HIGH COURT OF AUSTRALIA

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IN THE HIGH COURT OF AUSTRALIA
MELBOURNE REGISTRY

BETWEEN:

BISHOP PAUL BERNARD BIRD
Appellant

10 and

DP (A PSEUDONYM)
Respondent

20 **APPELLANT'S SUBMISSIONS**

Part I: Certification

1. These submissions are in a form suitable for publication on the internet.

Part II: Concise statement of issues

2. There are three issues before the Court. ***First,*** whether, as a matter of the common law of Australia, the doctrine of vicarious liability applies – or should be extended – to a relationship which is neither one of employment nor "true agency". ***Second***, whether the "relevant approach" explained in ***Prince Alfred College*** *v ADC*[1] requires the precise identification of the position in which a defendant put the tortfeasor vis-à-vis a plaintiff and how that position led to the tort which eventuated. ***Third***, whether the appellant (as representative of, and
10 hereafter, the **Diocese**) owed the respondent (**DP**) a non-delegable duty of care to protect him from the risk of sexual abuse by its priests, including Bryan **Coffey**, in the course of Coffey's functions and duties as a priest.

Part III: Section 78B of the *Judiciary Act 1903* (Cth)

3. The appellant considers that notice is not required under s 78B of the *Judiciary Act*.

Part IV: Judgement of the Court below

4. The reasons of the primary judge are unreported: *DP (a pseudonym) v Bird* [2021] VSC 850 (**PJ**): {CAB 5-125}. The reasons of the Court of Appeal are reported: *Bird v DP (a pseudonym)* (2023) 69 VR 408; [2023] VSCA 66 (**CA**): {CAB 154-210}.

Part V: Facts

20 5. **Facts relevant to assaults:** In 1960, Coffey, now deceased, was ordained. In February 1966, DP was born in Port Fairy: {PJ, [7]: CAB 7; CA, [8]: CAB 157}. Also in 1966, Coffey was appointed an assistant parish priest to St Patrick's Church, Port Fairy: {PJ, [12]: CAB 8; CA, [8]: CAB 157}.

6. In early 1971, when DP was five years of age, he began his preparatory year at the local primary school, also called St Patrick's. During 1971, on two occasions, Coffey assaulted DP at DP's parents' home: {PJ, [104], [109], [115]: CAB 29-30; CA, [25]-[26], [36]: CAB 160, 161}. Around March or April 1971, the first assault took place at what the primary judge found was likely "a social gathering at the family home attended by Coffey": {PJ, [83]-[87],

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[1] (2016) 258 CLR 134 at 159-160 [80]-[81] per French CJ, Kiefel, Bell, Keane and Nettle JJ.

[104]-[109]: CAB 22, 29; CA [25], [36]: CAB 160}.

7. On 26 December 1971, the second assault occurred when Coffey was visiting DP's family home: {PJ, [88]-[89], [114]: CAB 23; CA [26], [36]: CAB 160}.

8. **Facts relevant to vicarious liability:** The primary judge found that Coffey was not an employee of the Diocese: {PJ, [211]: CAB 56; CA, [44]: CAB 163}. Nevertheless, he considered that the law required a "holistic and broad inquiry into the circumstances surrounding: the relationship between the Diocese and Coffey; the role of … [the parish priest, Father O'Dowd] and Coffey; Coffey's role within the Port Fairy Catholic community; and Coffey's relationship with DP and his family": {PJ, [212]: CAB 56; CA, [44]: CAB 164-165}.
10 Accordingly, he made findings grouped under eight categories: {PJ, [224]: CAB 58-59}.

9. During 1971, Coffey delivered Mass and taught religious education to DP during his preparatory year and DP and his family attended Mass every Sunday over which Coffey, at times, officiated: {PJ, [263]: CAB 67; CA, [24]-[25]: CAB 159-160}.

10. His Honour concluded that "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": {PJ, [228]-[229]: CAB 60; CA, [45]: CAB 164}. It was inferred "that the Diocese provided accommodation for both Father O'Dowd [the parish priest] and Coffey and supplied his clerical garb and vestments": {PJ, [228]-[229]: CAB 60; CA, [45]: CAB 164}.

20 11. The primary judge found that there was "significant scope for an assistant priest to undertake the priest's duties", that "[a]ny pastoral duty or task of a parish priest could be delegated by him to an assistant parish priest", that pastoral duties "extended to activities at locations other than the church, including visits to parishioners' homes", and that, in addition to duties specified by scripture, pastoral duties "encompassed more vaguely defined activities", including "getting to know people": {PJ, [231]-[234]: CAB 60-61; CA, [46]: CAB 164}. He concluded 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: {PJ, [261], [266]: CAB 67; CA, [49]: CAB 165}.

12. Notwithstanding the chain of control described at paragraph 10 above, and the characterisation
30 as "all powerful", while there was a right to control sourced in canon law , "a diocese or bishop exerts limited control over the day-to-day activities of an assistant parish priest. The bishop (and the diocese) exerts no direct control over an assistant parish priest's hours of work, his

day-to-day tasks nor his manner of carrying them out". Those activities were subject to the direction of the parish priest: {PJ, [235]-[236]: CAB 61-62; CA, [45]-[47]: CAB 164}. However, 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", and that "it was at the will of the Diocese that Coffey received and maintained the assignment for the entire period": {PJ, [237]: CAB 62; CA, [47]: CAB 164}. So, while neither the Bishop nor the Diocese exercised actual control over Coffey's work, the Diocese had "the right to exercise control over certain aspects of a priest's work…": {PJ, [238]: CAB 62; CA, [47]: CAB 164}.

10 13. There was a finding that there was a "general or widely-held expectation by the Port Fairy Catholic community" that "priests stood as representatives of the Church's values and must embody them always": {PJ, [240]: CAB 63; CA, [48]: CAB 164-165}, and that "Coffey carried out the work of the Diocese 'in its place'": {PJ, [241]: CAB 63; CA, [48]: CAB 164-165}. It was also found that the "Diocese, through the Bishop, had given Coffey the imprimatur to undertake religious care for the spiritual life of the Port Fairy flock", including by "visiting parishioners' homes and interacting with the family and the children": {PJ, [242]: CAB 63-64; CA, [48]: CAB 164-165}.

Part VI: Argument

A. Ground (1): Vicarious liability requires a relationship of employment or agency

20 14. In Victoria, a diocese will be financially liable in tort for criminal abuse by its priests, whenever committed,[2] where it has acted negligently. Similar such organisations will also be liable irrespective of any fault, where the acts are those of an employee arising within the course of that employment. Where on the facts, a religious person is an employee, vicarious liability may attach. Further, a diocese will, for events from 1 July 2017,[3] also be liable in negligence where they have failed to prevent a priest (amongst others) from abusing a child, the reasonableness of its precautions being subject to a reverse onus of proof.[4] Against that background, the first issue is whether the common law of Australia ought to be developed to retrospectively impose no-fault liability for acts of persons other than employees.

