint about the pleading that the family members were reliant on the Diocese to protect Healy from the abuse. I will strike out paragraph 65(d) of the amended statement of claim and give the plaintiffs leave to replead the allegation of reliance.

(e) I accept the first defendant's complaint that the plaintiffs should plead particulars of the allegation of knowledge pleaded in paragraph 65(e) of the amended statement of claim. I will give the plaintiffs leave to plead those particulars.

(f) I reject the first defendant's complaint that the pleading of a requirement for the Diocese to provide psychological support to the immediate family is embarrassing. I accept that a case expressed in this fashion is not without its difficulties. However, the question of whether the risk of harm to the family plaintiffs would have been avoided or ameliorated by provision of psychological support is, having regard to the balance of my reasons, properly a matter for trial.

(g) I accept that paragraph 68(d)(i) of the amended statement of claim is embarrassing and should be repleaded. As it is currently framed the pleading requires the Diocese to have contacted altar boys at the church and students at the school who had participated in cross-country running practice with Coffey before Coffey was appointed parish priest at Ouyen. I will give the plaintiffs leave to replead.

(h) There is merit in the first defendant's complaint that pleadings 68(d)(iv), (v) and (vi) seek to impose unreasonably onerous obligations that are too wide.

For example, the pleadings required that the Diocese remain in contact with Healy over the course of his life. I will give the plaintiffs leave to replead those parts of the pleading.

91 I conclude, for the above reasons, that the family duty of care is not certain to fail. The first defendant's application to strike out the family duty of care pleading is refused.

Aggravated damages

92 The first defendant applied to strike out the following paragraph of the amended statement of claim:

> 72 Sandra Porter, Luke Po1ier and Niki Porter have each suffered mental anguish and humiliation flowing from the manner in which they discovered the Abuse, as pleaded herein.

93 In earlier paragraphs of the amended statement of claim it is pleaded that Healy made a statement to police about the abuse in 1998, and a further statement in writing in September 2007. It is pleaded that the second plaintiff read the police statement in April 2019 and suffered nervous shock as a result. It is pleaded that the third and fourth plaintiffs read the statement of complaint in December 2019 and suffered nervous shock as a result.

94 It is difficult to understand, on the case as pleaded, how it is said the defendants are responsible for the manner in which the family plaintiffs became aware of the abuse.

95 In *Hunter Area Health Service v Mirchlewski*,[49] Mason P, with whom Stein and Heydon JJA agreed, expressed doubt about whether aggravated damages were available in a negligence action,[50] and concluded they were not in cases of negligently inflicted pure psychiatric injury or nervous shock:

> [116] One such limitation is the principle that mere grief, distress or normal emotional reaction based on a wrong done to a third party are not compensable in a "nervous shock" claim: *Macpherson v Commissioner for Government Transport* (1959) 76 WN(NSW) 352; *Swan v Williams (Demolition) Pty Ltd* (1987) 9 NSWLR 172; *Jaensch v Coffey* (1984) 155 CLR 549 at 587; *Morgan* at 44 [130]. Artificial as it is, general damages must be apportioned so as to exclude non-compensable components: see *Marinko v Masri* (2000) Aust Torts Reports

49 (2000) 51 NSWLR 268.
50 Ibid 288 [110].

¶81–581 (64, 201).

> [117] In my view, it follows that to allow an award of aggravated damages in a claim for negligently inflicted pure psychiatric injury would put back what the specific law relating to "nervous shock" precludes. This would fracture the symmetry of tort law in this area of discourse. In a field where policy and precedent preclude or limit compensation for mental distress or injured feelings, policy and precedent ought not to be trumped by an appeal for aggravated damages.[51]

96 The conclusion expressed by Mason P was based on the principles relating to negligent infliction of pure nervous shock as they were then understood.[52] It is uncertain how, if at all, his Honour's conclusion would be affected by the subsequent development that has occurred in the principles relevant to psychiatric injury claims by secondary victims.

