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

Not Restricted

S ECI 2020 01541

DP (a pseudonym) — Plaintiff

v

BISHOP PAUL BERNARD BIRD — Defendant

JUDGE:	J FORREST J
WHERE HELD:	Melbourne
DATES OF HEARING:	27, 28 July; 2, 3, 4, 5, 6, 13 August; 21, 22, 23, 27, 28, 30 September 2021
DATE OF JUDGMENT:	22 December 2021
CASE MAY BE CITED AS:	DP (a pseudonym) v Bird
MEDIUM NEUTRAL CITATION:	[2021] VSC 850

INSTITUTIONAL LIABILITY — Personal injury — Historical abuse of a child by a priest — Vicarious liability of the Diocese for the unlawful actions of an assistant priest — Whether the Diocese failed to exercise reasonable care — Assessment of damages — Aggravated and exemplary damages — *Prince Alfred College Incorporated v ADC* (2016) 258 CLR 134 — *Malec v JC Hutton Pty Ltd* (1990) 169 CLR 638 — *Sweeney v Boylan Nominees Pty Ltd* (2006) 226 CLR 161 — *Various Claimants v Catholic Child Welfare Society* [2013] 2 AC1 — *Wrongs Act 1958 (Vic)* Part X.

APPEARANCES:	Counsel	Solicitors
For the Plaintiff	Dr G Boas with Dr E Kelly	Ken Cush & Associates
For the Defendant	Ms R Annesley QC with Ms T Skvortsova and Mr A Dinelli	Colin, Biggers & Paisley Lawyers

HIS HONOUR:

Introduction

1 DP[1] asserts that in 1971, when five years of age, he was assaulted by a Catholic priest, Father Bryan Coffey ('Coffey'), at his parents' home at Port Fairy. It is alleged that, during two visits to the family home in his capacity as an assistant parish priest and with the authority of the Diocese of Ballarat ('the Diocese'), Coffey groomed and then sexually abused him.

2 DP sues the Diocese through the current Bishop, Paul Bird, the named defendant.[2] He maintains that the Diocese is vicariously liable for the actions of Coffey. Additionally, he says that it is liable in negligence by reason of the Diocese's (and the relevant Bishop's) failure to exercise reasonable care in its authority, supervision, and control of the conduct of Coffey.

3 DP contends that as a result of the actions of Coffey he has developed, amongst other psychological conditions, complex post-traumatic stress disorder, which has affected him since the age of five and all but destroyed his earning capacity.

4 The Diocese does not admit that Coffey assaulted DP and denies that it is vicariously liable for his actions. It ultimately admitted that it owed a duty of care to DP, but asserts it was not breached. If the Diocese fails on those points, it says that the primary sources of DP's mental health issues are unrelated to the assault(s) and there is no cogent evidence to sustain an award of damages for economic loss.

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1 The plaintiff is referred to by a pseudonym pursuant to an order of Irving JR made on 21 April 2021.

2 The legal identity and potential legal liability of the defendant in the circumstances of this case is governed by the provisions of the *Legal Identity of Defendants (Organisational Child Abuse) Act 2018* ('the Act'). Bishop Bird is the nominated 'proper defendant': s 7. The Diocese is a non-government organisation and falls within the definition of an NGO under the Act: s 5. For all practical purposes the Diocese of Ballarat is the defendant to the claim of DP. I have referred to the Diocese and/or Bishop (meaning the Bishop of the Diocese of Ballarat at the relevant time) interchangeably throughout these reasons. The Bishop is the senior official of the Church within the Diocese and 'a management member' of an NGO: s 3 (definition of 'management member'). As admitted in the defence, the Bishop made a number of decisions relating to Coffey's engagement as assistant priest at St Patrick's: see s 3 (definition of 'management member' para (b)).

5 For the reasons that follow, I have determined that:

(a) Coffey assaulted DP as he alleges;

(b) The Diocese is vicariously liable for the assaults perpetrated by Coffey;

(c) DP has not established that the Diocese was negligent;

(d) DP's general damages (pain and suffering and loss of enjoyment of life) should be assessed at $200,000;

(e) There should be no award of damages for loss of earning capacity (past and future);

(f) Damages for medical and like expenses should be assessed at $10,000;

(g) Aggravated damages should be awarded in the sum of $20,000;

(h) There should be no award of damages for exemplary damages.

The background to the claim

6 Much of the following is, I think, uncontroversial. If any part is not, these are my findings of fact save where otherwise indicated.

7 DP is now 55 years of age. He was born in Port Fairy on 16 February 1966 and raised in a strict Catholic family.

8 He had four elder siblings: Rhonda, born in 1954; Kaye, born in 1955 (deceased in 2014); Brendan, born in 1957; and Sandra, born in 1960.

9 DP's father ran a fish-and-chip business in Warrnambool. His mother managed the family and the family home in William Street, Port Fairy. DP was particularly close to his mother. DP says that he did not get on with his father who was a strict disciplinarian and violent towards members of the family, including DP.

10 The local Catholic primary school, St Patrick's, is located about 200 metres from the family home. The parish church, also St Patrick's, is nearby on the corner of the

Princes Highway and College Street. The church and school are within the Ballarat Diocese.

11 Bishop Ronald Mulkearns ('Bishop Mulkearns') was the appointed bishop in charge of the Diocese between 1971 and 1997. The parish of Port Fairy, St Patrick's, was within that Diocese.

12 Coffey was ordained on 24 July 1960. He was appointed to St Patrick's as an assistant priest in 1966.

13 DP's grandmother, Mary Donohue, died on 13 November 1970 and the funeral was held several days later at St Patrick's church.

14 In early 1971, at the age of five, DP commenced 'prep' at St Patrick's primary school. During that school year DP suffered from asthma and missed much of the year's schooling.

15 At that time, Coffey was the assistant parish priest to Father Patrick O'Dowd ('Father O'Dowd') and taught at the school.

16 DP asserts that in 1971 on two separate occasions — the first in March or April at his grandmother's wake and the second on Boxing Day — he was assaulted by Coffey. I shall describe those assaults in more detail later.

17 In 1975 and 1976, DP was in his final primary school years — grades 5 and 6 at St Patrick's. He was taught by a female primary teacher ('the teacher'). He says that on "several" occasions she physically abused him. She would "crack" him over the head and drag him by the ear outside. The abuse was also emotional over those two years ('the school abuse'). These allegations have not been substantiated but have been repeated on many occasions with different emphasis by DP.

18 After completing primary school, in 1977 DP commenced his secondary studies at the Warrnambool Technical School. He was a student at that school for years 7 to 9 and then moved to the Warrnambool Community School for years 9 to 11. He completed

those scholastic years successfully but did not progress beyond Year 11. He finished his schooling in 1983.

19 At some time in the early 1980s (the evidence of DP was particularly confusing as to dates), he formed a sexual relationship with an elder boy, Danny. DP may have been as young as fifteen when this relationship commenced. In any event, the relationship lasted for several years until Danny's death.

20 Danny suffered severe injuries in a motor vehicle accident in 1985 and some nine months afterwards committed suicide whilst a patient at Caulfield Hospital Rehabilitation Centre.

21 From 1983 and for several years subsequently DP was employed, mainly on a casual basis, in businesses in Port Fairy and Warrnambool.

22 On 19 March 1985, tragedy struck the family. DP's parents were killed in a horrific traffic accident at Balranald, New South Wales. There was an extensive police investigation. The coroner concluded that the accident was caused by the driver of another vehicle falling asleep and crossing onto the incorrect side of the roadway. DP still harbours the suspicion that his father deliberately caused the collision.

23 At the time of his parents' death, DP was 19 years of age and living at home in Port Fairy with his parents. The family home was sold and DP was required to find alternative accommodation in the Warrnambool district.

24 At some point in time during the 1980s, DP commenced using hard drugs — heroin and cocaine. This lasted for a number of years but had ceased by the time he moved to Sydney in 1993.

25 In 1988, DP moved to Melbourne and obtained employment with the Melbourne and Metropolitan Tramways Board, initially as a conductor and then as a driver.

26 In 1993, DP moved to Sydney. He had several "agency" jobs and eventually obtained permanent employment in 1995 with Canon in a customer service role.

27 In 1996, in Sydney, DP met his partner, Peter. They remain partners.

28 In 1999, DP suffered a workplace back injury which ultimately resulted in him receiving a lump sum payment of $45,000. He was on and off work for several years (on modified duties) and ultimately in 2000 or 2001 his employment was terminated.

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

30 In August 2000, DP commenced receiving the Commonwealth Carer Payment and the Carer Allowance — on the basis that he was the carer of his partner, Peter. That continues to the present day.

31 In 2001, DP and Peter moved to Melbourne and purchased a house in Melton South. They continue to reside in that house.

32 Soon after his arrival in Melbourne, DP consulted Dr Marcus Watson, a general practitioner in Melton who continues to treat him.

33 Between 2001 and 2006, DP operated and managed café businesses. The first, in Main Street, Bacchus Marsh — Muzza's — was a partnership between himself and Peter. The second — called at different times Yvonne's Diner and Baydonmur — in Bakery Square, Melton, operated for several years but ultimately proved to be a financial disaster.

34 From 2003 through to the present time, DP has suffered from symptoms of depression, anxiety, panic disorder and agoraphobia which were attributed (in histories to his general practitioner and treating psychologists) to a variety of causes: in particular to his relationship with Peter, his and his sibling's treatment as children by their father, financial problems, the death of his parents and the school abuse.

35 DP was declared bankrupt in 2006. The bankruptcy continued for about five years.

36 From 2006, DP was treated with antidepressants by his general practitioner, Dr Watson.

37 In January 2011, DP consulted Mr Simon Lush, a clinical psychologist at Western Psychological Services ('WPS') and saw him on 11 occasions until August 2012.

38 In May 2013, DP consulted Ms Kim Marr, a clinical psychologist at WPS, and saw her on 20 occasions until September 2014.

39 In March 2014, DP's sister, Kaye, with whom he was close, died of a brain tumour.

40 In October 2014, Ms Marr ceased practising. DP was referred to Dr Angelo Pagano, also a clinical psychologist at WPS, and has seen him regularly since that time.

41 In 2014, DP commenced to investigate the circumstances of his parents' deaths and this occupied him (though not full-time) for at least another three to four years. He spent considerable time and effort communicating with individuals and organisations in Victoria and New South Wales concerning the facts surrounding their deaths, including whether he was entitled to compensation.

42 In November 2014, DP made a complaint to the Towards Healing organisation (a redress body established by the Catholic Church) in relation to the school abuse. He asserted that he had been physically and mentally abused by a female teacher at St Patrick's school over a period of two years when in grades 5 and 6. He consulted two firms of solicitors and sought compensation.

43 In March 2015, Dr Pagano provided a report to Slater and Gordon — DP's then solicitors — commenting on the effects of "the abuse that occurred between 1976 and 1977 while [DP] was a student at St Patrick's Primary School, Port Fairy, the psychological and lifestyle effects subsequent to the abuse, other problems and recommended treatment and likely costs".[3]

44 In 2016, the claim for compensation in relation to the school abuse was rejected by the

[3] Exhibit D25.

Towards Healing organisation.

45 In 2016, DP made a claim on the Transport Accident Commission ('TAC') for payments under the *Transport Accident Act 1986* in relation to the death of his parents.

46 On 6 June 2016, DP's claim was rejected by the TAC. His appeal to the Victorian Civil and Administrative Tribunal ('VCAT') was dismissed.

47 In 2016, DP sought an ex-gratia payment of $780,000 from the New South Wales government as a result of the psychological trauma sustained by him as a result of the death of his parents.

48 In August 2016, at DP's request, Dr Pagano wrote to Ms Jodie McKay MP, then opposition transport spokesperson in the New South Wales Parliament, supporting DP's claim for "potential benefits" as a result of "ill health suffered" "following the death of his parents in a motor vehicle accident on March 19, 1985".[4]

49 In September 2016, the New South Wales government refused DP's request for an ex-gratia payment.

50 In late 2018 (most likely December 2018), a friend by the name of Nicole sent DP a copy of an advertisement in a local Port Fairy newspaper, the *Moyne Gazette*, which sought information about potential victims of Coffey ('the December advertisement').[5] It had been placed in the newspaper by the solicitors acting for DP in this case, Ken Cush & Associates.

51 DP had told no one else (apart from Peter, on his account) about the fact that Coffey had assaulted him until he rang the office of Ken Cush & Associates in January 2019 after reading the December advertisement. He spoke to Mr Kitchen, solicitor, and disclosed details of the Coffey assaults to him.

52 This claim was issued on 27 March 2020. In his pleaded case and that advanced at trial, DP contended that the assaults by Coffey had caused long-term psychological

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4 Exhibit D24.
5 Exhibit D14.

damage (including post-traumatic stress disorder) which had caused major pain and suffering and destroyed his earning capacity.

The issues in this case

53 As I see it, the following are the primary issues to be determined:

- Was DP assaulted by Coffey?
- Is the Diocese vicariously liable for any assault of DP by Coffey?
- Is the Diocese liable in negligence for any assault of DP by Coffey?
- If Coffey assaulted DP, what injuries and damage did DP suffer?
- What is the appropriate assessment of DP's compensatory damages?
- Is the Diocese liable for an award of aggravated or exemplary damages?

The credibility of DP

54 I will initially deal with my findings as to the credibility of DP, which are relevant to the outcome on both liability and assessment of damages.