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2 *Legal Identity of Defendants (Organisational Child Abuse) Act 2018* (Vic), s 4(3).

3 *Wrongs Amendment (Organisational Child Abuse) Act 2017* (Vic), s 2.

4 *Wrongs Act 1958* (Vic), s 91.

A.1 The existing requirement for an employment relationship

15. **Employment-based liability:** As observed in *Scott v Davis*,[5] the common law concept of vicarious liability emerged from mediaeval notions of headship of a household, including wives and servants.[6] The law developed from an initial position of imposing liability for acts the master "had commanded or later ratified, then was supplemented by the notions of 'the course of employment' and of 'control'".[7]

16. As Professor Klar notes, after "some experiment with the theory of implied command, the basis of the modern principle of liability for all torts committed by the servant 'in the course of his employment' was finally laid in the earlier part of the 19th century".[8] The learned author later observes of the nomenclature of master and servant that vicarious liability "is incident only to a relationship of controlled employment, traditionally described as that of master and servant". Where this is absent, but one person engages another to accomplish a specified result, the relationship is that of principal and independent contractor"'.[9]

17. In 1907, in the first edition of *The Law of Torts,* Salmond expressed the requirements for liability in the now familiar[10] two-limbed test as follows:

> In order that this rule of vicarious responsibility may apply, there are two conditions which must co-exist:
>
> (a) The relationship of master and servant must exist between the defendant and the person committing the wrong complained of;
>
> (b) The servant must in committing the wrong have been acting in the course of his employment.
>
> A servant may be defined as any person employed by another to do work for him on the terms that he, the servant is to be subject to the control and directions of his employer in respect of the manner in which his work is to be done.

18. From that historical basis, the modern statement of the "general rule"[11] in Australia has long

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5 *Scott v Davis* (2000) 204 CLR 333 at 409-410 [230] per Gummow J.

6 *Scott v Davis* (2000) 204 CLR 333 at 409-410 [230] per Gummow J; *Hollis* (2001) 207 CLR 21 at 37 [34] per Gleeson CJ, Gaudron, Gummow, Kirby and Hayne JJ; ***Day*** *v Ocean Beach Hotel Shellharbour Pty Ltd* (2013) 85 NSWLR 335 at 341 [14] per Leeming JA (with whom Meagher, Emmett JJA agreed).

7 *Scott v Davis* (2000) 204 CLR 333 at 409-410 [230] per Gummow J, citing *Kooragang Investments Pty Ltd v Richardson & Wrench Ltd* [1982] AC 462 at 471-472. See also, A Gray, *Vicarious Liability: Critique and Reform* (2018), 207.

8 L ***Klar***, "Vicarious Liability" in C Sappideen and P Vines (eds), *Fleming's The Law of Torts* (10th ed, 2011), 437 [19.10].

9 Klar, at [19.30], 440.

10 *CFMMEU v* ***Personnel Contracting*** *Pty Ltd* (2022) 275 CLR 165 at 239 [191] per Gordon J.

11 *Day* (2013) 85 NSWLR 335 at 341-342 [14]-[15], citing *Torette House Pty Ltd v Berkman* (1939) 39 SR (NSW) 156 at 165 per Jordan CJ; *Stoneman v Lyons* (1975) 133 CLR 550 at 574 per Mason J; *Burnie Port Authority v*

been that an employer will be vicariously liable for the wrongs of an employee, but not of an independent contractor. That this has been the central basis from which vicarious liability arose has been widely understood to reflect Australian law.[12] As Edelman and Steward JJ recently observed, this Court has not extended vicarious liability of this kind beyond employees.[13]

19. Unlike other countries (save for agency, discussed below) the categories of employee and independent contractor have covered the field of relationships relevant to the imposition of vicarious liability. This conclusion is supported both by the exceptional nature of the strict liability which is imposed,[14] and by the Court's reluctance to embrace reformulations of
10 vicarious liability on a broader footing beyond those categories. Thus, in *Scott v Davis*, Gummow J, rejecting a proposed expansion of vicarious liability beyond employees by reference to agency, said:[15]

> What the appellants seek to have this Court do is to introduce a new species of actor, one who is not an employee, nor an independent contractor, but an ''agent'' in a non-technical sense. They then seek to advance this indeterminacy by attaching vicarious liability to the defendant whose social connection with that actor occasioned their injuries.

20. In ***Hollis*** *v Vabu Pty Ltd*,[16] the majority explained that "[t]he tokens – 'employer', 'employee', 'principal' and 'independent contractor' - which provide the currency in this field of discourse have survived for a very long time and have been adapted to very different social conditions".

20 21. In *Sweeney*, the majority observed:[17]

> Whatever may be the logical and doctrinal imperfections and difficulties in the origins of the law relating to vicarious liability, the two central conceptions of distinguishing between independent contractors and employees and attaching determinative significance to course of employment are

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General Jones Pty Ltd (1994) 179 CLR 520 at 575 per Brennan J; *Hollis* (2001) 207 CLR 21 at 36 [32] per Gleeson CJ, Gaudron, Gummow, Kirby and Hayne JJ; *Personnel Contracting* (2022) 275 CLR 165 at 199 [82]-[83] per Kiefel CJ, Keane and Edelman JJ, 239 [191] per Gordon J.

[12] D Rolph et al, ***Balkin & Davis***: *Law of Torts* (6th ed, 2021), p 862 [26.2] "Thus, notwithstanding developments elsewhere…in Australia it remains the law that an employer may be liable for the acts of its employees, but there is generally no vicarious liability for the acts of those who are not in an employment relationship". See also, p 882 [26.19] describing the employment test as the "legally salient inquiry". See also, P **Giliker**, "Analysing institutional liability for child sexual abuse in England and Wales and Australia: Vicarious liability, non-delegable duties and statutory intervention" (2018) 77 *Cambridge Law Journal* 506, 518, 526; C Beuermann, ***Reconceptualising Strict Liability*** *for the Tort of Another* (2019), pp 8-10, 23.

[13] *CCIG Investments Pty Ltd v* ***Schokman*** (2023) 97 ALJR 551 at 561-562 [51] per Edelman and Steward JJ.

[14] F Pollock, *Essays in Jurisprudence and Ethics* (1882), pp 115-116, A Gray, *Vicarious Liability* (2018), p 206.

[15] *Scott v Davis* (2000) 204 CLR 333 at 423, [269], Gleeson CJ, Hayne J and Callinan J agreeing in the result.

[16] (2001) 207 CLR 21 at 37 [33] per Gleeson CJ, Gaudron, Gummow, Kirby and Hayne JJ.

[17] ***Sweeney*** *v Boylan Nominees Pty Ltd* (2006) 226 CLR 161 at 167 [12] per Gleeson CJ, Gummow, Hayne, Heydon and Crennan JJ.

now too deeply rooted to be pulled out.