97 In answer to the first defendant's application, the plaintiffs argued that the family plaintiffs' claims were not limited to pure psychiatric injury but extended to the physical harm inflicted on them by Healy. However, paragraph 72 as it is currently pleaded is limited to the circumstances in which the family plaintiffs became aware of the abuse. There is no obvious linkage to the claim they make for physical harm.

98 I conclude paragraph 72 of the amended statement of claim should be repleaded by the plaintiffs in order to put the defendants more clearly on notice of the claim for aggravated damages. It is likely that however that is done the plaintiffs will face difficulties maintaining the claim at trial. Despite the obvious difficulties with the claim, I will allow it to proceed. Evidence relevant to the claim for aggravated damages will be led in any event. It is appropriate that the availability of aggravated damages be determined after the claim has been repleaded, evidence heard and the question fully argued.

99 The first defendant also applied to strike out the claim for aggravated damages made for the first plaintiff. That claim is maintainable and will not be struck out.[53]

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51 Ibid 289 (Stein JA agreeing at 291, Heydon JJA agreeing at 291).

52 See, eg, *Morgan v Tame* (2000) 49 NSWLR 21 (Spigelman CJ, Mason P and Handley JA).

53 *DP (a pseudonym) v Bird* [2021] VSC 850, [450]–[461] (J Forrest J).

Exemplary damages

100 The plaintiffs plead the exemplary damages as follows:

> 74 The Abuse occurred in the course of Fr Coffey's engagement at the Church and the School on the Premises.
>
> 75 The conduct of each of—
>
> (a) the Diocese;
>
> (b) the Sisters,
>
> in failing to—
>
> (c) protect [Healy] from the Abuse;
>
> (d) mitigate the harm suffered by [Healy] flowing from the Abuse;
>
> (e) provide any recognition or support to [Healy]'s immediate family,
>
> particularly in light (but not only because) of the knowledge pleaded in Section F held by—
>
> (f) the Diocese;
>
> (g) the Sisters,
>
> was cruel, contemptible and demonstrated contumelious disregard for ~~the victim's,~~ Sandra Porter's, Luke Porter's and Niki Porter's welfare and rights.

101 The plaintiffs plead the defendants knew, before the abuse occurred, that Coffey was capable of child abuse. In particular, the plaintiffs plead that the Diocese moved Coffey between various parish appointments because of knowledge or suspicion that he was capable of child abuse. I understand that pleading to be a foundation of the claim for exemplary damages.

102 Exemplary damages may be awarded in cases of reckless and contumelious disregard of a plaintiff's rights.[54]

103 Whether or not the family plaintiffs can establish, by direct evidence or inference, that given what it knew about Coffey the Diocese acted in a deliberate or reckless disregard of the risk of harm to the plaintiffs when it appointed Coffey parish priest at Ouyen is

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54 *Lamb v Cotogno* (1987) 164 CLR 1 (Mason CJ, Brennan, Deane, Dawson and Gaudron JJ); *Gray v Motor Accident Commission* (1998) 196 CLR 1 (Gleeson CJ, McHugh, Gummow, Kirby, Hayne and Callinan JJ).

a question for evidence at trial. The application to strike out the claim for exemplary damages is refused.

Preliminary questions

104 The Court has discretion under r 47.04 of the Rules and/or s 49 of the Act to order a separate trial of the questions set out by the first defendant in the summons.