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

56 The first is DP's failure to disclose Coffey's conduct and its effects to any member of his family, or friends, until after he saw the December advertisement. He said he told his current partner, Peter, in about 1998 of the fact of the Coffey assaults. This, on his account, was the first time he had told anyone about Coffey's behaviour. However, Peter was not called and given my reservations as to DP's reliability I do not accept that this disclosure occurred. Otherwise, DP conceded that he told no one until he read the December advertisement. I am conscious that Mr Harrison, a friend called by DP, said that DP had mentioned the fact of being assaulted approximately five or

six years ago. Whilst I accept his evidence generally, this evidence was imprecise and underwhelming. Moreover, it was inconsistent with DP's own account. I think it far more likely that this conversation occurred in 2019, after DP read the December advertisement.

57 It is extraordinary that in the process of making the school abuse complaint to a Catholic redress body — with the help of two firms of solicitors — that DP did not mention Coffey's actions. Indeed, it is puzzling in the extreme that on his own account the first disclosure of the Coffey abuse (apart from that to Peter — which I do not accept) was to a lawyer whom he had never met, by telephone, after reading the December advertisement.

58 Second, and, in my view, of greater significance, is DP's concession that he did not inform any of his treating psychologists at WPS, Mr Lush, Ms Marr or Dr Pagano (who treated him from 2011), or his general practitioner, Dr Watson (who treated him from 2001), of the assaults by Coffey until after he had contacted his solicitors in January 2019 in response to the December advertisement. He was well aware that in a confidential setting these professionals were treating him for his psychological problems, their causes, and their effects upon him.

59 DP saw Dr Watson regularly and was prescribed antidepressant medication for his psychological condition. He saw the WPS psychologists on numerous occasions (over 40) and did not recount Coffey's behaviour during these sessions. On the other hand, he informed these treating specialists and his general practitioner of many other events in his past life which he said had profoundly affected his psyche — particularly that of the violence of his father towards the family, the impact of the death of his parents, the school abuse, the death of his sister, his relationship with his partner and his bankruptcy.

60 It is of significance that in 2014 in his signed statement[6] concerning the school abuse — completed for the purpose of pursuing a claim for compensation with Towards

[6] Exhibit D9.

Healing — DP attributed his manifest and significant psychological symptoms to the teacher's prolonged abuse. He stated that, up until the time of the school abuse, he had led a "straightforward and quite normal" childhood. In cross-examination, he explained this omission by stating that he was ashamed to divulge the offending of Coffey.[7]

61 Dr Pagano recounted a similar history in his 2015 report,[8] prepared at DP's request, which supported DP's claim for compensation about the school abuse. In the report, DP's psychological problems (major depressive disorder, persistent depressive disorder, panic disorder and agoraphobia) were attributed to the school abuse with no mention of the Coffey assaults. Again, DP described to Dr Pagano a normal upbringing prior to the school abuse: "otherwise it was a relatively normal early childhood without significant trauma prior to his abuse at St Patrick's School".

62 I do not accept the explanation that DP was too "embarrassed and disgraced"[9] to mention the Coffey abuse to others (including his treating professionals). This may quite reasonably have accounted for his failure to do so as a child, teenager and for a significant part of his adult life. But as I have just stated, it does not square with his accounts to others of the cause of his problems and particularly to those professionals in a therapeutic confidential setting; nor does it sit comfortably with his first disclosure of the abuse — by telephone to a solicitor he had never met.

63 Moreover, it is out of character with the person I saw and heard in the witness box who was quick to attribute blame to others for his misfortunes. I think that the real explanation is that advanced by the Diocese: that DP's account is tailored to further the particular wrong which he perceived as the cause of his problems — whatever that might be at the time.

64 This selective approach of DP as to attribution of his psychological issues is also evidenced by his capacity to segregate parts of his life as it suits him and depending

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7 T823-24.
8 Exhibit D25.
9 T793.

on the circumstances.

65 An example is his partnership with Peter running a café — 'Muzza's' — between 2001 and 2004. Despite the fact that his claim is for destroyed earning capacity caused by the Coffey assaults, this enterprise was not mentioned in DP's particulars of "past loss of earning capacity" which states that he was unemployed in 2001 and only commenced a café business in 2004. He did not mention 'Muzza's' in his evidence-in-chief. In fact, he managed the business and did the cooking, with Peter occasionally helping out.[10] In cross-examination, he gave the following answers:

> Counsel: DP, when you say this business, did you run any other business?
>
> DP: Yes, I did.
>
> Counsel: What was that called?
>
> DP: That was with Peter.
>
> Counsel: What was that called?
>
> DP: It was Peter's business in 2001.
>
> Counsel: What was that called?
>
> DP: Muzzas, m-u-z-z-a-s.
>
> Counsel: What was that?
>
> DP: It was a café as well.
>
> Counsel: Where was that, was that in the same location at 49 Bakery Square?
>
> DP: Yes. The reason why that has not been declared to you is because it was a partnership business.
>
> Counsel: So you were in a partnership business with [Peter] from when to when?
>
> DP: From 2001 til 2004, and then I moved into Bakery Square and put it in my name in 2004 to 2006.
>
> Counsel: Muzzas business was a café, correct?
>
> DP: Yes, that's correct.
>
> Counsel: And it was operated by you and [Peter] between 2001 and 2004?

[10] T266; T860-63.

DP: Correct.

Counsel: And what was the location?

DP: Um, it was in Bacchus Marsh.

Counsel: Where abouts in Bacchus Marsh?

DP: Main Street, Bacchus Marsh.

Counsel: And did you – you have not declared that in terms of any – in this proceeding before now, is that correct, you've not told anyone about that?

DP: I have not told because that is a business co-ownership between me and [Peter].

Counsel: Yes?

DP: So all I was asked to declare was what I [owned] for myself.[11]

66 Indeed, in this litigation, in the history initially provided to Associate Professor Quadrio (a consulting forensic psychiatrist engaged by DP's lawyers) at a lengthy consultation in her rooms, he underplayed the effect of the school abuse and the death of his parents and emphasised the role of the Coffey assaults with the commencement of symptoms from that time. This was totally inconsistent with the accounts he gave to his treating psychologists as to the causes and onset of his symptoms.

67 Third, I do not accept the evidence of Associate Professor Quadrio that this delay in disclosing the abuse can be explained by studies of the responses of other victims of sexual abuse in similar settings. In her report of February 2020 ('first report'), she said as follows:

> In the first years of his relationship with Dr Pagano, DP did not disclose details of the sexual abuse. This is a typical avoidance in male survivors, it reflects that shame that is almost universal and it is a barrier to help seeking as has been the case with DP.

68 Putting aside the basic proposition that each case turns on its own facts, Associate Professor Quadrio's opinion was based on one (admittedly lengthy) interview with DP at her rooms and DP's statement. DP's solicitors elected not to provide the Associate Professor with any material which might have assisted her at this

11 T859.

consultation, such as reports or notes from the treating general practitioner, or the psychologists.[12] Nor did they provide any material that accompanied his claims for compensation from the New South Wales government, TAC and Towards Healing in respect of other unrelated insults to his psyche.

69 The Associate Professor did not seek any additional information and simply relied upon DP's word as to the cause of his problems and the asserted basis for the delay in disclosing the Coffey allegations. In these circumstances, reliance upon generalised propositions are ill-conceived and do not substantiate the opinion she ultimately provided.

70 Moreover, it was not just in "the first years" that DP did not disclose the fact of the assaults to Dr Pagano. He did not tell Mr Lush or Ms Marr of the fact or the details. He did not disclose any information about Coffey's assaults (not just omitting details) until after he had contacted the solicitors in early 2019, some five years after Dr Pagano commenced treating him. This was in circumstances where Dr Pagano had on two separate occasions provided reports supporting claims for compensation relating to depression and anxiety arising from the school abuse and the death of his parents.

71 I shall return to this when I deal with the assessment of damages, but the end result is that I cannot be satisfied that the Associate Professor had anything like a true picture of DP and this undermines any confidence I could have in her opinion.

72 Fourth, I formed the distinct view that DP had, at least to a layman's perception, a close to obsessive personality. His behaviour in relation to the investigations concerning the death of his parents demonstrates this starkly. It is not at all clear what triggered his crusade, but what is apparent is that the goalposts kept shifting. Initially (and still today), he suspected that his father (who he regarded as a violent man) had deliberately driven into the path of an oncoming vehicle with the intention of killing his mother and committing suicide. Then he turned his attention to the construction of the road and blamed the Mains Road Authority in New South Wales for the

[12] The only information given to the Associate Professor was a statement of DP made in November 2019.

accident. This crusade continued to the point of him writing a number of letters to Members of Parliament and eventually meeting with the responsible Shadow Minister in Sydney. As I see it, this trait colours his perception of events and causes him to focus on a particular episode in his life which he sees as the cause of his problems.

73 Fifth, I also have the distinct impression that DP is prepared to blame others for what he sees as his life's tragedies or misfortunes, as suggested by the Diocese. He blamed his sister for failing to make a TAC claim for him in relation to the death of his parents. Of course, at the time he was of majority and could have made the application himself, but to this day he sees her as the perpetrator of this injustice. He blames his father for his mother's death, notwithstanding the coroner's finding that it was the other driver who was responsible. He blamed the school abuse and later, after reading the December advertisement, he blamed the Coffey assaults as the root cause of his life problems. Even during the trial he accused Dr Pagano of unlawfully disclosing information to the Court about his condition and said he would terminate the doctor's engagement.

74 Sixth is the failure by DP to call several relevant medical witnesses whom it could reasonably be expected would be called, given the challenge to his account of both the immediate and long-term effects of the assaults. Neither Dr Pagano (or any of his predecessors at WPS) nor Dr Watson were called to support his case as to the cause of his psychological problems or the effects of the Coffey assaults. There was no question of unavailability. Not only is a *Jones v Dunkel*[13] inference available based on that failure but also that described by Lord Mansfield in *Blatch v Archer*.[14] I shall return to this in more detail when I deal with the assessment of damages.

75 Indeed, there is a yawning chasm in terms of corroborative evidence of DP's account: no family member; no partner; no treating doctor; no treating psychologist. If there were any immediate or delayed psychological consequences of the Coffey assaults during his childhood or teen years then family or close friends could have reasonably

13 (1959) 101 CLR 298.
14 (1774) 98 ER 969.

been expected to be called — especially given the attack on his reliability by the Diocese. No one gave before and after evidence. The closest in time to the assaults was Ms Margaret Jago, who first met DP as a fellow student after the assaults — her evidence simply confirmed some of the childhood issues that DP experienced.

76 The end result is that I have considerable reservations to the point of substantive doubt about most of the evidence of DP as to the effects of the Coffey assaults upon him. Absent corroboration or a soundly drawn inference from the evidence, I cannot be satisfied that his personal account of the trials and tribulations that he now attributes to those assaults meets the requisite standard of proof.

77 However, as will become apparent, I do not have the same concerns about his account of the Coffey assaults and the circumstances in which Coffey regularly visited the family home. This is for two reasons. First and primarily, the evidence of the other boys (discussed in detail in a moment) who were abused by Coffey strongly corroborates the account of DP both as to Coffey's 'MO, as well as the manner of the assaults. Second, DP's evidence on this issue rings true — it does not appear to be exaggerated and has remained generally constant since he disclosed it in 2019.

Was DP assaulted by Coffey?

78 Before I go to the alleged circumstances surrounding each assault, I think it helpful to restate three simple but sometimes overlooked propositions.

79 First, DP carries the onus of proof: he is required to prove his case on the balance of probabilities, both as to the happening of the assault(s) and the consequences that may translate into an award of damages.[15]

80 Second, the fact that these alleged events occurred nearly 50 years ago when DP was five years of age is particularly relevant. Juries in criminal trials are instructed that, where a delay has been shown to inflict a forensic disadvantage on an accused, they must take the forensic disadvantage into account when considering the evidence.[16]

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15 *Evidence Act 2008* s 140 ('*Evidence Act*').
16 *Jury Directions Act 2015* s 39.

These disadvantages were spelt out by McHugh J in *Longman v The Queen*:[17]

> The fallibility of human recollection and the effect of imagination, emotion, prejudice and suggestion on the capacity to "remember" is well documented. The longer the period between an "event" and its recall, the greater the margin for error. Interference with a person's ability to "remember" may also arise from talking or reading about or experiencing other events of a similar nature or from the person's own thinking or recalling. Recollection of events which occurred in childhood is particularly susceptible to error and is also subject to the possibility that it may not even be genuine …
>
> No matter how honest the recollection of the complainant in this case, the long period of delay between her formal complaint and the occurrence of the alleged events raised a significant question as to whether her recollection could be acted upon safely. The likelihood of error was increased by the circumstances in which the complainant said the incidents occurred. The opportunity for error in recalling, twenty years later, two incidents of childhood which are alleged to have occurred as the complainant awoke, and then pretended to be asleep, are obvious. Experience derived from forensic contests, experimental psychology and autobiography demonstrates only too clearly how utterly false the recollections of honest witnesses can be …
>
> To the potential for error inherent in the complainant's evidence must be added the total lack of opportunity for the defence to explore the surrounding circumstances of each alleged offence. By reason of the delay, the absence of any timely complaint, and the lack of specification as to the dates of the alleged offences, the defence was unable to examine the surrounding circumstances to ascertain whether they contradicted or were inconsistent with the complainant's testimony.[18]

81 Third, in contradistinction to the second point, it is well accepted that delay in making a complaint is not inconsistent with the credibility of the complainant's account. In the criminal law this is reflected by s 53 of the *Jury Directions Act 2015*. In giving directions to a jury, a trial judge may advert to many reasons why a victim of sexual assault may delay or hesitate in complaining about such an offence. For instance: ignorance about the nature, quality and character of the act performed; feelings of powerlessness; a fear of family dissolution or punishment for the offender; having been sworn to secrecy, or feeling compelled to secrecy, by threats of harm to themselves or other people; feelings of responsibility, guilt or blameworthiness for the acts that occurred; feelings of shame or embarrassment; a fear of bringing disgrace to the family; or a fear of not being believed.