22. **Agency-based liability:** vicarious liability may also arise through agency.[18] The main basis for vicarious liability in agency,[19] and that relied on in the Court of Appeal, was the principle in *Colonial Mutual Life Assurance Society Ltd v Producers and Citizens Co-operative Assurance Co of Australia Ltd* (***CML***).[20] *CML's* confined ratio was authoritatively explained by the majority in *Sweeney*.[21] *Sweeney*, together with earlier cases,[22] confirmed that the principle is limited to cases where the tortfeasor is "the principal's agent (properly so called)".[23] The Court in *Sweeney* expressly rejected *CML* as standing for a "wider
10 proposition", that "if A 'represents' B, B is vicariously liable for the conduct of A".[24] Accordingly, in this case, reliance on agency was misplaced and it has no role to play to found vicarious liability.

23. **International development of vicarious liability:** Consistently with its approach to expanding tortious liability more generally,[25] this Court has eschewed direct resort to the policy-based expansion. In Canada, the expansion of vicarious liability has been undertaken by reference to twin policy considerations of enterprise risk theory and deterrence.[26]

24. In England and Wales, that expansion has had regard to what is "fair and just" to impose on defendants. In *Lister v Hesley Hall Ltd*,[27] the House of Lords addressing the second limb abandoned the Salmond test in favour of a test of "sufficient connection" buttressed by a
20 requirement that the imposition of liability be fair and just.[28]

25. Similarly, in expanding the first limb to embrace roles "akin to employment", the UK Supreme

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18 *Day* (2013) 85 NSWLR 335 at 342 [15]; *Balkin & Davis*, p 881 [26.18]-[26.26]; *Reconceptualising Strict Liability*, p 9.

19 Putting to one side acts commanded by a principal and categories relating to motor vehicles: see *Soblusky v Egan* (1960) 103 CLR 215.

20 (1931) 46 CLR 41.

21 *Sweeney* (2006) 226 CLR 161 at 170 [22] per Gleeson CJ, Gummow, Hayne, Heydon and Crennan JJ.

22 *Scott v Davis* (2000) 204 CLR 333 at 338-339 [4] per Gleeson CJ, 422-424 [268]-[273] per Gummow J.

23 *Sweeney* (2006) 226 CLR 161 at 170 [22] per Gleeson CJ, Gummow, Hayne, Heydon and Crennan JJ. See also, *Balkin & Davis,* pp 881-886 [26.18]-[26.26].

24 *Sweeney* (2006) 226 CLR 161 at 171 [26] per Gleeson CJ, Gummow, Hayne, Heydon and Crennan JJ.

25 *Sullivan v Moody* (2001) 207 CLR 562 at 579 [49] per Gleeson CJ, Gaudron, McHugh, Hayne, Callinan JJ, cited in *Prince Alfred College* (2016) 258 CLR 134 at 156 [68] per French CJ, Kiefel, Bell, Keane and Nettle JJ.

26 *Bazley v Curry* [1999] 2 SCR 534 at 553-555 [30]-[32] per McLaughlin J, writing for the Court.

27 [2002] 1 AC 215.

28 [2002] 1 AC 215 at 230 [28] per Lord Steyn (with whom Lord Hutton and Lord Hobhouse agreed) ("whether the warden's torts were so closely connected with his employment that it would be fair and just to hold the employers vicariously liable").

Court relied on whether imposition of liability was fair, just and reasonable.[29] The Court considered[30] whether a religious educational institute could be vicariously liable for the sexual abuse of non-employees. Lord Philips, with whom other members of the Court agreed, described the "policy objective underlying vicarious liability" as being "to ensure, in so far as it is fair, just and reasonable, that liability for tortious wrong is borne by a defendant with the means to compensate the victim".[31] His Lordship considered that expansion required "the court to identify the policy reasons why it is fair, just and reasonable to impose vicarious liability and to lay down the criteria that must be shown to be satisfied in order to establish vicarious liability",[32] identifying five features which he considered met this requirement.[33]

10 26. By contrast, this Court has consistently sought to advance the law by reference to principle rather than policy.[34]

A.2 The employment requirement should not be abandoned

27. **Error by the Court of Appeal:** On appeal, DP argued that in fact the Diocese's vicarious liability arose by virtue of agency. Faced with arguments invoking different forms of vicarious liability, the Court of Appeal considered that, despite there being no employment relationship, because the relationship of assistant priest and Diocese was *sui generis* rather than commercial or social {CA, [120]: CAB 182}, the question was whether, applying the principles discussed (from both branches of liability), "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

20 such as would, in an appropriate case, attract the principle of vicarious liability by the Diocese for a wrongful act by Coffey in the performance of his work": {CA, [121]: CAB 182}.

28. That approach did not expressly articulate the test to which the evidentiary analysis would be applied. However, it is to be inferred that the Court of Appeal considered that it should assess

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29 *Various Claimants v Catholic Child Welfare Society* [2013] 2 AC 1 (***CCSW Case***) at 18 [47] per Lord Phillips (with whom Lady Hale, Lord Kerr, Lord Wilson and Lord Carnwath agreed), citing *E v English Province of Our Lady of Charity* [2013] QB 722, adopting terminology arising from ***John Doe*** *v Bennett* [2004] 1 SCR 436 at 449 [27] per McLachlin CJ. See also, *Cox v Ministry of Justice* [2016] AC 660; *Armes v Nottinghamshire County Council* [2018] AC 355; *Various Claimants v Barclays Bank plc* [2020] AC 973.

30 The Court of Appeal having shortly beforehand considered a case in which the possibility of a relationship akin to employment being sufficient had been conceded: *E v English Province of Our Lady of Charity* [2013] QB 722 at 765 [62], 772 [81] per Ward LJ, 784 [122] per Davis LJ. Tomlinson LJ dissented.

31 *CCSW Case* [2013] 2 AC 1 at 15 [34].

32 *CCSW Case* [2013] 2 AC 1 at 15 [34].

33 *CCSW Case* [2013] 2 AC 1 at 15 [35].

34 *Prince Alfred College* (2016) 258 CLR 134 at 149-150 [45]. See also, *Sullivan v Moody* (2001) 207 CLR 562 at 579 [49] per Gleeson CJ, Gaudron, McHugh, Hayne, Callinan JJ,

whether, in effect, Coffey's relationship with the Diocese was one which was "akin to employment". Their Honours appeared to place emphasis on a number of features drawn from the authorities, including the reference to enterprise risk by McLachlin J in *Bazley v Curry*, as referred to in *Hollis* {CA [92]-[94]: CAB 176}, the dissenting view of McHugh J in that case {CAB 177[95]-[96]}, whether the tortfeasor was presented as an "emanation" of the "principal": {CA [104]: CAB 179}, and the importance of the power to control a priest and the priest's lack of right to delegate work: {CA [115], [127]-[128]: CAB 181, 184}.