105 The first defendant bears the onus of establishing that some matters in issue on the pleadings should be determined separately at a preliminary trial.[55] The discretion to order a separate trial of a question should be exercised with great caution and only in a clear case.[56]

106 The interests of justice and the efficient conduct of court business are relevant considerations to whether certain issues should be determined at a preliminary trial.[57]

107 Courts have often exercised the discretion to order a preliminary trial where a finding on a question might determine the fate of the litigation at an early stage.[58]

108 For the following reasons I conclude that the questions identified by the first defendant should be heard and determined at the trial of this proceeding. First, for reasons already stated, consideration of whether the family duty of care exists is likely factually complex, and involve careful examination of the salient features as contemplated by Allsop P in *Stavar*. Similar considerations may apply to determination of the fiduciary duty claim. In this case that will necessitate careful examination of the relationships between the Diocese, Coffey, Healy and the family plaintiffs. In that context it will be necessary to examine the nature and extent of injury suffered by Healy as a result of the alleged abuse, the way in which Healy's injuries impacted on his relationships with the family plaintiffs, and the aetiology of psychiatric injuries sustained by the family plaintiffs. The evidence is likely to span a

55 *Idoport Pty Ltd v National Australia Bank Ltd* [2000] NSWSC 1215, [7] (Einstein J).
56 *Vale v Daumeke* [2015] VSC 342, [31] (Derham AsJ).
57 *Jacobson v Ross* [1995] 1 VR 337, 344–345 (Brooking J), 352 (J D Phillips J); *Wadley v Ron Finemore Bulk Haulage Pty Ltd* [2013] VSC 5 (J Forrest J).
58 *Spandideas v Vellar* [2008] VSC 198 (Kaye J); *Fitzgerald v New South Wales* [2017] NSWSC 1602 (Johnson J).

significant period of time.

109 Second, it is very likely that there will be significant factual disputes between the parties in relation to evidence relevant to duty. This is not a case such as *Tame*, *Agar*, or *Homsi*, where the evidence relevant to duty will be limited and may be the subject of agreed facts. It is likely viva voce evidence will need to be given by a number of witnesses.

110 Third, it is unlikely the question of duty can be determined without detailed findings of fact being made. The reliability and credit of witnesses may be put in issue.

111 Fourth, there is at least a reasonable prospect of the family plaintiffs being required to give evidence at a preliminary hearing and at trial. As I understand it, there is evidence that the family plaintiffs each suffer psychiatric illness. It would be unduly burdensome and in the circumstances prejudicial to the family plaintiffs to have to attend court and give evidence on more than one occasion.

112 Fifth, there will necessarily be a significant overlap between the evidence called in relation to the question of duty and the other issues to be determined at trial. Difficulties can often arise attempting to determine whether a duty of care exists in isolation from consideration of questions of breach, causation and damage.[59]

113 Sixth, resolution of the preliminary questions in favour of the first defendant will not finally determine all of the issues in the cause of action. The claim for the first plaintiff will remain to be determined. There are very significant factual disputes in relation to that claim, including as to the fact, nature and extent of the abuse. While a finding that the family duty of care does not exist would determine finally the claims of the family plaintiffs, it cannot be said at this stage that it would likely lead to a resolution of the entire proceeding.

114 Finally, the timing of the application is relevant. An order was made on 9 November 2021 fixing the proceeding for trial on 28 February 2023. The first defendant's

[59] *John Pfeiffer Pty Ltd v Canny* (1981) 148 CLR 218, 241–242 (Brennan J); *Minister for the Environment v Sharma* (2022) 400 ALR 203, 208-209 [12]–[14] (Allsop CJ).

application was filed on 28 November 2022, more than a year after the order for trial was made and, taking account of the summer break, only a very short time before trial. A preliminary trial of the duty questions would necessarily delay the final trial of the proceeding by many months.

115 For the above reasons it is not in the interests of justice or the efficient use of Court time for there to be a preliminary trial of the questions as to the existence of the family duty of care.

Conclusion

116 Orders will be made in accordance with these reasons. I will hear from the parties as to the form of the order and any consequential matters, including costs.

CERTIFICATE

I certify that this and the 36 preceding pages are a true copy of the reasons for ruling of Justice Keogh of the Supreme Court of Victoria delivered on 28 December 2022.

DATED this twenty-eighth day of December 2022.

Associate