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17 (1989) 168 CLR 79.

18 Ibid [107–8] (citations omitted).

82 All these considerations (on both sides of the ledger) hold good for judges in their determination of the facts of a particular civil case.

The first assault

83 DP said that Coffey was a regular visitor to his parents' house. He recounted that, in or around 1970–1971, "there was [sic] marital problems in the family. Coffey used to come around … to talk to my parents".[19] DP said that on about five or six occasions Coffey had visited DP in his bedroom.[20]

84 He said that the first assault by Coffey occurred at the wake of his paternal grandmother, which was held at his family home at some time in the early part of 1971.[21] In cross-examination, DP said that it occurred in March or April of that year.[22]

85 During the evening, DP became tired; Coffey offered to put him to bed: "He put me over his shoulder and carried me into the bedroom and … slapped me on the bum [on] the way in"[23] using two "forceful slap[s]".[24]

86 Once in DP's bedroom, Coffey put him to bed "under the sheets" and sat on the edge of the bed talking to DP while he "dozed off". DP then "woke up to find [Coffey's] hand under the sheets fondling with my … personal parts", meaning his penis and "ball area", inside the fly of his pyjama pants.[25] This continued for five minutes or so, after which Coffey said, "Oh we'll be all right", and returned to the party still going in the lounge room of the house.[26] DP went back to sleep.

87 DP and Coffey were alone during this episode. He did not tell his mother or anyone else what had occurred.

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19 T311.
20 T316.
21 T318.
22 T811–12.
23 T320.
24 T322.
25 T323.
26 T324.

The second assault

88 DP said that Coffey assaulted him on a second occasion on Boxing Day 1971 (also when DP was five years old).

89 Coffey was again visiting the family home. DP took him out to the backyard to show him an "Indian tent" that he had received for Christmas. DP climbed into the tent and Coffey followed him into it. Inside the tent Coffey asked:

> …basically, "Do you like what Santa brought you? Is it a good present?" and he proceeded to lift my shirt and tickle me on the stomach down towards the … bottom region of my body … towards my … genital region of my body, as far down as below the belly button.[27]

The tickling continued for three minutes or so, at which point DP yelled out for his mother, who was outside the tent. DP then left the tent. When his mother asked him what was wrong, DP replied, "Oh, can I just get out of here please?".[28]

90 DP did not tell his mother nor anyone else in his family about this second assault by Coffey.

The tendency evidence

91 On a preliminary application as to the admissibility of tendency evidence under s 97 of the *Evidence Act 2008*, I ruled that, collectively, extracts from the statements of nine witnesses, who were assaulted by Coffey as young boys, were evidence of his tendency to:

(a) have a sexual interest in young Catholic boys who came into his orbit when he was assistant parish priest in the Western District of Victoria; and

(b) act on that interest by physically interacting with, to the point of assaulting, such young Catholic boys.[29]

92 Accordingly, the extracts were tendered at the trial.[30] A table summarising the

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27 T327.
28 T327.
29 *DP (a pseudonym) v Bishop Bird* [2021] VSC 453.
30 Exhibit P7.

allegations is contained within the ruling and is reproduced below (with some minor amendments):

DESCRIPTION OF ALLEGED CONDUCT	DATE	TIME	PLACE	CIRCUMSTANCES	WITNESS(ES)
1. A boy aged 6–7 years was sexually abused by Coffey including in the boy's home during a visit by Coffey. On each occasion Coffey put his hands down the boy's pants, kneaded his buttocks and rubbed around his anus.	1960 – 1963	Various	Coffey's mother's home in Ballarat; the boy's home in Ballarat.	In the course of 'horseplay' between Coffey and the boy and in the context of Coffey's pastoral work in the parish.	Trevor Tagilabue.
2. [Reference to Number 2 has been removed.]					
3. A boy aged 6 years was sexually abused by Coffey in the boy's home. Coffey put his hands down the boy's pants, fondled his genitals and pushed his finger upon the boy's anus.	1963	Evening	The boy's home in Terang.	In the course of 'horseplay' between Coffey and the boy and in the context of Coffey's pastoral work in the parish.	Michael Glennen — Deceased
4. A boy aged 8 years was sexually abused by Coffey at the boy's home. Coffey put his hands down the boy's pants, pretended to smack him and pushed his finger into the boy's anus.	1963	Evening	The boy's home in Terang.	In the course of 'horseplay' between Coffey and the boy and in the context of Coffey's pastoral work in the parish.	'GMP'
5. A boy in Years 3–6 was sexually abused by Coffey at St Patrick's School, Port Fairy and the sacristy of the Port Fairy Church. Coffey grabbed the boy when naked in the shower and fondled and rubbed his penis and	1963 – 1967	Various	Sports change rooms; sacristy of the Port Fairy. Church.	Following school football games, during altar boy service and in the context of Coffey's pastoral work in the parish.	'DJ'

DESCRIPTION OF ALLEGED CONDUCT	DATE	TIME	PLACE	CIRCUMSTANCES	WITNESS(ES)
penetrated the boy's anus with his finger. During altar boy service, Coffey held the boy from behind, placed his hand in the boy's pants and fondled his penis and testicles. The boy saw Coffey touching other boys in the shower after football.					
6. A boy in Years 3–6 was sexually abused by Coffey in the sacristy of the Port Fairy Church, at the boy's home, and at St Patrick's School, Port Fairy. During altar boy service, Coffey held the boy from behind, pressed his erect penis into the boy's back, and placed his hand in the boy's pants and fondled his buttocks. Following a football competition, Coffey grabbed the boy when naked in the shower and rubbed his thighs. The boy saw Coffey touching other boys in the showers after football.	1965 – 1968	Various	Sports change rooms; the boy's home in Yambuk; sacristy of the Port Fairy Church.	While the victim was engaged in altar boy duties, during a visit by Coffey to the boy's home to see his parents, and in the showers following a football game, and in the context of Coffey's pastoral work in the parish.	'MJG'
7. A boy in Year 2 was sexually abused by Coffey at St Patrick's School, Port Fairy. The boy was directed to attend Coffey in a room at the School, where Coffey placed his hand in	1966	During school hours	St Patrick's School, Port Fairy.	When the boy was directed by a nun at the School to attend Coffey in a room at the School, and in the context of Coffey's pastoral work in the parish.	'VRJ'

DESCRIPTION OF ALLEGED CONDUCT	DATE	TIME	PLACE	CIRCUMSTANCES	WITNESS(ES)
the boy's pants and fondled his penis.					
8. A boy in Year 6 was sexually abused by Coffey at St Patrick's School, Port Fairy. The boy was directed to attend Coffey in a room at the School, where Coffey spanked the boy's bare bottom, rubbed his backside and anus and penetrated the boy's anus with his finger.	1968	During school hours	St Patrick's School, Port Fairy.	When the boy was directed by a nun at the School to attend Coffey in a room at the School, and in the context of Coffey's pastoral work in the parish.	'PFS'
9. A boy aged 12–13 years was sexually abused by Coffey in the presbytery of St Joseph's Church in Ouyen during school hours. Coffey spanked the boy's bare buttocks and fondled his genitals. Coffey went on cross-country runs with the boy during lunchtimes on school days and the boy was required to change in the presbytery and be weighed by Coffey near the shower.	1973 – 1974	During school hours	Presbytery of St Joseph's Church, Ouyen.	The boy was sent to see Coffey in the presbytery by teachers. The boy was required to go on cross-country runs and to change and shower in Coffey's bedroom in the presbytery, and in the context of Coffey's pastoral work in the parish.	Peter Lonergan
10. A boy aged about 13 years was sexually abused by Coffey while a pupil at St Joseph's School, Ouyen at the presbytery of St Joseph's Church, Ouyen. Coffey required him to change in Coffey's bedroom after cross-country runs,	1975 – 1976	During school hours	Presbytery of St Joseph's Church, Ouyen.	Following lunchtime cross-country runs while changing and showering in Coffey's bedroom in the presbytery, and in the context of Coffey's pastoral work in the parish.	Bernard Healey — Deceased.

DESCRIPTION OF ALLEGED CONDUCT	DATE	TIME	PLACE	CIRCUMSTANCES	WITNESS(ES)
weighed him while naked, and on at least four occasions made the boy lay on his bed and then rubbed the boy's thighs and buttocks before forcefully penetrating the boy's anus with his penis.					

93 With one exception, this body of evidence was not challenged by the Diocese. The exception was the evidence of Mr Bernard Healey, which was comprised of two statements — one made in 1998 and the other in 2007.

94 Mr Healey is deceased and his two statements related to Coffey were admitted under s 63 of the *Evidence Act* — "Exception — civil proceedings if maker not available".

95 The Diocese argued that there were substantial inconsistencies between:

(a) the 1998 statement made by Mr Healey to a police investigator;[31] and

(b) the 2007 statement made by Mr Healey to Catholic Professional Standards.[32]

96 The Diocese contended that the discrepancies were such that no weight should be attached to Mr Healey's evidence. I accept that there are several major inconsistencies as to the actions of Coffey and have disregarded Mr Healey's evidence concerning Coffey's conduct.

97 The following features of the other instances of abuse of the boys (excluding Mr Healey) were common to the account given by DP of his assaults by Coffey:

- The age of the alleged victims — all the boys were pre-pubescent or in early puberty, ranging from six to 13 years of age.
- All of the boys lived, or encountered Coffey, within the parish.

31 Exhibit P7.
32 Exhibit D21.

- A number of the alleged instances of abuse (four) took place during a visit to the boy's home.

- A number of the boys (five) described Coffey putting his hand into the boy's pants and fondling his genitals and/or anus and/or penetrating his anus.

- A number of the boys (three) described Coffey "smacking" or "spanking" the boy's buttocks.

98 Only two of the eight boys informed an adult of the abuse at or around the time it occurred.

Finding as to the occurrence of the assaults

99 The Diocese's position was essentially to put DP to his proof. Senior counsel urged me to apply a "critical and cautious approach"[33] in assessing the evidence of DP and contended that on the balance of probabilities I could not be satisfied that either assault occurred.[34]

100 However, it was not suggested either to DP in cross-examination or in final submissions that DP was lying in relation to his general description of the assaults. Nor was the tendency evidence of eight of the nine boys challenged.

101 That, of course, does not relieve DP of the need to prove the happening of the assaults to the requisite standard.[35]

102 Notwithstanding the failure to call any family member who was present on either occasion, I am satisfied to the requisite standard that DP was assaulted by Coffey in the manner he alleges. His account of each incident rings true, it does not appear to be exaggerated, and, most importantly, it is strongly corroborated by the tendency evidence.

103 I do not accept the Diocese's submission that relatively minor discrepancies in DP's account of the first assault undermines his evidence as a whole. This is to be expected

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33 T1250.
34 T1280.
35 *Evidence Act* s 140.

when recounting in detail events now 50 years in the past. In general terms there is no significant inconsistency between his evidence and other versions that he has given. In my view, the account given by DP in evidence is plausible and sits conformably with the description of other assaults perpetrated by Coffey on young boys — particularly those involving smacking of the buttocks.

104 Subject to the following qualification, the first assault is made out as alleged by DP.

105 I am not satisfied that the first assault took place at a wake for DP's grandmother. DP's evidence was that the "wake" was held several months after the death of his grandmother at between 8:00pm and 8:30pm. There was lots of drinking, music and DP's extended family were there on holidays.[36]

106 Prior to giving evidence, DP in several out of court statements described the gathering as a "party". In examination-in-chief, DP described the first assault by Coffey as having taken place in March or April at an "evening party" at home with extended family in attendance ".[37] In cross-examination, he stated "it was only the adults that were… allowed to come to the party".[38]

107 Associate Professor Quadrio in her first report notes that the assault occurred at "one of the regular parties at [DP's family's] house".[39] The report of Dr Jager also describes the first assault as a "party".[40] Both these accounts were based on DP's history to the doctors.

108 It is highly uncommon for a wake to be held four months after the death. The out-of-court statements militate against acceptance of DP's description of a wake.

109 I am ,therefore, not satisfied that the first assault took place at a wake for his grandmother; more likely it was a social gathering at the family home attended by Coffey.

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36 T251; T319-20.
37 T318-19; T807.
38 T808.
39 Exhibit P11.
40 Exhibit D19.

110 In relation to the second assault, the Diocese again contended that there were such discrepancies in DP's description that I should be satisfied that there was a significant exaggeration, at the least, by DP in his description of the actions of Coffey. Indeed, the Diocese went on to submit that this interaction between Coffey and DP did not constitute an assault.

111 I reject that contention as I do the submission as to the veracity of DP's account of this incident.

112 The substance of the Diocese's complaint went to the nature of the "tickling" engaged in by Coffey and whether it was or was not sexual in nature.

113 DP at no time suggested that Coffey had actually touched his genitals during this assault. Whether or not the tickling proceeded below DP's belly button is, it seems to me, of no real consequence notwithstanding the Diocese's urging to examine every minute detail of DP's account.

114 The short point is that I accept that Coffey for several minutes and within the confines of the tent tickled DP on and around the stomach including below his belly button and this constituted an assault.