29. **Approach to altering the present law:** Given the current state of the law – that a relationship of employment must exist to establish vicarious liability – it would be necessary for this Court to either: (a) expand the first limb in a manner similar to including relationships "akin to employment" (as has occurred in Canada[35] and England and Wales[36]); or (b) abandon the first limb of the test. Neither course is desirable. Either would require the Court to re-open the conclusions in *Hollis, Scott v Davis* and *Sweeney* that a relationship of employment is a necessary precursor to a finding of vicarious liability of the kind here asserted. Leave to reopen those cases is not supported by the considerations in ***John*** *v Federal Commissioner of Taxation*,[37] and, if sought, should not be granted. This Court has been asked numerous times to reformulate the test for vicarious liability in a way which abandons the need to strictly establish an employment relationship.[38] Other than from McHugh J,[39] such a revised approach has never received support.[40]

30. A crucial objective of the common law is stability. It was that imperative with which the High Court was concerned when it declined to abandon the requirement of an employer-employee relationship in *Hollis.*[41] The importance of such stability and predictability is heightened

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[35] *John Doe v Bennett* [2004] 1 SCR 436 at 449 [27] per McLachlin CJ, Iacobucci, Major, Bastarache, Binnie, Arbour, LeBel, Deschamps and Fish JJ.

[36] *Various Claimants Various Claimants v Catholic Child Welfare Society* [2013] 2 AC 1 (***CCSW***) at 18 [44], 20 [60] per Lord Philips (with whom Baroness Hale, Lord Kerr, Lord Wilson and Lord Carnwath JJSC agreed at 7, [21]); *Trustees of the Barry Congregation of Jehovah's Witnesses v BXB* [2023] 2 WLR 953 at 956 [2] per Lord Burrows (with whom Lord Reed, Lord Hodge, Lord Briggs and Lord Stephens agreed).

[37] (1989) 166 CLR 417 at 438-439 per Mason CJ, Wilson, Dawson, Toohey, Gaudron JJ. The four relevant considerations are set out, and discussed in further detail in the context of reopening *Lepore*, at paragraph 64 below.

[38] *Scott v Davis* (2000) 204 CLR 333 at 334-337 (Argument); *Sweeney* (2006) 226 CLR 161 at 162-163 (Argument); *Hollis* (2001) 207 CLR 21 at 23 (Argument).

[39] *Scott v Davis* (2000) 204 CLR 333 at 346 [34], 355 [61]; *Hollis* (2001) 207 CLR 21 at 50 [73]-[74], 57 [93].

[40] *Sweeney* (2006) 226 CLR 161 at 171 [27] per Gleeson CJ, Gummow, Hayne, Heydon and Crennan JJ.

[41] *Hollis* (2001) 207 CLR 21.

where, as here, the doctrine involves an already "unstable principle",[42] the application of which is notoriously difficult. Where, as here, the doctrine is also a product of competing policy considerations, which are in tension and incomplete,[43] it is appropriate that its precise metes and bounds be expanded by the legislature, and not by this Court.

31. The English experience is salutary. To expand the ambit of vicarious liability, the English courts have, guided by an oversimplified understanding of the policy justifications which underpin vicarious liability, greatly expanded its reach. To adopt a similar approach would produce uncertainty in two dimensions.

32. ***First***, the "akin to employment" test in the *CCSW Case* has led to doubtful results expanding strict liability to relationships which hitherto would not have been understood to be liable for another's wrongs. These included the vicarious liability of a prison service for injuries caused to a prison catering manager by the negligence of a prisoner,[44] and the liability of a council for physical and sexual abuse allegedly carried out by two foster parents.[45] Such test also leaves uncertain the liability of organisations for the conduct of volunteers.

33. ***Second***, the divorcing of the test from an employment relationship risks further complicating the already fraught distinction between employees and independent contractors. Despite claims in England that the adoption of that test has introduced no difficulty in distinguishing between cases of independent contractors, it is difficult to see how a reliance on only a sub-set of the indicia will not generate difficulty distinguishing employees from contractors. It is no answer to that challenge that central instances of contracting will still be simply resolved, the difficulties are inevitably with "difficult borderline cases".[46]

34. The requirement for legislative development has been the approach historically. For example, liability of the State for conduct of police officers, who, as persons holding public office were not employees,[47] has been addressed through legislative intervention.[48] That is despite the fact

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

[43] *Scott v Davis* (2000) 204 CLR 333 at 436 [300] per Hayne J.

[44] *Cox v Ministry of Justice* [2016] AC 660.

[45] ***Armes*** *v Nottinghamshire County Council* [2018] AC 355.

[46] *New South Wales v* ***Lepore*** (2003) 212 CLR 511 at 536 [42] per Gleeson CJ, there speaking about the second limb.

[47] *Jarratt v Commissioner of Police (NSW)* (2005) 224 CLR 44 at 49 [4]-[6]. See also, *Enever v The King* (1906) 3 CLR 969.

[48] See *Victoria Police Act 2013* (Vic), s 74; *Police Service Administration Act 1990* (Qld), s 10.5; *Law Reform (Vicarious Liability) Act 1983* (NSW), Part 4; *Police Act 1892* (WA), s 137; *Police Act 1998* (SA), s 65; *Police*

that the limits on vicarious liability for such roles arose from historical roots.

35. The Victorian Parliament has been in receipt of two separate detailed inquiries.[49] Each of the Parliamentary Report[50] and Royal Commission Report[51] considered issues regarding the need for an employment relationship to establish vicarious liability. Recommendations 89 to 93 of the Royal Commission Report recommended the implementation of a statutory non-delegable duty in certain circumstances for institutional child sexual abuse which would extend, in addition to employees, to religious leaders, but which would operate prospectively.[52]

36. In response to the Royal Commission Report, certain parliaments expressly changed the law to largely adopt the "akin to employment" test.[53] Where they have done so, most legislatures[54]
10 have implemented the recommendation that such changes operate prospectively.[55] Some have also tailored exceptions. For example, New South Wales and the Northern Territory have excluded persons under foster care arrangements,[56] which would have the effect of avoiding outcomes of the kind in *Armes*.

37. In March 2017, the Victorian Parliament amended the *Wrongs Act 1958* (Vic)[57] to introduce the duty of care now found in Part XIII. In 2018, the Victorian Parliament passed the *Legal Identity of Defendants (Organisational Child Abuse) Act 2018* (Vic).

38. That the Victorian Parliament has implemented a suite of legislative responses in light of the

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Service Act 2003 (Tas), s 84. See further, *New South Wales v Ibbett* (2006) 229 CLR 638 at 641-642 [4]-[6] per Gleeson CJ, Gummow, Kirby, Heydon and Crennan JJ.

49 In November 2013, the Victorian Parliament's Joint House Family and Community Development Committee handed down its report *Betrayal of Trust: Inquiry Into the Handling of Child Abuse by Religious and Other Non-Government Organisations* (**Parliamentary Committee Report**). In September 2015, the Commonwealth Royal Commission into Institutional Responses to Child Sexual Abuse produced its *Redress and civil litigation report* (**Royal Commission Report**).

50 Betrayal of Trust Report, pp 548-552.

51 Royal Commission Report, pp 470-473.

52 Royal Commission Report, pp 77-78, 495.

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

54 *Civil Liability Act 2002* (NSW), Schedule 1, cl 44; *Civil Liability Act 2002* (Tas), s 4(8); *Personal Injuries (Liabilities and Damages) Act 2003* (NT), s 17B(5).

55 In South Australia the provisions operate retrospectively: *Civil Liability Act 1936* (SA), s 50D(1).

56 *Civil Liability Act 2002* (NSW), s 6G(3)(b), (5); *Personal Injuries (Liabilities and Damages) Act 2003* (NT), s 17G(5)(a)(i) consistent with the Royal Commission Report recommendation.

57 By the *Wrongs Amendment (Organisational Child Abuse) Act 2017* (Vic), which passed the Legislative Council on 21 March 2017.

Royal Commission's findings but has not extended the first limb of vicarious liability tells against this Court now taking that step. So too does the fact that other legislatures having considered the position and having made some aspects of the legislative regime retrospective, have concluded that the appropriate balance of interests is to make any extension of vicarious liability prospective only, in line with the recommendations in the Royal Commission Report.

39. **Expansion not supported by policy considerations:** Alternatively, if the Court considers that such considerations do not prevent it expanding the common law, the policy factors which underlie vicarious liability do not support abandonment of the employment limb.

40. The ambit of vicarious liability has been determined "not by way of an exercise in analytical jurisprudence but as a matter of policy",[58] and based on "social convenience and rough justice".[59] The policy considerations that have been identified are numerous. The normative force of each consideration may vary depending on the circumstances in which it is invoked.[60] Accordingly, where the Court is considering the expansion (or abandonment) of the test applied to vicarious liability it is appropriate to consider the force of the underlying policy considerations, the most frequently identified of which are: (a) enterprise-risk theory; and (b) deterrence.

41. <u>Enterprise risk theory:</u> One early influential statement of enterprise risk theory was that by Pollock, writing that vicarious liability was imposed because "a man has for his own convenience brought about or maintained some state of things which in the ordinary course of nature may work mischief to his neighbours".[61] But, in addition to other deficits in this explanation, as Neyers has identified "it cannot explain why charities should be vicariously liable for their employees' torts since altruistic institutions do not receive the material benefits required to render the reciprocity argument applicable against them".[62] Pollock's statement that a state of things has been brought about by someone for "their own convenience"

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[58] *Darling Island Stevedoring and Lighterage Co Ltd v Long* (1957) 97 CLR 36 at 56-57 per Fullagar J; see also *Sweeney* [11] per Gleeson CJ, Gummow, Hayne, Heydon and Crennan JJ; *Hollis* (2001) 207 CLR 21 at 37 [34] per Gleeson CJ, Gaudron, Gummow, Kirby and Hayne JJ; *Lepore* (2003) 212 CLR 511 at 580 [196] per Gummow and Hayne JJ.

[59] *Imperial Chemical Industries Ltd v Shatwell* [1965] AC 656 at 685 per Lord Pearce.

[60] J Morgan, "Vicarious Liability for Independent Contractors?" (2015) 31 *Professional Negligence* 235, 235.

[61] F Pollock, *Essays in Jurisprudence and Ethics* (1882), p 122; *Lepore* (2003) 212 CLR 511 at 582 [202] per Gummow and Hayne JJ.

[62] J Neyers "A Theory of Vicarious Liability" (2005) 43 *Alberta Law Review* 287, 298; J Morgan, "Vicarious Liability for Independent Contractors?" (2015) 31 *Professional Negligence* 235, 252.

identifies the self-interest involved in such justification. It cannot sensibly be said that the appointment to a parish of an assistant priest to carry out the intended beneficent activities of the Diocese involves actions for the Diocese's convenience in any true sense. While the expansion of vicarious liability to non-profit enterprises has doubtless taken place and foreign courts have discarded this objection,[63] this has largely occurred without careful analysis of how the normative force of the enterprise risk justification transposes to a non-profit's context.[64] Members of this Court have correctly had more significant reservations about both the justification itself absent a profit motivation[65] and the policy implications of imposing liability for such altruistic organisations.[66]

10 42. Deterrence: a further justification frequently relied on is the prospect that liability will act as deterrence. Difficulties with such justification have been expressed both about the unlikelihood of deterring employees for criminal acts,[67] and the improbability of improving the hiring practices of employers for criminality that involves subterfuge. However, in the present case, the more significant observation is that there have already been legislative remedies (of various kinds) which seek to more effectively achieve deterrence whether by imposition of a duty subject to a reverse onus or the prospective liability. Where that liability has already been established prospectively, and expanded liability will relate to historical arrangements, deterrence can provide no substantial support.

B. Ground (2): Misapplication of *Prince Alfred College*

20 43. Alternatively, the Court of Appeal erred in holding that the Diocese placed Coffey in a position that provided both the opportunity and the occasion for the assaults. This error arose from a failure to analyse the actual responsibilities with which the Diocese had charged Coffey and how those gave rise to the offending.

44. **Fact finding required by the "relevant approach":** The need for such specific factual finding is justified both by authority and policy, and is evidenced by a proper appreciation of

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63 *Bazley v Curry* [1999] 2 SCR 534, 563-566 [47]-[56], [2004] 1 SCR 436 at 446-447 [22].

64 In *Bazley*, McLachlin J's reasoning at [49]-[50] instead shifts to other justifications of deep-pockets, deterrence and a claim of risk creation.

65 *Scott v Davis* (2000) 204 CLR 333 at 438-439 [309] per Hayne J.

66 *Lepore* (2003) 212 CLR 511 at 544 [66] per Gleeson CJ, observing that "the more intensive the care provided by an educational or recreational organisation, the more extensive will be its risk of no-fault liability for the conduct of its employees" and that "there is little practical wisdom in discouraging them from providing anything more than academic instruction" recognising that the imposition of no-fault liability discourages the provision of more extensive assistance.

67 *Lepore* (2003) 212 CLR 511 at 534 [36] per Gleeson CJ, 587 [218] per Hayne and Gummow JJ.

how both limbs of the test have evolved. In short, that development shows that as the justification provided by the relationship between plaintiff and tortfeasor has grown more attenuated, to justify the imposition of no-fault liability courts have directed attention to the relationship between defendant and plaintiff.

45. As earlier noted, the employment-based test has evolved from justification based on express command to implied command, to acts within the "course of employment". The requirement of actual control has been replaced with the ability to exert control being sufficient.[68] Employer's liability for fraudulent conduct no longer depends on their employee acting for an employer's benefit.

10 46. By developing in "halting steps",[69] in a variety of factual circumstances, liability has expanded, gradually progressively detaching from its policy underpinnings. In a case of the present kind, the circumstances cumulate to significantly weaken the normative justifications for imposing no-fault liability in at least three dimensions. ***First***, "control" is deployed in only the most notional sense based on a right rather than any actual exercise of control. ***Second***, not only is the wrongful conduct not for the defendant's benefit and antithetical to the organisation's objectives, it is a form of criminality which inherently involves active and careful deception of the defendant, said to have control.[70] ***Third***, the enterprise is a non-profit entity which does not seek to accrue benefits for self-interested reasons.