115 The second assault is also made out as alleged by DP.

Is the Diocese vicariously liable for the assault(s) of DP by Coffey?

116 In 1966, Coffey was appointed by the then Bishop of Ballarat, James O'Collins ('Bishop O'Collins'), as an assistant priest to Father O'Dowd, the parish priest of St Patrick's.[41] Coffey was engaged in this role at the time of the assaults in 1971.[42]

117 The Diocese admitted that during 1971 the Diocese, through the Bishop, appointed priests to parishes within the Diocese including St Patrick's, Port Fairy,[43] and that:

> Father Coffey's duties as a priest at the church and in the diocese included the provision of pastoral guidance and support and spiritual guidance to members

41 Paragraphs [5] and [6] of the defence of the Diocese.
42 Ibid.
43 Paragraphs [3] and [4] of the defence of the Diocese.

of the congregation that worshipped at the church. [44]

118 However, the Diocese, both in its defence and its conduct in the trial, denied that the Diocese was vicariously liable for Coffey's conduct as a Catholic priest. [45]

119 This dispute, as I see it, raises two fundamental and closely inter-related questions.

120 First, was the relationship between Coffey and the Diocese or Bishop such that it gives rise to vicarious liability on the part of the Diocese for Coffey's conduct?

121 Simply put (and I hope I do no disservice to counsels' detailed submissions) DP says that, following authority in the United Kingdom and Canada as well as the decision in *Prince Alfred College Inc v ADC*[46] in this country, the Diocese is liable irrespective of whether Coffey was its employee. A finding of vicarious liability is not limited by any lack of formal employment indicia such as a written contract. It should be determined by reference to a number of the factors identified by the High Court in *Hollis v Vabu Pty Ltd*[47] in terms of the totality of the relationship between the Diocese and Coffey.

122 The Diocese, in response, contends that unless it is demonstrated that a priest is an employee of the Diocese then it cannot be vicariously liable. That, it is said, is the end of the inquiry: the High Court decision in *Sweeney v Boylan Nominees Pty Ltd*[48] prevents an Australian court (at least at this level) from considering vicarious liability outside an employment scenario. The Diocese says that the High Court has made clear that the distinction between employee and independent contractor is "critical" to the determination of vicarious liability and has rejected suggestions that a less categorical approach should be adopted. This, the Diocese says, means that absent an affirmative conclusion as to the existence of an employment relationship no finding of vicarious liability is open. The Diocese submits, and I accept, that s 7(2)(b) of the *Legal Identity of Defendants (Organisational Child Abuse) Act 2018* does not address the issue of vicarious liability and cannot of itself result in attribution of Coffey's unlawful

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44 Paragraph [7] of the defence of the Diocese.
45 Paragraph [43] of the defence of the Diocese.
46 (2016) 258 CLR 134 ('*Prince Alfred College*').
47 (2001) 207 CLR 21, [41] – [45] ('*Hollis*').
48 (2006) 226 CLR 161 ('*Sweeney*').

conduct to the Diocese.

123 Second, if there is a relationship that gives rise to vicarious liability, is the Diocese or the Bishop liable for Coffey's unlawful conduct, it being accepted that the assaults were unlawful and far outside Coffey's clerical role?

124 DP says that it is. Consistent with *Prince Alfred College*[49] and United Kingdom and Canadian cases, the relationship between Coffey and DP's family and the circumstances of the assaults upon DP are sufficient to establish liability on the part of the Diocese. The Diocese contends that howsoever the relationship is categorised it cannot be held liable for Coffey's unlawful acts, which were wholly outside his clerical duties.

125 I should here mention the following. There does not appear to be a binding decision in this country on the issue of whether a diocese, or bishop, is vicariously liable for the actions (lawful or unlawful) of a priest appointed by a bishop.

126 Lord Steyn, in *Lister v Hesley Hall Ltd*,[50] said of the doctrine of vicarious liability:

> Vicarious liability is legal responsibility imposed on an employer, although he is himself free from blame, for a tort committed by his employee in the course of his employment. Fleming observed that this formula represented "a compromise between two conflicting policies: on the one end, the social interest in furnishing an innocent tort victim with recourse against a financially responsible defendant; on the other, a hesitation to foist any undue burden on business enterprise".[51]

127 That observed, this is not the place to discuss the jurisprudential basis for vicarious liability being imposed upon a party who may have no knowledge of, or plays no part in, the actions of a person who causes harm to another.[52] It is authoritatively established (and has been for over a hundred years) that in tort an employer is vicariously liable for the conduct of an employee acting within the course of their employment (and, on occasions, outside it). On the other hand, a principal is not

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49 (2016) 258 CLR 134, [81].

50 [2002] 1 AC 215 ('*Lister*').

51 Ibid [14], quoting John G Fleming, *The Law of Torts* (LBC Information Services, 9th ed, 1998) 409–10.

52 In the United Kingdom, see the discussion in *Mohamud v Wm Morrison Supermarkets plc* [2016] AC 677, [10]–[11], [17] (Lord Toulson). In Australia, see *Scott v Davis* (2000) 204 CLR 333, [106]–[122] (McHugh J), [123]–[239] (Gummow J) ('*Scott*').

vicariously liable for the actions or omissions of an independent contractor.[53]

128 As a starting point, it is clear that there is no presumption in Australian law that a religious cleric is not or cannot be an employee of a religious organisation or church.[54]

129 Whether or not a priest can be said to be an employee of his or her diocese or bishop turns on the facts of the case, in particular, the manner of the priest's appointment and the nature or structure of the relevant religious organisation.[55]

130 In *Humberstone v Northern Timber Mills*,[56] Dixon J said:

> The question is not whether in practice the work was in fact done subject to a direction and control exercised by an actual supervision or whether an actual supervision was possible but whether ultimate authority over the man in the performance of his work resided in the employer so that he was subject to the latter's order and directions.[57]

131 Subsequently, in *Stevens v Brodribb Sawmilling Co Pty Ltd*,[58] Wilson and Dawson JJ (with whom Brennan and Deane JJ agreed) held that the existence or absence of control in the master–servant sense is no longer a reliable indicator of an employment relationship given that:

> [I]n modern conditions a person may exercise personal skills so as to prevent control over the manner of doing his work and yet nevertheless be a servant.[59]

Further, in the same case Mason J held:

> [T]he common law has been sufficiently flexible to adapt to changing social conditions by shifting the emphasis in the control test from the actual exercise of control to the right to exercise it, "so far as there is scope for it", even if it be "only in incidental or collateral matters" … Furthermore, control is not now regarded as the only relevant factor. Rather it is the totality of the relationship between the parties which must be considered.[60]

132 So, the modern test of control has "[shifted] the emphasis … from the actual exercise

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53 *Scott* (2000) 204 CLR 333, [18]–[33]; *Sweeney* (2006) 226 CLR 161, [12]; *Day v The Ocean Beach Hotel Shellharbour Pty Ltd* (2013) 85 NSWLR 335, [18]–[21].
54 *Ermogenous v Greek Orthodox Community of SA Inc* (2002) 209 CLR 95.
55 Ibid [31].
56 (1949) 79 CLR 389.
57 Ibid [404].
58 (1986) 160 CLR 16 ('*Stevens*').
59 Ibid [10].
60 Ibid [19] (citations omitted).

of control to the right to exercise it", including even in "incidental or collateral matters".[61] This "modern approach" requires a holistic assessment of the practical reality of the relationship. The court must "have regard to a variety of criteria",[62] of which control is one. This is exemplified by the High Court's decision in *Hollis*.

133 In *Hollis*, an (unidentified) bicycle courier struck down and injured the plaintiff, Mr Hollis, while working for the defendant courier company, Vabu Pty Ltd ('Vabu'). The issue, on which the vicarious liability of Vabu turned, was whether the courier was an employee of Vabu or an independent contractor.

134 The majority (Gleeson CJ, Gaudron, Gummow, Kirby and Hayne JJ) said of the rationale for the principle of vicarious liability:

> In *Bazley v Curry*, the Supreme Court of Canada saw two fundamental or major concerns as underlying the imposition of vicarious liability. The first is the provision of a just and practical remedy for the harm suffered as a result of the wrongs committed in the course of the conduct of the defendant's enterprise. The second is the deterrence of future harm, by the incentive given to employers to reduce the risk of accident, even where there has been no negligence in the legal sense in the particular case giving rise to the claim.
>
> *In general, under contemporary Australian conditions, the conduct by the defendant of an enterprise in which persons are identified as representing that enterprise should carry an obligation to third persons to bear the cost of injury or damage to them which may fairly be said to be characteristic of the conduct of that enterprise*. In delivering the judgment of the Supreme Court of Canada in *Bazley v Curry*, McLachlin J said of such cases that "the employer's enterprise [has] created the risk that produced the tortious act" and the employer must bear responsibility for it. McLachlin J termed this risk "enterprise risk" and said that "where the employee's conduct is closely tied to a risk that the employer's enterprise has placed in the community, the employer may justly be held vicariously liable for the employee's wrong". Earlier, in *Ira S Bushley & Sons, Inc v United States*, Judge Friendly had said that the doctrine of respondeat superior rests "in a deeply rooted sentiment that a business enterprise cannot justly disclaim responsibility for accidents which may fairly be said to be characteristic of its activities".[63]

135 The majority held that the courier was an employee, due to the following features:

- The unskilled nature of the labour, not needing special qualifications: "A bicycle courier is unable to make an independent career as a free-lancer or to

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61 Ibid, quoting *Zuijs v Wirth Bros Pty Ltd* (1955) 93 CLR 561 [571].
62 Ibid [9].
63 *Hollis* (2001) 207 CLR 21, [41]–[42] (emphasis added) (citations omitted).

generate any 'goodwill' as a bicycle courier. The notion that the couriers somehow were running their own enterprise is intuitively unsound".[64]

- The extent to which Vabu controlled its couriers' manner of work: the couriers had fixed start times and had no say in the jobs they were assigned. They could not refuse work on pain of termination.

- The importance of this control, because of the centrality of the couriers' work, to Vabu's business: "Vabu's whole business consisted of the delivery of documents and parcels by means of couriers. Vabu retained control of the allocation and direction of the various deliveries. The couriers had little latitude … Vabu's business involved the marshalling and direction of the labour of the couriers, whose efforts comprised the very essence of the public manifestation of Vabu's business".[65]

- The extent to which the couriers outwardly represented Vabu: "[C]ouriers were presented to the public and to those using the courier service as emanations of Vabu".[66] The couriers wore uniforms bearing Vabu's logo and were forbidden from wearing certain attire while working.

- Vabu's control over financial arrangements: Vabu produced pay summaries which couriers could dispute, but only within a certain time. There was no scope for negotiating remuneration. Vabu also arranged insurance for couriers and deducted the cost of this from their pay.

136 Other potential indicia of employment that have been identified by courts include the following:

- The employer has the right to the exclusive services of the employee.[67]

- The provision of paid holidays or sick leave.[68]

- The deduction of income tax from the employee's pay.[69]

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64 Ibid [48].
65 Ibid [57].
66 Ibid [50].
67 *Abdalla v Viewdaze Pty Ltd* [2003] AIRC 504, [34] ('*Abdalla*').
68 Ibid.
69 *Stevens* (1986) 160 CLR 16 [9].

- The right to suspend or dismiss the employee.[70]
- The employee cannot delegate or subcontract their work without reference to the employer.[71]
- The employee does not have a separate place of work or advertise their services to the world at large.[72]
- The employee does not provide and maintain their own significant tools or equipment.[73]
- The employee is paid regular wages and superannuation payments are made for them, rather than providing invoices for each job performed.[74]

137 Three years after *Hollis* in *New South Wales v Lepore*,[75] the High Court considered the question of vicarious liability of a school authority for the sexual abuse of a student by a teacher. The separate judgments are difficult to reconcile and the decision in *Prince Alfred College* has resolved much of that dilemma. I will not explore it further.

138 The boundaries of the employment relationship and that of independent contractor and principal were considered by the High Court in 2006 in *Sweeney*. It is this decision (and subsequent decisions applying its ratio) that the Diocese relied upon to argue that the only relationship which could give rise to vicarious liability was that of employer and employee. It needs close consideration.

139 In *Sweeney*, a customer at a convenience store was injured when the door of a refrigerator containing milk cartons fell and struck her. She sued the company with responsibility for servicing and maintaining the refrigerator. The refrigerator door had been recently repaired, negligently, by a mechanic who was engaged by the

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70 Ibid [11].
71 Ibid [13].
72 *Abdalla* [2003] AIRC 504, [34].
73 Ibid; *Sweeney* (2006) 226 CLR 161, [73]. The emphasis in this feature is on the *significance*, meaning the cost or complexity, of the equipment. In *Hollis*, the majority differentiated in this regard between motorcycle couriers and bicycle couriers working for Vabu, all of whom provided their own vehicles. The former had been held to be independent contractors in a previous proceeding, while the High Court majority found that the New South Wales Court of Appeal had placed too much weight on this factor in deeming the bicycle couriers not to be employees, given the relatively low cost and other, non-work related uses of a bicycle.
74 *Sweeney* (2006) 226 CLR 161, [54].
75 (2003) 212 CLR 511 ('*Lepore*').

company as a contractor, and not an employee. The mechanic invoiced the company for the work he did for it and for parts he used. He arranged his own workers' compensation and public liability insurance. His van advertised his own business, and the company did not provide him with a uniform, tools, equipment or vehicle, nor did it exercise any control over the way in which he carried out his work.