47. While each of these expansions arising individually (or in some combination) has doubtless
20 occurred, their cumulation in cases of the present kind, explain why courts have sought to support liability by identifying a stronger connection in some other dimension. Under the "relevant approach", the requirement for a role to provide both opportunity and occasion, draws that stronger connection from:

(a) a defendant's practical ability to perceive the risk it created towards some determinate class of persons by placing a person within a given role; and

(b) the connection of that role with the wrongful conduct that eventuates.

48. For that reason, such cases require factual findings about the actual arrangements the Diocese made for Coffey's role and how those gave rise to the risk which eventuated.

49. **Historical shift in focus:** The requirements for such factual finding are supported by a review

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[68] Albeit, actual control remains highly relevant to the person's status, as to which see *Hollis* at 44 [57].

[69] *Trustees of The Roman Catholic Church v Ellis* (2007) 70 NSWLR 565, 576 [53] per Mason P.

[70] *Lepore* (2003) 212 CLR 511 at 583 [204] per Gummow and Hayne JJ at 626 [345] per Callinan J.

of the recent developments of the law in this area. While *Hollis* dealt with the test's first limb, that decision demonstrates important shifts in focus unappreciated by the Court below. The plurality in *Hollis*, in expanding the first limb through a more flexible notion of employment, looked to two considerations which strengthened the justification for a defendant's liability. ***First***, while acknowledging that a mere "right to exercise" control can suffice to establish employment,[71] on the facts the Court emphasised the significance in a marginal case of "the actual exercise of control".[72] ***Secondly***, the Court (dealing with a profit-making enterprise and having referred to enterprise risk as a policy justification)[73] placed weight on the defendant's knowledge of how the cyclists had been performing their duties and the consequent risk to which the defendant was exposing persons such as the plaintiff.[74] Analysis of the defendant's creation of risk and its knowledge of that risk, represented a shift in focus from the relationship between defendant and tortfeasor to that between defendant and plaintiff (or the class to which the plaintiff belonged), a feature which continued in later cases.

50. Two years later, in *Lepore*,[75] while disparate views were expressed about vicarious liability for sexual offending of employed teachers, Gleeson CJ's analysis[76] presaged that of the plurality in *Prince Alfred College*.[77] In *Lepore*, Gleeson CJ observed:[78]

> If there is sufficient connection between what a particular teacher is employed to do, and sexual misconduct, for such misconduct fairly to be regarded as in the course of the teacher's employment, <u>it must be because the nature of the teacher's responsibilities, and of the relationship with pupils created by those responsibilities</u>, justifies that conclusion. <u>It is not enough to say that teaching involves care</u>. So it does; but <u>it is necessary to be more precise about the nature and extent of care in question</u>. Teaching may simply involve care for the academic development and progress of a student. In these circumstances, it may be that, as in *John R* [*v Oakland Unified School District* (1989) 769 P 2d 948], the school context provides a mere opportunity for the commission of an assault. However, where the teacher-student relationship is invested with a high degree of power and intimacy, the use of that power and intimacy to commit sexual abuse may provide a sufficient connection between the sexual assault and the employment to make it just to treat such contact as occurring in the course of employment. The degree of power and intimacy in a teacher-student relationship must be assessed by reference to factors such as the age of students, their particular vulnerability if any, <u>the tasks allocated to teachers</u>, and the number of adults concurrently

[71] *Hollis* (2001) 207 CLR 21 at 40-41 [43]-[45].

[72] *Hollis* (2001) 207 CLR 21 at 44 [57].

[73] *Hollis* (2001) 207 CLR 21 at 39-40 [41]-[42].

[74] *Hollis* (2001) 207 CLR 21 at 42-43 [52].

[75] (2003) 212 CLR 511.

[76] *Lepore* (2003) 212 CLR 511 at 539 [52], 546 [74] per Gleeson CJ.

[77] *Prince Alfred College* (2016) 258 CLR 134 at 158-159, [75], [80] per French CJ, Kiefel, Bell, Keane and Nettle JJ.

[78] *Lepore* (2003) 212 CLR 511 at 546 [74] per Gleeson CJ (emphasis added).

responsible for the care of students. Furthermore, the nature and circumstances of the sexual misconduct will usually be a material consideration.

51. *Prince Alfred College* considered employer's liability for conduct of an employed boarding housemaster. Drawing on the analysis of Gleeson CJ,[79] the plurality, in laying down the "relevant approach" considered the defendant's relationship with the plaintiff, including how the defendant's actions in appointing the tortfeasor to a special role placed the plaintiff in a relationship of vulnerability. The Court held that "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".[80] On the facts in *Prince Alfred*, it was noted that the relevant approach required "a careful examination of the role that [the defendant] actually assigned to housemasters and the position in which [the housemaster] was thereby placed vis-à-vis the respondent and the other children".[81]

52. As to the necessary level of fact finding, the plurality observed that the primary judge had been "alert to the importance of the evidence concerning the actual role assigned", and that the "evidence did not permit her Honour to determine that question" because "[m]uch of the evidence necessary to a determination had been lost".[82] In holding that the Full Court had erred in overturning the primary judge's decision to deny an extension of time,[83] the plurality referred to the primary judge's reasoning that the school was prejudiced because on the issue of vicarious liability it was left in the position of "warding off inferences and being unable to call evidence on that issue" and that this "prevented the court from undertaking a close examination of [the housemaster's] role and being able to draw any conclusion about it". Their Honours noted that offences alleged to have occurred at the boarding house and those occurring elsewhere may have led to different results,[84] and held that the primary judge had been correct in her conclusions in this regard.[85]

53. Like Gleeson CJ's analysis in *Lepore*, in seeking to reconcile imposing liability on a blameless party for wrongs of another which were both criminal and antithetical to the employer's

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[79] *Prince Alfred College* (2016) 258 CLR 134 at 159 [80] per French CJ, Kiefel, Bell, Keane and Nettle JJ.
[80] (2016) 258 CLR 134 at 160 [81] per French CJ, Kiefel, Bell, Keane and Nettle JJ.
[81] (2016) 258 CLR 134 at 161 [84] per French CJ, Kiefel, Bell, Keane and Nettle JJ (emphasis added).
[82] (2016) 258 CLR 134 at 161 [85] per French CJ, Kiefel, Bell, Keane and Nettle JJ.
[83] (2016) 258 CLR 134 at 168 [110] per French CJ, Kiefel, Bell, Keane and Nettle JJ.
[84] (2016) 258 CLR 134 at 163 [94] per French CJ, Kiefel, Bell, Keane and Nettle JJ.
[85] (2016) 258 CLR 134 at 166 [102] per French CJ, Kiefel, Bell, Keane and Nettle JJ.

aims,[86] the Court continued to shift its analysis from the relationship between defendant and tortfeasor and toward that of defendant and plaintiff.