140 Concluding that the mechanic was not an employee of the service company,[76] the Court considered the question of whether vicarious liability could nevertheless arise given the mechanic's relationship with the service company:

> Whatever may be the justification for the doctrine, it is necessary always to recall that much more often than not, questions of vicarious liability fall to be considered in a context where one person has engaged another (for whose conduct the first is said to be vicariously liable) to do something that is of advantage to, and for the purposes of, that first person. Yet it is clear that the bare fact that the second person's actions were intended to benefit the first or were undertaken to advance some purpose of the first person does not suffice to demonstrate that the first is vicariously liable for the conduct of the second. The whole of the law that has developed on the distinction between employees and independent contractors denies that benefit or advantage to the one will suffice to establish vicarious liability for the conduct of the second. But there is an important, albeit distracting, consequence that follows from the observation that the first person seeks to gain benefit or advantage from engaging the second to perform a task. It is that the relationship is one which invites the application of terms like "representative", "delegate" or "agent". The use of those or other similar expressions must not be permitted to obscure the need to examine what exactly are the relationships between the various actors.[77]

141 The majority also said:

> Three recent decisions of this Court have examined questions of vicarious liability: *Scott v Davis*, *Hollis v Vabu Pty Ltd* and *New South Wales v Lepore*. It is unnecessary to rehearse all that is established by those decisions. It is important, however, to begin examination of the issues in this appeal from a frank recognition of some considerations that are reflected in those decisions. First, "[a] fully satisfactory rationale for the imposition of vicarious liability in the employment relationship has been slow to appear in the case law". Secondly, "the modern doctrine respecting the liability of an employer for the torts of an employee was adopted not by way of an exercise in analytical jurisprudence but as a matter of policy". That may suggest that the policy to which effect was given by "the modern doctrine" is clearly identified, but, as is implicit in the first proposition, the policy which is said to lie behind the development of the modern doctrine is not and has not been fully articulated.

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76 *Sweeney* (2006) 226 CLR 161, [6].
77 Ibid [13].

> Thirdly, although important aspects of the law relating to vicarious liability are often traced to the judgment of Parke B in *Quarman v Burnett*, neither in that decision, nor in other early decisions to which the development of the doctrine of vicarious liability may be traced, does there emerge any clear or stable principle which may be understood as underpinning the development of this area of the law. Indeed, as is demonstrated in *Scott*, the development of the law in this area has not always proceeded on a correct understanding of the basis of earlier decisions.
>
> Nonetheless, as the decisions in *Scott*, *Hollis* and *Lepore* show, there are some basic propositions that can be identified as central to this body of law. For present purposes, there are two to which it will be necessary to give principal attention. *First, there is the distinction between employees (for whose conduct the employer will generally be vicariously liable) and independent contractors (for whose conduct the person engaging the contractor will generally not be vicariously liable).* Secondly, there is the importance which is attached to the course of employment. Whether, as has recently been suggested, these, or other, considerations would yield a compelling and unifying justification for the doctrine of vicarious liability need not be decided in this matter. In particular, whether, as suggested, the justification for the doctrine of vicarious liability is found in an employer's promise in the contract of employment to indemnify the employee for legal liability suffered by the employee in the conduct of the employer's business is a large question which is better examined in the light of full argument.[78]

142 And then, after considering earlier decisions of the Court, their Honours said:

> But the wider proposition that underpinned the argument of the appellant in this case, that if A "represents" B, B is vicariously liable for the conduct of A, is a proposition of such generality that it goes well beyond the bounds set by notions of control (with old, and now imperfect analogies of servitude) or set by notions of course of employment.
>
> These bounds should not now be redrawn in the manner asserted by the appellant. Hitherto the distinction between independent contractors and employees has been critical to the definition of the ambit of vicarious liability. The view, sometimes expressed, that the distinction should be abandoned in favour of a wider principle, has not commanded the assent of a majority of this Court.
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> In *Scott*, the majority of the Court rejected the contention that the owner of an aircraft was vicariously liable for the negligence of the pilot of that aircraft if the pilot operated the aircraft with the owner's consent and for a purpose in which the owner had some concern. The argument that "a new species of actor, one who is not an employee, nor an independent contractor, but an 'agent' in a non-technical sense" should be identified as relevant to determining vicarious liability, was rejected.
>
> In *Hollis*, the Court amplified the application of the distinction between independent contractors and employees to take account of differing ways in which some particular enterprises are now conducted. As was said in the joint

78 Ibid [11]–[12] (emphasis added) (citations omitted).

reasons:

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

> But neither in *Scott* nor in *Hollis*, nor earlier in [*Colonial Mutual Life Assurance Society Ltd v Producers and Citizens Co-operative Assurance Co of Australia Ltd*], was there established the principle that A is vicariously liable for the conduct of B if B "represents" A (in the sense of B acting for the benefit or advantage of A). On the contrary, *Scott* rejected contentions that, at their roots, were no different from those advanced in this case under the rubric of "representation" rather than, as in *Scott*, under the rubric "agency". As was said in *Scott* of the word "agent", to use the word "representative" is to begin but not to end the inquiry.[79]

143 The Diocese contends that these passages conclusively dispose of DP's argument as to the existence of vicarious liability outside an established employment relationship.

144 I will return to these submissions shortly. I think it helpful now, in light of the Diocese's contention, to examine how the criteria for determining the existence of a relationship giving rise to vicarious liability have been developed in other Commonwealth jurisdictions. This is particularly so in the context of child abuse cases and the liability of dioceses/institutions for the actions of priests or clergy under their general control or direction.

145 In *Hollis,* the High Court considered with apparent approval the Canadian Supreme Court decision in *Bazley v Curry*,[80] an employer/employee case in which an employee sexually abused a child in the care of a residential children's home. In *Bazley*, it was held that an employer should be held vicariously liable for the conduct of its employee where such conduct is sufficiently incidental to a risk to the community inherent in its business, and the risk eventuates and causes loss or damage to a member of the community.[81]

146 McLachlin J (who delivered the lead judgment) identified the issue as follows:

> The fundamental question is whether the wrongful act is *sufficiently related* to

79 Ibid [26]–[29] (citations omitted).
80 [1999] 2 SCR 534 ('*Bazley*').
81 Ibid [22], [38].

> conduct authorized by the employer to justify the imposition of vicarious liability. Vicarious liability is generally appropriate where there is a significant connection between *the creation or enhancement of a risk* and the wrong that accrues therefrom, even if unrelated to the employer's desires. Where this is so, vicarious liability will serve the policy considerations of provision of an adequate and just remedy and deterrence. Incidental connections to the employment enterprise, like time and place (without more), will not suffice.[82]

147 Her Honour then set out a list of factors (non-exhaustive) relevant in determining whether vicarious liability exists in the particular case:

> (a) the opportunity that the enterprise afforded the employee to abuse his or her power;
>
> (b) the extent to which the wrongful act may have furthered the employer's aims … ;
>
> (c) the extent to which the wrongful act was related to friction, confrontation, or intimacy inherent in the employer's enterprise;
>
> (d) the extent of power conferred on the employee in relation to the victim;
>
> (e) the vulnerability of potential victims to wrongful exercise of the employee's power.[83]

148 Applying these factors to cases of sexual abuse by employees of others, McLachlin J said:

> [T]here must be a strong connection between what the employer was asking the employee to do (the risk created by the employer's enterprise) and the wrongful act. It must be possible to say that the employer *significantly* increased the risk of harm by putting the employee in his or her position and requiring him [or her] to perform the assigned tasks.[84]

149 Accordingly, since 2000, this is the test by which Canadian courts determine vicarious liability in sexual abuse cases irrespective of whether the perpetrator is or is not properly categorised as an employee. So, recently in *BN v Anglican Church*,[85] Menzies J applied the *Bazley* test in holding that an Anglican diocese was liable for sexual assaults of a young girl by a priest whilst at Sunday School.

150 Subsequently, a number of decisions of the Court of Appeal and Supreme Court of the

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82 Ibid [41(2)] (emphasis in original).

83 Ibid [41(3)].

84 Ibid [42] (emphasis in original). This passage was subsequently cited by the Supreme Court of the United Kingdom in *Various Claimants v Catholic Child Welfare Society* [2013] 2 AC 1, [64] ('*Christian Brothers*').

85 [2020] MBQB 2.

United Kingdom have considered the application of the *Bazley* test in the United Kingdom in determining whether a cleric may be treated as if he was an employee (or quasi-employee) of a diocese or institution. And whether that body should be held vicariously liable for his conduct where it involved unlawful physical, emotional or sexual abuse outside the scope of his usual duties.

151 There are some minor caveats as to the application of these decisions. First, the conclusions of the respective Courts were, to a certain extent, dependent on the evidence adduced at trial as to the relationship between the particular diocese or organisation and the cleric. Second, as will be discussed, the approach adopted in the United Kingdom differs somewhat to that in Canada; neither has been accepted authoritatively in this country.

152 In *Maga v Archbishop of Birmingham*,[86] decided in 2010, the claimant successfully sued a Catholic archdiocese for damages for personal injuries, arguing that the archdiocese was vicariously liable for his sexual abuse at the hands of a priest who lived and worked within its bounds. The priest had taken on particular responsibility as part of his duties for work involving young people, including organising "discos" (which were open to both Catholic and non-Catholic youths within the archdiocese), various clubs and football teams. The claimant, who was not a Catholic, came into contact with the priest when he was around 12 or 13 years of age by attending (at the priest's invitation) one of the "discos". From there, the claimant was engaged by the priest to do odd jobs around the presbytery, at a house privately owned by him, and, on one occasion, in the church itself. The abuse occurred mainly at the presbytery, but also at the priest's house and in his car.

153 At first instance, whilst it was accepted that "youth work" was part of the priest's engagement as a cleric, it was held that the abuse was not sufficiently connected with the priest's employment by the Church to render the archdiocese vicariously liable.

154 The Court of Appeal allowed the appeal, holding that the correct test for the vicarious

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86 [2010] 1 WLR 1441 ('*Maga*').

liability of an employer laid down by Lord Steyn in *Lister* was satisfied: the abuse was "so closely connected with [the priest's] employment" as a priest at the Church "that it would be fair and just to hold the [archdiocese] vicariously liable".[87]

155 Lord Neuberger MR said the particular authority vested in the priest by the employer in such a case tightened the connection between employment and abuse:

> [T]he progressive stages of intimacy were to my mind only possible because Father Clonan had the priestly status and authority which meant that no one would question his being alone with the claimant. It is this that provides the close connection between the abuse and what Father Clonan was authorised to do.[88]

156 Two years later in *Various Claimants v Catholic Child Welfare Society*,[89] the Supreme Court of the United Kingdom considered the issue in the context of the liability of a Catholic institute for the unlawful conduct of brothers under its direction towards students at the institute.

157 This was a class action brought by 170 men who had been sexually abused as children at a residential school for "boys in need of care" against two groups of defendants — the board of managers of the school who employed the teachers who committed the abuse, and the Institute of the Brothers of the Christian Schools (the 'Institute'), a worldwide association of Catholic lay brothers from which the school's teachers were drawn. The issue on appeal (both to the Court of Appeal and the Supreme Court) was whether the Institute had a sufficiently close connection to the abuse to satisfy the *Lister* test and should be held vicariously liable as well as the board of managers.

158 While this issue was readily determined in respect of the liability of the board of managers (due to the contract of employment between it and the teachers), both the Court of Appeal and the Supreme Court were required to consider the application of the *Lister* test where there was no clear-cut employer/employee relationship — such as that between a religious order or institution and a cleric.

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87 Ibid [38] (Lord Neuberger MR), quoting *Lister* [2002] 1 AC 215, [28].
88 Ibid [84].
89 [2013] 2 AC 1 ('*Christian Brothers*').

159 Lord Phillips (with whom the other members of the Court agreed) formulated the following test:

(a) Is the relationship between the tortfeasor and the defendant such as to give rise to vicarious liability for the wrongdoing? That is, is the relationship, in its "essential elements", sufficiently akin to that of employer/employee relationship?

(b) Is the abuse sufficiently connected to the tortfeasor/defendant relationship to make the defendant vicariously liable for the abuse?[90]

160 Lord Phillips said:

> The relationship that gives rise to vicarious liability is in the vast majority of cases that of employer and employee under a contract of employment. The employer will be vicariously liable when the employee commits a tort in the course of his employment. There is no difficulty in identifying a number of policy reasons that usually make it fair, just and reasonable to impose vicarious liability on the employer when these criteria are satisfied: (i) the employer is more likely to have the means to compensate the victim than the employee and can be expected to have insured against that liability; (ii) the tort will have been committed as a result of activity being taken by the employee on behalf of the employer; (iii) the employee's activity is likely to be part of the business activity of the employer; (iv) the employer, by employing the employee to carry on the activity will have created the risk of the tort committed by the employee; (v) the employee will, to a greater or lesser degree, have been under the control of the employer.[91]

161 And subsequently added:

> At para 35 above, I have identified those incidents of the relationship between employer and employee that make it fair, just and reasonable to impose vicarious liability on a defendant. Where the defendant and the tortfeasor are not bound by a contract of employment, but their relationship has the same incidents, that relationship can properly give rise to vicarious liability on the ground that it is "akin to that between an employer and an employee".[92]

And also:

> In the context of vicarious liability the relationship between the teaching brothers and the institute had many of the elements, and all the essential elements, of the relationship between employer and employees. (i) The institute was subdivided into a hierarchical structure and conducted its

90 Ibid [35], [47].
91 Ibid [35].
92 Ibid [47].

> activities as if it were a corporate body. (ii) The teaching activity of the brothers was undertaken because the provincial directed the brothers to undertake it. True it is that the brothers entered into contracts of employment with the Middlesbrough defendants, but they did so because the provincial required them to do so. (iii) The teaching activity undertaken by the brothers was in furtherance of the objective, or mission, of the institute. (iv) The manner in which the brother teachers were obliged to conduct themselves as teachers was dictated by the institute's rules.[93]

162 Brief mention should be made of a series of subsequent decisions of the Supreme Court of the United Kingdom which affirmed the Court's reasoning in *Christian Brothers* and held definitively that vicarious liability may arise outside the formal boundaries of an employer/employee relationship by applying the criteria set out by Lord Phillips: *Cox v Ministry of Justice*,[94] *Mohamud v Wm Morrison Supermarkets plc*,[95] and *Armes v Nottinghamshire County Council*.[96]

163 Returning now to the Antipodes, *Prince Alfred College* was decided by the High Court 10 years after *Sweeney*.

164 The case against the school related to the conduct of a housemaster employed by it who sexually abused a student in his care. The claim was issued 20 years after the abuse. A limitation point was determined as part of the trial in the Supreme Court of South Australia.