54. Under the "relevant approach", the significance of the specific arrangements by which the defendant "actually assigned" the tortfeasor a "special role" *vis-à-vis* the plaintiff (or the class to which the plaintiff belonged) is that it illuminates the nature of the risk which the defendant created and for which it is fair for it to bear liability.[87] It is for this reason that Gleeson CJ in *Lepore* stressed precision about findings regarding the nature of the care provided, the plurality in *Prince Alfred College* noted the importance of a careful examination of the role "actually assigned" to the tortfeasor.

10 55. **Error by the Court of Appeal:** In *Lepore*, Gleeson CJ, considering the need for analysis of "close examination" of "specific responsibilities of a particular employee",[88] had earlier observed that the "level of generality at which it is proper to describe the nature of an employee's duties ought not to be pitched so high as to pre-empt the issue".[89] Here, instead of analysing the actual arrangements the Diocese had put in place between Coffey and DP and how those connected to the assaults, the Court of Appeal reasoned at a higher level of abstraction leading to two related failures. ***First***, over objection,[90] it sought to make the necessary findings about the Diocese's operations based on the practices of priests and dioceses generally. ***Secondly***, it failed to draw a sufficient connection between the specific tasks the Diocese assigned and the wrongdoing which occurred.

20 56. The Court of Appeal, in effect, reasoned as follows: the Diocese had appointed Coffey to his role, under which he was subject to directions of the parish priest; "that role, in itself, engendered a significant degree of respect and trust in him by his parishioners, enabling him to achieve real intimacy with the respondent's family, and with the respondent in particular" {CA [149]: CAB 189}; "Coffey had regularly visited the family home to counsel and mediate between the respondent's parents in respect of their matrimonial issues" {CA [150]: CAB 190}; and, accordingly, it was through this relationship of trust that he had committed the

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86 *Lepore* (2003) 212 CLR 511 at 583 [204] per Gummow and Hayne JJ.

87 *Schokman* (2023) 97 ALJR 551 at 560 [38] per Kiefel CJ, Gageler, Gordon and Jagot JJ noting that for such cases "the focus is upon the position in which [the tortfeasor] was placed by the employment and what the employment entailed" (emphasis added).

88 Of schools, his Honour distinguished between those employed "simply to teach" and others with responsibilities involving them in "intimate contact with children": *Lepore* (2003) 212 CLR 511 at 540 [53].

89 *Lepore* (2003) 212 CLR 511 at 539 [51]-[52] per Gleeson CJ.

90 {CA [122]: CAB 183}.

assaults. Summarising that chain, the Court observed that 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": {CA [155]: CAB 191}.

57. That one of those occasions was found to be social was said not to preclude the imposition of vicarious liability because Father Dillon's evidence about practices of other parishes was that "the visiting of homes was seen as an integral part of parish pastoral care":[91] {CA [151]: CAB 190}.

10 58. In the present case, the level of generality at which the relevant approach was applied results in a test that proves too much; and leads to the "large conclusion"[92] that liability is likely to flow in respect of almost all offending for such religious institutions and many other not for profit bodies where a position of power can be harnessed to develop relationships which in turn facilitate offending.[93]

59. What emerges from the cases,[94] is that, while power and intimacy are frequently present, liability generally arises where those characteristics result from a specific position in which the defendant placed the tortfeasor with the plaintiff. The distinction between offending of a boarding housemaster against pupils for whose care the school had assigned him responsibility is significantly different from offending by a priest who had nothing more than general
20 pastoral duties towards parishioners as a whole, which duties may take him into their houses.

60. The reasons of Gummow and Hayne JJ in *Lepore*,[95] were apt in warning of the broad use of risk analysis with hindsight reasoning.[96] The level at which the Court of Appeal, and the trial judge, conducted their analyses fell into precisely this error.

61. Finally, the need for such analysis is also supported by role of deterrence as a policy

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91 The world "integral" was used by Father Dillon, rather than being a conclusion in the legal sense used in *Personnel Contracting* based on particular facts found: {CA [151]: CAB 190}.

92 *Lepore* (2003) 212 CLR 511 at 587 [217] per Gummow and Hayne JJ.

93 As Gummow and Hayne JJ observed in *Lepore* (2003) 212 CLR 511 at 587 [216], this is a pattern true of most cases of child sexual abuse.

94 *Lepore* (2003) 212 CLR 511 at 542 [61] per Gleeson CJ.

95 *Lepore* (2003) 212 CLR 511 at 589 [223].

96 See also, *Trustees of the Barry Congregation of Jehovah's Witnesses v BXB* [2023] 2 WLR 953 at 975-976 [70] per Lord Burrows observing that a focus on "but for" causation can elide distinctions between the relevant connection and what is properly background context.

justification. That deterrence may rationally justify imposing no fault liability, presupposes that a defendant could take meaningful steps to mitigate, if not obviate, the risk in question. That, in turn, highlights the need for an analysis of what the defendant did to place the tortfeasor in the role, and how that role assigned resulted in the harm which eventuated.

C. Notice of contention: Non-delegable duty does not apply

62. **Current law:** To accept the argument on the notice of contention, the Court must develop the common law by two steps: one, hitherto unknown (that the category of Diocese and parishioner is amongst the relationships giving rise of a non-delegable duty),[97] the other, previously rejected by this Court (that non-delegable duties can be owed by a party to prevent 10 a third person from inflicting harm by intentional torts and, relatedly, that they are of a kind imposing absolute liability to protect).[98] In *Lepore*, a majority as to this issue also observed that such an obligation to ensure care was taken did not amount to an absolute obligation to prevent harm.[99]

63. **Case not conducted below on this basis:** The case was run as one in negligence – which failed – and on the basis of vicarious liability (for the intentional torts of Coffey) {PJ, [2]: CAB 6}. It was not conducted on the basis that the Diocese owed the plaintiff a non-delegable duty. As the plurality observed in *Prince Alfred College*, the issue of non-delegable duty ought not be approached solely as a question of law. Rather, the necessary analysis "requires in the first place that the nature and content of the particular duty and responsibility owed to 20 the respondent be identified".[100] Relevant to that issue may be, for example, whether the Diocese had materially increased the risk of the criminal conduct in question[101] and, if so, in what respects, and how. Consistent with the well-established approach in *Suttor v Gundowda Pty Ltd*,[102] the argument should not be regarded as open in this Court.

64. **Leave to reopen should not be granted:** In *Prince Alfred College*, the plurality declined to

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[97] *Lepore* (2003) 212 CLR 511 at 599 [255] per Gummow and Hayne JJ referring to the established categories identified by Mason J in ***Kondis*** *v State Transport Authority* (1984) 154 CLR 672 at 687.

[98] *Lepore* (2003) 212 CLR 511 at 531-535 [31]-[38] per Gleeson CJ, 601-603 [264]-[270] per Gummow and Hayne JJ, at 599-601 [256]-[265], 624 [338]-[340] per Callinan J.

[99] *Lepore* (2003) 212 CLR 511 at 529 [22], 531 [31] per Gleeson CJ, 533 [105] per Gaudron J, 600-601 [261]-[263] per Gummow and Hayne JJ, 624 [338]-[340] per Callinan J.