165 The alleged conduct of the employee in *Prince Alfred College* was as follows. The housemaster was responsible for three dormitories in the boarding house in which the plaintiff resided. He was rostered on two or three times a week and could, if required, discipline boys in his charge. When on duty he regularly molested the plaintiff on over 20 occasions, initially in the dormitory and subsequently at the housemaster's room at the school, and once at a house away from the school. In these circumstances, did the school have any liability for its employee's misconduct?

166 Although the appeal to the High Court was nominally on the limitation point, substantial parts of the reasons for judgment of both the majority and the separate

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93 Ibid [56].
94 [2016] AC 660 ('*Cox*').
95 [2016] AC 677.
96 [2018] AC 355.

judgment of Gageler and Gordon JJ are directed to consideration of the respective analyses by the trial judge and the Court of Appeal of the vicarious liability of the school for the actions of the housemaster.

167 There was no issue as to the general proposition that the school was vicariously liable for the conduct of its employee. The question that occupied the Court's attention was the extent of the liability of the employer for the employee's sexual assault of a schoolboy under his charge.

168 In addition, the Court's statements of principle are, as will be seen, relevant to the approach to be adopted by this Court on the question of the existence of vicarious liability on the part of the Diocese for the actions of Coffey.

169 The High Court considered that it was necessary to provide "some guidance" given the differing views expressed in the judgments in *Lepore*.[97]

170 The Court noted the tensions present within the doctrine as a principal factor behind the lagging development of a "fully satisfactory rationale"[98] in the case law and referred to "course or scope of employment" as the method by which the common law balances such competing interests by providing "an objective, rational basis for liability and for its parameters".[99]

171 Importantly, the majority said:

> Of course, if a general principle favours the imposition of liability it may be said to provide some level of certainty. And, if a general principle provides that liability is to depend upon a primary judge's assessment of what is fair and just, the determination of liability may be rendered easier, even predictable. But principles of that kind depend upon policy choices and the allocation of risk, which are matters upon which minds may differ. They do not reflect the current state of the law in Australia and the balance sought to be achieved by it in the imposition of vicarious liability.
>
> Since the search for a more acceptable general basis for liability has thus far eluded the common law of Australia, it is as well for the present to continue with the orthodox route of considering whether the approach taken in decided cases furnishes a solution to further cases as they arise. This has the advantage

97 *Prince Alfred College* (2016) 258 CLR 134, [10].
98 Ibid [39].
99 Ibid [40].

> of consistency in what might, at some time in the future, develop into principle. And it has the advantage of being likely to identify factors which point toward liability and by that means provide explanation and guidance for future litigation. Such a process commences with the identification of features of the employment role in decided cases which, although they may be dissimilar in many factual respects, explain why vicarious liability should or should not be imposed.[100]

172 This, I think, suggests that each case must be judged on its own facts and the avoidance of a rule of general application such as that postulated by the Diocese as a "pro forma" approach to vicarious liability — i.e. employment or nothing. Whilst consideration of the indicia of employment is a valid analysis, the Court was not suggesting, as I see it, that this was the only way by which vicarious liability may be established.

173 In developing the "relevant approach" test (set out later as part of the second question analysis), the majority examined several cases (including *Bazley*), in which there was consideration of the victim's relationship with the wrongdoer, and the role performed by the wrongdoer:

> Although the term "authority" is used in *Lloyd v Grace, Smith & Co* and *Morris v C W Martin & Sons Ltd*, it was not just ostensible authority which was decisive of those cases. Fundamentally, those cases were decided by reference to the position in which the employer had placed the employee vis-à-vis the victim of the wrongful act, as the passage from Diplock LJ set out above makes plain. In the words of Dixon J, the position is one to which the apparent performance of the employment "gives occasion" for the wrongful act. In *Lloyd v Grace, Smith & Co* the position of the clerk, from the client's perspective, was indistinguishable from that of a partner of the firm. Because of what the clerk's position conveyed to the client, the clerk was able to secure the client's trust and confidence so that she unhesitatingly complied with his requests with respect to the deeds and the documents. In *Morris v C W Martin & Sons* the position of the employee was again one of trust, but is perhaps more simply explained by reference to the level of control he was given over the property.[101]

174 I acknowledge that much of the decision in *Prince Alfred College* is concerned with developing an appropriate method for structuring an inquiry into vicarious liability in the context of an intentional wrongful act performed in the course of an established employment relationship; that is, how to identify the relevant factual features for distinguishing between a role merely providing an opportunity for the wrongful act

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100 Ibid [45]–[47].
101 Ibid [56].

and where it provides an occasion for that act (this is the second question).

175 However, it is also apparent from both the majority judgment and the separate judgment of Gageler and Gordon JJ that the Court's statements relevant to that issue were not intended to be viewed in isolation from the issue of vicarious liability generally. As I see it, these statements were intended to assist lower courts to navigate this whole area, including whether the relationship is such that it gives rise to vicarious liability.

176 It seems to me to be tolerably clear that the Court in *Prince Alfred College* did not endorse a confined theory of vicarious liability (restricted solely to an employer/employee relationship) as contended by the Diocese.

177 This interpretation is confirmed by the statement of Gageler and Gordon JJ, in their separate judgment:

> The course of decisions in this Court and the courts of final appeal in the United Kingdom and in Canada reveals that decisions concerning vicarious liability for intentional wrongdoing are particularly fact specific. Decisions in the United Kingdom and Canada recognise that resolution of each case will turn on its own particular facts and that existing cases provide guidance in the resolution of contestable and contested questions. The overseas decisions also expose a difficulty in undertaking any analysis by reference to generalised "kinds" of case. Why? Because the "[s]exual abuse of children may be facilitated in a number of different circumstances".[102]
>
> We accept that the approach described in the other reasons as the "relevant approach" will now be applied in Australia. That general approach does not adopt or endorse the generally applicable "tests" for vicarious liability for intentional wrongdoing developed in the United Kingdom or Canada (or the policy underlying those tests), although it does draw heavily on various factors identified in cases involving child sexual abuse in those jurisdictions.
>
> The "relevant approach" described in the other reasons is necessarily general. It does not and cannot prescribe an absolute rule. It does not and cannot prescribe an absolute rule. Applications of the approach must and will develop case by case. Some plaintiffs will win. Some plaintiffs will lose. The criteria that will mark those cases in which an employer is liable or where there is no liability must and will develop in accordance with ordinary common law methods. The Court cannot and does not mark out the exact boundaries of any principle of vicarious liability in this case.[103]

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102 Citing *Christian Brothers* [2013] 2 AC 1, [85].
103 Ibid [128], [130]–[131] (citations omitted).

178 As has been seen, other jurisdictions have moved away from the position advocated by the Diocese.[104] The statements of the High Court in *Prince Alfred College* demonstrate, I suggest, that there is room for an Australian court to adopt a robust and contemporaneous approach to vicarious liability drawing "heavily on various factors identified in cases involving child sexual abuse" in overseas jurisdictions.[105] In such cases, courts will need to "make and develop the common law, as distinct from discovering and declaring it", which may involve making judgments about "[i]dentification, modification or even clarification of some general principle or test … in the context of, and by reference to, contestable and contested questions".[106]

179 This approach is demonstrated by the recent decision of Schmidt AJ in *Plaintiff A and B v Bird*.[107] This case involved the vicarious liability of an organisation for the unlawful actions of a volunteer. Although it was unnecessary for the ultimate conclusion (it being held that the volunteer was an employee), her Honour said as follows:

> If I had not reached this conclusion I can see no reason, in principle, why there should not have been vicarious liability for his acts, given the tests discussed in *Prince Alfred College* and "the orthodox route of considering whether the approach taken in decided cases furnishes a solution to further cases as they arise" there discussed: at [46].
>
> A case like this does not appear previously to have arisen for consideration in Australia, as it has in the UK. There in *Cox v Ministry of Justice* the advent and principles of a "modern theory of vicarious liability" which extends beyond the strict relationship of employment was explained by reference to *Catholic Child Welfare Society v Various Claimants*. Those principles were considered in *Barclays Bank plc v Various Claimants*: at [27].
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> …
>
> These principles do not entirely accord with those established in *Prince Alfred College,* which must be applied in this case, but they do demonstrate how the common law develops, when new situations arise for consideration.

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104 See Paula Giliker, 'Analysing institutional liability for child sexual abuse in England and Wales and Australia: Vicarious Liability, Non-Delegable Duties and Statutory Intervention' (2018) 77(3) *Cambridge Law Journal* 506; Stephen Todd, 'Personal Liability, Vicarious Liability, Non-Delegable Duties and Protecting Vulnerable People' (2016) 23(2) *Torts Law Journal* 105.

105 *Prince Alfred College* (2016) 258 CLR 134, [130].

106 Ibid [127].

107 [2020] NSWSC 1379. O'Meara J in *PCB v Geelong College* [2021] VSC 33 ('*PCB*') cast doubt about the correctness of this decision: at [309]–[312]. I am not so sure, but it matters not as this case is quite different and his Honour did not express a concluded view.

> I consider that application of the Australian principles to the facts I have found, would permit the conclusion that Little Pigeon was vicariously liable for Mr Bird's acts, even if he provided his services to Little Pigeon as a volunteer, rather than as an employee.[108]

180 Then there is the recent decision of the Court of Appeal in this state in *Roman Catholic Trusts Corporation for the Diocese of Sale v WCB*,[109] in which the Court said:

> Accordingly, in respect of the claim against the defendant based on vicarious liability, the central issue will depend, not so much on the actual duties that were delegated to Hourigan as an assistant priest, but, rather, on whether the authority, power, trust and control, that he bore, and that derived from his status as a parish priest, enabled him to take advantage of his position to sexually abuse the plaintiff … The determination of the question of the defendant's vicarious liability for Hourigan's conduct would substantially depend upon the relevant nexus that might be established between the authority and power vested in him as an assistant parish priest, and his abuse of the plaintiff.[110]

181 I accept, as submitted by the Diocese, that the Court did not deal directly with the issue of whether the Diocese was vicariously liable for the unlawful actions of an assistant priest. Despite this, it would seem odd in the extreme for the Court to have proceeded to the second question without being satisfied that the precondition (ie the existence of vicarious liability) was satisfied or, at least, tenable.

182 Notwithstanding the force of the authorities I have just referred to, it was contended by the Diocese that the law in Australia does not permit a court sitting at first instance to reach a conclusion inconsistent with the general rule that vicarious liability is confined to an employment situation. To put it squarely and simply, it was said by the Diocese that *Sweeney* was binding on the confined nature of vicarious liability whatever the factual scenario before the lower court and that was the end of the matter — at least at this level.

183 I reject this argument.

184 It fails to properly identify the true nature of any precedent allegedly created by *Sweeney* in its pronouncement of a so-called "general rule". In addition, *Sweeney* and

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108 Ibid [419]–[420], [423]–[424] (citations omitted).
109 (2020) 62 VR 234.
110 Ibid [151].

the cases that the Diocese relies upon to support the contention are legally and factually far removed from the considerations in this case.

185 *Sweeney* stands for the proposition that a principal cannot be liable for the acts or omissions of an independent contractor — no more, no less.[111]

186 Moreover, the paragraph of *Sweeney* primarily relied upon[112] to support the Diocese's proposition needs to be viewed in context both factually and legally; the case was solely concerned with the actions of an independent contractor and the liability of the principal for his actions. The Court did not lay down an absolute rule as is demonstrated by its statement extracted above[113] in relation to independent contractors that "the person engaging the contractor will *generally* not be vicariously liable".[114]

187 This is reinforced, I consider, by the reference to *Colonial Mutual Life Assurance Society Ltd v Producers & Citizens Co-operative Assurance Co of Australia Ltd*[115] as the background for the Court's discussion of the employee/independent contractor dichotomy — a case which (contrary to the general proposition) held a principal vicariously liable for the conduct of an independent contractor.[116] By way of this example as an exception, the Court demonstrated that it was unusual, but entirely possible and consistent with the vicarious liability principle, for the particular features of a case to require liability to be transferred to a principal in some circumstances.

188 *Sweeney* clearly establishes, at a general level, the proposition that the roles and legal obligations of an independent contractor and an employee (to a third party) are distinguishable and discrete, as seen in similar commercial and industrial facts (as applied by the New South Wales Court of Appeal and the Federal Court in the authorities relied upon by the Diocese — discussed in a moment).

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111 Non-criminal or criminal.
112 *Sweeney* (2006) 226 CLR 161, [33].
113 [141] above.
114 *Sweeney* (2006) 226 CLR 161, [12] (emphasis added).
115 (1931) 46 CLR 41.
116 Ibid [48–50] (Dixon J).

189 Where the Diocese's interpretation of *Sweeney* fails is that it does not account for the way that the decision leaves the door open to exceptions to that general rule. This is reflected by the statements I have extracted from *Prince Alfred College* and, as discussed, decisions in the United Kingdom and Canada. So, in the United Kingdom, Baroness Hale recently said of the decision in *Christian Brothers* and its relationship to the distinction between independent contractors and employees:

> It is significant that, shortly after the decision in *Christian Brothers*, this court decided the case of *Woodland v Swimming Teachers Association* [2014] AC 537, in which it was held that a school had a non-delegable duty of care towards the pupils for whom it arranged compulsory swimming lessons with an independent contractor. Lord Sumption JSC said this:
>
> > The boundaries of vicarious liability have been expanded by recent decisions of the courts to embrace tortfeasors who are not employees of the defendant, but stand in a relationship which is sufficiently analogous to employment: *Various Claimants v Catholic Child Welfare Society* . But it has never extended to the negligence of those who are truly independent contractors, such as Mrs Stopford appears to have been in this case.
>
> Lord Sumption JSC not only saw the *Christian Brothers* case as adopting the "sufficiently analogous to employment" test but also as casting no doubt on the conventional distinction between employees, and those analogous to employees, and independent contractors.[117]

190 The only "door" that was shut by *Sweeney* was that limited to the relationships between persons engaged to perform work on behalf of others in the context of commercial and industrial settings as independent contractors. That door remains closed. Any broader construction, such as the one submitted by the Diocese which endeavours to limit vicarious liability outside of this context, is inconsistent with other statements of the High Court both before and after *Sweeney*.

191 It is also wrong, as the Diocese's submissions might imply, to endeavour to conflate the factual context of this case (and its potential consequences in the determination of this issue) with these two cases the Diocese relied upon as supporting the primacy of *Sweeney*:[118] *Day v The Ocean Beach Hotel Shellharbour Pty Ltd*[119] (pre-dating *Prince Alfred College*) and *Construction, Forestry, Maritime, Mining and Energy Union v Personnel*

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117 *Various Claimants v Barclays Bank plc* [2020] AC 973, [19] (citations omitted).
118 Paragraphs 22-23, 26, 28 of the Diocese's written outline of submissions.
119 (2013) 85 NSWLR 335 ('*Day*').

Contracting Pty Ltd.[120].

192 Both cases were set within a modern commercial and industrial context, dealing with the employment status of a contracted security guard and a contracted construction labourer respectively. In those cases, both Courts, with respect, correctly applied *Sweeney*, citing paragraph [33] of the majority judgment as the authority requiring, as a matter of binding principle, that the respective principals in each case (a hotel and a labour hire company) could not be held liable for the wrongs of the actors (independent contractors) in those circumstances.

193 It is not necessary to identify in detail the respects in which these facts can be distinguished because not even the Diocese submitted that the relationship between Coffey and the Diocese is one of Principal and independent contractor. Both the facts and issues in those cases are eons removed from the facts and issues in this one.

194 Accordingly, whilst *Day* and *CFMEU* correctly applied *Sweeney*, they do not provide a basis for contending that a determination of vicarious liability in this case without a preliminary positive employment finding would be to depart from longstanding and binding authority.

195 Next, the Diocese's submission suggests that it is inappropriate for "a court sitting at first instance to so expand the law".[121]

196 The High Court has pointed out regularly that it is bound to answer only the questions put before it. Both it and intermediate appellate courts are limited to the extent that they can consider only contested and contestable questions arising from the particular facts of the case.

197 In addition to the acknowledgement by the majority in *Prince Alfred College* that the High Court "encourages primary judges to deal with all issues, even if one is dispositive" (admittedly said in a different context),[122] it is worth repeating the closing

120 (2020) 279 FCR 631 ('*CFMEU*').
121 Paragraph [28] of the Diocese's written outline of submissions.
122 *Prince Alfred College* (2016) 258 CLR 134, [9].

remarks of the joint judgment of Gageler and Gordon JJ. These appear to contemplate the very exercise which the Diocese endeavours to prevent this Court from undertaking — that trial courts may need to make use of their fact-finding jurisdiction to assess issues in the absence of clear and authoritative precedent:

> Judges make and develop the common law, as distinct from discovering and declaring it. Identification, modification or even clarification of some general principle or test requires that judgments be made. Those judgments are best made in the context of, and by reference to, contestable and contested questions.…
>
> The "relevant approach" described in the other reasons is necessarily general. It does not and cannot prescribe an absolute rule. Applications of the approach must and will develop case by case. Some plaintiffs will win. Some plaintiffs will lose. The criteria that will mark those cases in which an employer is liable or where there is no liability must and will develop in accordance with ordinary common law methods. The Court cannot and does not mark out the exact boundaries of any principle of vicarious liability in this case.[123]

198 These remarks echoed what had been said by McLachlin J in *Bazley*:

> Increasingly, courts confronted by issues of vicarious liability where no clear precedent exists are turning to policy for guidance, examining the purposes that vicarious liability serves and asking whether imposition of liability in the new case before them would serve those purposes.
>
> This review suggests that the second branch of the *Salmond* test may usefully be approached in two steps. First, a court should determine whether there are precedents which unambiguously determine on which side of the line between vicarious liability and no liability the case falls. If prior cases do not clearly suggest a solution, the next step is to determine whether vicarious liability should be imposed in light of the broader policy rationales behind strict liability.[124]

199 *Sweeney* does not resolve the "contested or contestable" issues in this case. The facts of this case raise questions unanswered by Australian legal doctrine, namely whether the wrongs of a person who is clearly not an independent contractor can be imposed on a second person with whom that first person has an ongoing, defined and close relationship with authority vested in the first person, albeit that it is not one of employment (in an industrial or contractual sense). And, if so, how the imposition of liability is to be assessed. This is a crucial contested and contestable issue. These are issues that this Court, and not an appeal court, is uniquely placed to posit an answer

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123 Ibid [127], [131] (citations omitted).

124 [1999] 2 SCR 534, [14]–[15] (citations omitted).

— at least until it reaches a higher court.

200 Finally, there is the submission of the Diocese that this Court should follow the "seriously considered dictum" of Mason P on this issue in *Trustees of the Roman Catholic Church for the Archdiocese of Sydney v Ellis*.[125]

201 *Ellis* is better known for its conclusion as to the absence of legal personality on the part of an archdiocese (or diocese). This has now been remedied in most states by legislative intervention.[126]

202 I accept the contention of the Diocese that a further obstacle identified by Mason P was whether the relationship between the Diocese and the assistant priest was one which permitted the attribution of strict or vicarious liability to a diocese:

> The relationship between members of a Church such as the Roman Catholic Church and individual office holders in that Church is far remote from any category that has been found to entail vicarious liability.
>
> The relationship between an assistant parish priest and the "members" as a whole is too slender and diffuse to establish agency in contract or vicarious liability in tort.[127]

203 I reject, however, the suggestion that there is any binding force in the observations of Mason P given his Honour's preliminary remark that "[t]he rationale of vicarious liability awaits definitive exposition".[128]

204 Moreover, *Ellis* was decided in 2007 and much of the decision turned upon an analysis of the law of unincorporated associations and agency. Indeed, a significant part of Mason P's reasoning was based upon the decision in *Wilkins v Jennings*,[129] which appears to have been resolved by a consideration of whether some parts of canon law of the Catholic Church could result in vicarious liability being imposed on the Diocese. This alone is sufficient to distinguish it from the reasoning in a raft of later cases of high authority involving institutions and clergy which have adopted a very different

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125 (2007) 70 NSWLR 565 ('*Ellis*').
126 See, e.g., *Legal Identity of Defendants (Organisational Child Abuse) Act 2018*.
127 *Ellis* [53]–[54] (citations omitted).
128 Ibid [53].
129 (1985) Aust Torts Reports 80–754.

approach to the question of the imposition of vicarious liability.

205 So, this submission of the Diocese is misconceived. The Court could not and should not be bound by observations in a case which have now been overtaken by highly persuasive judicial statements in this country and other Commonwealth jurisdictions, in particular, those of the High Court in *Prince Alfred College*, the Supreme Court of Canada in *Bazley*, and the Supreme Court of the United Kingdom in the *Christian Brothers* case.

206 To adopt Lord Phillips' statement in *Christian Brothers*: "The law of vicarious liability is on the move",[130] and *Ellis* has been left in its wake.

207 Nor is the fact (as the Diocese contended) that several Australian jurisdictions, other than Victoria, have enacted statutory amendments to expand the concept of vicarious liability (to make institutions liable for the actions of persons "akin to an employee") of any significance.[131]

208 As I said in *Homsi v Homsi*,[132] there may be many reasons why a legislature decides to insert a particular provision relating to the existence or absence of a duty of care, "not the least being an abundance of caution as to where the common law might progress over time"[133] — or in this case, may not progress.

209 The question to be answered is simple and not answered by references to deeming provisions in the legislation of other states: whether the common law of Australia permits the attribution of vicarious liability to the Diocese?

210 In summary, I do not accept the submission of the Diocese that the existence of an employment relationship is the only basis upon which vicarious liability can be imposed upon it in relation to the actions of Coffey. Nor do I think that this Court is precluded by prior decisions of appellate courts or legislative enactments from determining the factors that constitute a relationship which might give rise to such a

130 *Christian Brothers* [2013] 2 AC 1, [19].
131 See, eg, *Civil Liability Act 2002* (NSW) s 6G and 6H.
132 (2016) 51 VR 694.
133 Ibid [66].

liability and whether the actions of the assistant priest should ultimately be visited upon the Diocese.

211 Returning now to the facts of this case and the answer to the first question. Applying the *Hollis* criteria, I am not convinced that Coffey can be treated as an employee of the Diocese given the absence of any formal employment contract or arrangement and, as will be discussed, the lack of immediate control or supervision by the Diocese over Coffey's activities. Although many other features of the employment relationship and referred to in the authorities are apparent, for present purposes, I will accept that Coffey was not an employee of the Diocese.

212 However, for reasons I have just set out, that does not mean that DP's case must fail. To the contrary, and consistent with the authorities I have referred to, I consider that the appropriate determination of whether the Diocese may be vicariously liable for Coffey's assaults of DP requires the following — a holistic and broad inquiry into the circumstances surrounding: the relationship between the Diocese and Coffey; the role of both 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.

213 Whilst I accept that a number of the criteria examined in *Hollis* and other employment cases will be relevant to that inquiry, it ought not be limited by preconceived notions of agency or employment. Rather, as *Prince Alfred College* demonstrates, the inquiry ought to be directed to the totality of the relationship so as to enable a determination as to whether the Diocese should be held vicariously liable for Coffey's actions as an assistant parish priest.

214 In reaching this conclusion, I am fortified by the words of Lord Reed (on behalf of the UK Supreme Court) in *Cox*:[134]

> The other lesson to be drawn from *Viasystems (Tyneside) Ltd v Thermal Transfer (Northern) Ltd*, E *v English Province of Our Lady of Charity* and the *Christian Brothers* case is that defendants cannot avoid vicarious liability on the basis of technical arguments about the employment status of the individual who committed the tort. As Professor John Bell noted in his article, "The Basis of Vicarious

134 [2016] AC 660.

> Liability" [2013] CLJ 17, what weighed with the courts in E *v English Province of Our Lady of Charity* and the "*Christian Brothers*" case was that the abusers were placed by the organisations in question, as part of their mission, in a position in which they committed a tort whose commission was a risk inherent in the activities assigned to them.[135]

215 Now, turning to the second question. If it is established that the relationship is one that gives rise to vicarious liability, the remaining issue is whether the Diocese should be held liable for the assaults committed by Coffey upon DP, given they were committed outside the lawful scope of his engagement by the Diocese.

216 I will briefly examine those principles as, fortunately, much of the above discussion is relevant and need not be repeated.

217 It suffices to say that the extent to which an employer will be vicariously liable for the unauthorised or unlawful conduct of an employee has been the subject of considerable jurisprudence for over 100 years in common law jurisdictions.

218 Cases such as *Deatons Pty Ltd v Flew*,[136] *Lloyd v Grace, Smith & Co*,[137] and *Morris v C W Martin & Sons Ltd*[138] were the meat of tort classes in the 1960s and 1970s.

219 Since that time, as has already been seen, the learning on the scope and limits of the vicarious liability principle — i.e. where the vicarious liability line is to be drawn when the acts of the perpetrator are unlawful and unauthorised — has continued.[139] This is particularly so in recent years in this country with what are now described in this State as "institutional abuse" cases, of which *Prince Alfred College* is an example.

220 In *Prince Alfred College*, the Court (as previously mentioned) noted the difficulties with *Lepore*.[140] After an extensive analysis of Australian and other Commonwealth authorities, the critical part is to be found under the heading, "The relevant approach", in which the majority said:

> In cases of the kind here in question, the fact that a wrongful act is a criminal

135 Ibid [31].
136 (1949) 79 CLR 370.
137 [1912] AC 716.
138 [1966] 1 QB 716.
139 See, eg, *Blake v JR Perry Nominees* (2012) 38 VR 123.
140 *Prince Alfred College* (2016) 258 CLR 134, [10].