[100] *Prince Alfred College* (2016) 258 CLR 134 at 169 [114] per French CJ, Kiefel, Bell, Keane and Nettle JJ. As observed in *Lepore*, the critical analysis for such duties will be their scope or content*:* (2003) 212 CLR 511 at 529 [22]-[23] per Gleeson CJ, 553 [105] per Gaudron J, 600-601 [261]-[263] per Gummow and Hayne JJ.

[101] *Lepore* (2003) 212 CLR 511 at 560 [126] per Gaudron J.

[102] (1950) 81 CLR 418 at 438 per Latham CJ, Williams and Fullagar JJ.

reopen *Lepore* to address the notice of contention filed.[103] The requisite leave should not now be granted. Each of the four factors in *John*,[104] as they pertain to *Lepore's* conclusion regarding non-delegable duties for intentional torts, points against the grant of that leave. ***First***, the absence of such a duty rests on principle worked out in successive cases: in *Lepore*, it was observed that over the long history through which non-delegable duties had been established they had always been confined to negligence.[105] ***Secondly***, there is no material difference in reasoning between the members of *Lepore's* plurality on this point. Gleeson CJ and Callinan J agreed on this issue, the views of Gummow and Hayne JJ were materially the same.[106] While Gaudron J did not decide the issue, her Honour's critical conclusion on the related issue of the
10 true characterisation of non-delegable duties is materially the same.[107] ***Thirdly***, *Lepore's* conclusion on this issue has not produced inconvenience; to the contrary, it has produced certainty. ***Fourth***, the principle has by now been relied on in many proceedings – settlements have been entered and loss distribution mechanisms arranged around that understanding.

65. **No duty for intentional acts:** If, however, leave is granted, for substantially the reasons in *Lepore*, non-delegable duty should not extend to intentional torts.

66. **Scope of any duty:** If, contrary to existing authority, a diocese does owe such a non-delegable duty to its parishioners, the scope of such duty would not extend to the present circumstances. An antecedent relationship and a vulnerability of the plaintiff, while necessary, are not sufficient to impose such a duty. Rather, the "special duty arises because the person on whom
20 it is imposed has undertaken the care, supervision or control of the person or property of another".[108] Here, the Diocese assumed control over neither the plaintiff nor any known "hazard".[109] There is no analogy to cases such as schools and pupils where the assumption arises from the establishment of a school coupled with the legal obligation imposed on parents

103 *Prince Alfred College* (2016) 258 CLR 134, 147, [36] (French CJ, Kiefel, Bell, Keane and Nettle JJ), citing *Queensland v The Commonwealth* (1977) 139 CLR 585; *John* (1989) 166 CLR 417; *Wurridjal v The Commonwealth* (2009) 237 CLR 309.

104 (1989) 166 CLR 417 at 438-439 per Mason CJ, Wilson, Dawson, Toohey and Gaudron JJ.

105 *Lepore* (2003) 212 CLR 511 at 599 [256] per Gummow and Hayne JJ.

106 *Lepore* (2003) 212 CLR 511 at 531-535 [31]-[38] per Gleeson CJ, at 599-601 [256]-[265] per Gummow and Hayne JJ, at 624 [338]-[340] per Callinan J.

107 *Lepore* (2003) 212 CLR 511 at 553 [105] per Gaudron J.

108 *Kondis* (1984) 154 CLR 672 at 687 per Mason J. See also, *Lepore* (2003) 212 CLR 511 at 533-534 [35] per Gleeson CJ.

109 *Woodland v Swimming Teachers Association* [2014] AC 537 at 549-550 [20] per Lord Sumption.

to place their children in such care.[110] Here, any such duty owed by a diocese which may for example exist in the conduct of a Sunday school cannot extend to all conduct of its priests. That is especially so having regard to the breadth at which the primary judge and Court of Appeal characterised the pastoral duties. An assumption at such breadth could only arise from the kind of legal fiction to which the "common law is hostile".[111]

Part VII: Orders sought

67. The appellant seeks the orders set out in the notice of appeal {CAB 222}.

Part VIII: Time for oral argument

68. The appellant's time for oral argument, including reply, is estimated to be 2 ½ hours.

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Dated: 15 December 2023.

	Bret Walker	**Albert Dinelli**
T	(02) 8257 2527	(03) 9225 6909
E	caroline.davoren@stjames.net.au	albert.dinelli@vicbar.com.au

Alexander James-Martin
(03) 9225 6905
alex.jamesmartin@vicbar.com.au

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Colin Biggers & Paisley Lawyers
Solicitors for the appellant

110 *The Commonwealth v Introvigne* (1982) 150 CLR 258 at 271 per Mason J.

111 *Scott v Davis* (2000) 204 CLR 333 at 375-376 [128] per Gummow J, cited with approval *Harriton v Stephens* (2006) 226 CLR 52 at 132 [269] per Crennan J (with whom Gleeson CJ, Gummow J and Heydon J agreed).

ANNEXURE

Pursuant to para of the Practice Direction No 1 of 2019, the particular constitutional provisions and statutes referred to in the respondent's submissions follows:

	Title	Version	Provisions
1.	*Civil Liability (Institutional Child Abuse Liability) Amendment Act 2021* (SA)	Repealed	
2.	*Civil Liability Act 1936* (SA)	Current, at 22 June 2023	ss 50A and 50G, 50D(1)
3.	*Civil Liability Act 2002* (NSW)	Current, at 16 June 2022	ss 6H and 6G, Schedule 1, cl 44
4.	*Civil Liability Act 2002* (Tas)	Current, at 1 May 2020	ss 49I and 49J, 4(8)
5.	*Civil Liability Amendment (Organisational Child Abuse Liability) Act 2018* (NSW)	Repealed 2 January 2019	
6.	*Justice Legislation Amendment Organisational Liability for Child Abuse Act 2019* (Tas)	Repealed	
7.	*Law Reform (Vicarious Liability) Act 1983* (NSW)	Current, at 1 December 2014	Part 4
8.	*Legal Identity of Defendants (Organisational Child Abuse) Act 2018* (Vic)	Current, at 1 May 2020	s 4(3)
9.	*Personal Injuries (Liabilities and Damages) Act 2003* (NT)	Current, at 1 January 2023	ss 17G, 17B(5)
10.	*Police Act 1892* (WA)	Current, at 24 Oct 2023	s 137
11.	*Police Act 1998* (SA)	Current, at 10 October 2022	s 65
12.	*Police Service Act 2003* (Tas)	Current, at 1 July 2019	s 84

	Title	Version	Provisions
13.	*Police Service Administration Act 1990* (Qld)	Current, at 1 September 2023	s 10.5
14.	*Victoria Police Act 2013* (Vic)	Current, at 1 December 2023	s 74
15.	*Wrongs Act 1958* (Vic)	Current, at 11 October 2023	s 91
16.	*Wrongs Amendment (Organisational Child Abuse) Act* 2017 (Vic)	Repealed, 1 July 2018	s 2