> offence does not preclude the possibility of vicarious liability. As *Lloyd v Grace, Smith & Co* shows, it is possible for a criminal offence to be an act for which the apparent performance of employment provides the occasion. Conversely, the fact that employment affords an opportunity for the commission of a wrongful act is not of itself a sufficient reason to attract vicarious liability. As *Deatons Pty Ltd v Flew* demonstrates, depending on the circumstances, a wrongful act for which employment provides an opportunity may yet be entirely unconnected with the employment. Even so, as Gleeson CJ identified in *New South Wales v Lepore* and the Canadian cases show, the role given to the employee and the nature of the employee's responsibilities may justify the conclusion that the employment not only provided an opportunity but also was the occasion for the commission of the wrongful act. By way of example, it may be sufficient to hold an employer vicariously liable for a criminal act committed by an employee where, in the commission of that act, the employee used or took advantage of the position in which the employment placed the employee vis-à-vis the victim.[141]

221 The Court then set out the "relevant test" to determine whether an employer is liable for the unauthorised acts of an employee.[142] I have paraphrased this statement for the purpose of this proceeding:

> *The appropriate inquiry is whether [Coffey's] role as [a priest] placed him in a position of power and intimacy vis-à-vis [DP] such that [Coffey's] apparent performance of his role as [a priest] gave the occasion for the wrongful acts and that because he misused or took advantage of his position, the wrongful acts could be regarded as having been committed in the course of his employment.*

222 Accordingly, this second part of the inquiry, as the High Court stipulated and to be applied in this case, requires a careful examination of the role assigned by the Diocese to an assistant parish priest and how Coffey was placed in such a role vis-à-vis DP and other children within his pastoral care.

223 The factors relevant to the two questions I initially posed at [120] – [123] are intertwined and can be considered together. To recap, the first question: is the relationship between Coffey and the Diocese or the Bishop such that it gives rise to vicarious liability on the part of the Diocese for Coffey's conduct? The second is: if there is a relationship that gives rise to vicarious liability, is the Diocese liable for Coffey's unlawful conduct?

224 At [212] I set out, in general terms, the issues which need to be reviewed in respect of

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141 Ibid [80] (citations omitted).
142 Ibid [81].

the first question. The following, it seems to me, are the relevant factors (of varying importance) which need to be considered in this case in determining the answers to both questions:

- The relationship between Coffey and the Diocese.
- Coffey's role as an assistant parish priest in the Catholic community at Port Fairy.
- The control exercised by the Diocese or the Bishop over Coffey in his role as an assistant parish priest.
- The centrality of Coffey's work to that of the Diocese and the Church's mission in Port Fairy.
- The opportunity the Diocese provided to Coffey to abuse his power or authority.
- Coffey's relationship to DP and with his family: both generally and at the time of the assaults.
- The vulnerability of potential victims to the wrongful exercise of Coffey's authority.
- The circumstances in which Coffey carried out the assaults of DP.

The relationship between Coffey and the Diocese

225 The Bishop of Ballarat appointed priests and assistant priests to parishes within the Diocese. The Diocese accepted that Father O'Dowd had the care, management and control of St Patrick's during 1971.[143] It admitted that Coffey "would have assisted the Parish Priest during the Relevant Period … in his role as a pastor of the parish of Port Fairy, which assistance included conducting religious services".[144]

226 This is consistent with canon law and the evidence of Father Kevin Dillon (currently the parish priest of St Simon's, Rowville), who deposed to the duties of a priest and an assistant priest within a Catholic parish in Victoria in the 1970s. He was a persuasive witness and I accept his evidence on this issue and all other issues

143 Paragraphs [3] and [4] of the defence of the Diocese.
144 Paragraph [6] of the defence of the Diocese.

surrounding the work of priests in a Victorian diocese in the early 1970s.

227 I reject the Diocese's criticism of his evidence, which was founded on the proposition that one could not transpose Father Dillon's evidence about his personal experience in a metropolitan parish to Port Fairy. It was clear from the outset that I would be invited to draw inferences as to the practices within Victorian dioceses based on Father Dillon's evidence. Not only was there no serious challenge to his evidence but, tellingly, the Diocese — which includes Port Fairy parish — called no evidence in rebuttal of his testimony. If ever there was an occasion for the *Blatch v Archer*[145] principle to be applied, it was here with the Diocese's failure to call contradictory evidence.

228 Father Dillon said that the Bishop was all-powerful in the management of clergy within a diocese. 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.[146]

229 It can be readily inferred that the Diocese provided accommodation for Father O'Dowd and Coffey, and supplied his clerical garb and vestments.

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

230 At a general level, under canon law, an assistant pastor (priest) supplies the place of priest and enjoys all rights and offices of the parish pastor, on whom a parish is conferred in title along with the souls in the parish.

231 Father Dillon set out, in practical terms, the scope and nature of the pastoral role and the duties of a parish priest and assistant parish priest. While an assistant priest is expected to follow the direction of the priest and obey the priest's version of the Canon rules, there is still significant scope for an assistant priest to undertake the priest's duties. It was not uncommon for assistant priests to help the sick and those close to death, and carry out pastoral care in the community. Any pastoral duty or task of a

145 (1774) 98 ER 969. See also *Swain v Waverley Municipal Council* (2005) 220 CLR 517 [17].
146 T608; T610–11.

parish priest could be delegated by him to an assistant parish priest.[147]

232 Geographically, the priest's role, Father Dillon said, was defined broadly by the boundaries of the relevant parish.[148] But his pastoral duty extended to any person connected with the parish, regardless of where they lived:

> [T]he general accepted practice would be that if someone comes forward and associates themselves with the parish or an activity of the parish … then you have a … connection, and in some degree an obligation to support them and care for them.[149]

233 The nature of such support and care encompassed activities based in the church, such as taking confessions and hearing mass.[150] However, it also extended to activities at locations other than the church, including visits to parishioners' homes:

> [T]he visiting of homes was seen as an integral part of parish pastoral care within the context of the parish.[151]

234 Pastoral activities in private homes might include those specified by scripture, such as administering last rites or marriage sacraments, but also encompassed more vaguely defined activities which Father Dillon described as "getting to know people": "sometimes it would be … by invitation, sometimes it would be just social, and other times it might be that they had a particular … issue that [they wanted to] discuss and … they felt much more at home, literally, in doing that in the privacy of their own home …".[152]

The control exercised by the Diocese (or the Bishop) over Coffey in his role as an assistant parish priest

235 This "right to exercise control" or "ultimate authority" exists in the case of the Diocese in canon law. Canon law 476.6 provides that an assistant parish priest's: —

> rights and obligations are contained in the diocesan statutes, the letter of [appointment from] the Ordinary [that is, the bishop], and from the

147 T595-96.
148 T596.
149 T614.
150 T587.
151 T621.
152 T619.

commission of the pastor [that is, the parish priest][153]

Father Dillon in his evidence explained that the "diocesan statutes" are "any local laws that there are within the archdiocese, which are not necessarily part of canon law, but which are the practice within the diocese".[154]

236 The diocese, through the bishop, appoints the parish priest and his assistant priests. Under canon law, the parish priest provides a yearly report to the bishop on the assistant parish priest.[155] As the evidence of Father Dillon and canon law demonstrates, 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. These activities are subject to the direction of the parish priest — in this case, Father O'Dowd.[156]

237 On the other hand, Coffey's assignment at St Patrick's was subject to the ultimate authority of the Diocese, as exercised by the Bishop, to remove any priest and exercise discretion over the appointment of priests to parishes. The Diocese had ultimate control over the parameters of Coffey's appointment, namely the duration, the location, the general duties, the responsibility of supervision and the benefits provided to Coffey for accepting the assignment. Despite the day-to-day supervision of Father O'Dowd, it was at the will of the Diocese that Coffey received and maintained the assignment for the entire period.

238 It can be accepted that, in contrast to *Hollis*, the Diocese or Bishop did not exercise the kind of control over Coffey's work that Vabu did in relation to its couriers. However, the Diocese, as just discussed, had the right to exercise control over certain aspects of a priest's work even if only "incidental or collateral" to his main work.

153 Exhibit P3.
154 T611–12.
155 Canon law 476.7, Exhibit P3.
156 T611-12.

The centrality of Coffey's work to that of the Diocese and the Church's mission in Port Fairy

239 In *Maga*, Lord Neuberger MR said of the role of a Catholic priest in the community:

> Like many other religions, [the archdiocese] has a special concern for the vulnerable and the oppressed. That concern may not be quite the same as the legal obligation to care or assumption of responsibility for care that was emphasised by Lord Steyn or Lord Hobhouse in *Lister's* case but it seems to me to be analogous.
>
> In the case of the Roman Catholic Church, this situation is further emphasised by its claim to be the authoritative source of Christian values. For centuries the church has encouraged lay persons to look up to (and indeed revere) their priests. The church clothes them in clerical garb and bestows on them their title Father, a title which Father Clonan was happy to use. It is difficult to think of a role nearer to that of a parent than that of a priest. In this circumstance the absence of any formal legal responsibility is almost beside the point.[157]

240 Under canon law, any priest must be outstanding for good morals, doctrine, zeal for souls, and all praiseworthy virtues. Father Dillon said that at the relevant time priests stood as representatives of the Church's values and must embody them always as they could be called upon at any time to fulfil their duties.[158] This demonstrates a general or widely-held expectation by the Port Fairy Catholic community, indeed all lay members of the Diocese, about the conduct of priests and the trust placed by members of the community in their priests and assistant priests.

241 The work of Coffey in his capacity as assistant parish priest in a small community comprised the "very essence" of the public manifestation of the Diocese and the Church in Port Fairy. It was not the case that Coffey "supplemented" or "aided" the work performed by the Diocese. To the people engaging the services of Coffey, he and Father O' Dowd *were* the Diocese, and his role was to perform the Diocese's operations in the community. Put another way, Coffey carried out the work of the Diocese "in its place" ie doing work "of" the Diocese.[159]

242 This is apparent from a combination of the evidence of Father Dillon, DP and the four tendency witnesses (which I will set out directly). The parish priest, and assistant priest, played a real part in the everyday life of Catholic parishioners in the 1970s. The

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157 *Maga* [2010] 1 WLR 1441, [82]–[83].
158 T590; T628.
159 See *Colonial Assurance Society Ltd v Producers & Citizens Co-operative Assurance Co of Australia Ltd* (1931) 46 CLR 41, [48].

Diocese, through the Bishop, gave Coffey the imprimatur to undertake religious caring for the spiritual life of the Port Fairy flock. He was not a recluse. He was out and about in the community as part of his pastoral role. He took Mass and taught religious education at the parish school. As part of those duties, as will be seen, he would visit parishioners' homes and interact with the family and the children. He did so both during the day and in the evening.

243 This was also consistent with the evidence of Ms Jago who was a fellow student of DP at St Patrick's school in the 1970s

244 Ms Jago said that, as "a Catholic child of Catholic parents", the priests were held in high regard. She said it was a sign of good social standing if a priest came to your home for a visit or for dinner. Her perception was that, as a child in Port Fairy, priests "couldn't do anything wrong" and "you'd always trust a priest"; "your parents would never believe that they would do anything wrong".[160]

The opportunity the Diocese provided to Coffey to abuse his power or authority

245 Father Dillon said that a part of the training of priests was to emphasise the role of the confessional and the intimacy of priests with the members of their parish for pastoral care and guidance. This was regarded as a special role that priests occupied for their congregation.[161] Father Dillon also explained that there were a number of other reasons why priests may attend the personal homes of their congregations, including social calls:[162]

> [T]he visiting of homes was seen as an integral part of parish pastoral care within the context of the parish. In fact, there were a number of … priests who were renowned for their … visiting … [I]n fact, at my second parish [there was] a very fine priest and he — that was his whole focus, was to visit his parishioners, and he would find that sitting in … their place of comfort, namely their … kitchen or whatever was the way in which he got to know them best and they formed a positive and valuable relationship with him. And that was certainly my experience too.[163]

160 T902.
161 T587.
162 T619.
163 T621.

246 In addition to DP, four of the boys who gave tendency evidence were abused by Coffey at their respective homes during the course of what appear to be pastoral visits.

247 DP said that Coffey had visited the family home on multiple occasions and that the purpose was to give advice to the family.[164] Coffey did so in the context of DP's parents' marital problems.[165] When he visited on these occasions, he wore a clerical collar.[166]

248 Coffey was a cousin of Trevor Tagilabue, and about 20 years his elder. They were regular visitors at one another's homes in Ballarat throughout Tagilabue's childhood. Coffey assaulted Tagilabue on four occasions. Two of those were at Tagilabue's family home.

249 The first was at a party held at Coffey's family home in 1960 to celebrate his ordination:

> What happened was that in the late evening we were in the lounge room of the house, and Coffey's sister [name] was playing the piano. Bryan was sitting on a big old forties style arm chair. I was standing on the right hand side of the chair. I remember people standing around and Bryan talking to them. Bryan Coffey has put his arm around me and pulled [me] closer to the arm of the chair and pulled me against it…. .[167]

250 The other, in 1963, occurred when Coffey was visiting the Tagilabue home with another member of his family, and assaulted Tagilabue in the lounge room of the house.[168]

251 In or around 1963, Coffey assaulted Michael Glennen when invited for dinner at the Glennen family home. While their parents were in the kitchen, Coffey was in another room with Glennen and his two brothers, playing with them and telling jokes. He tickled Glennen's brother and then began to tickle and then assaulted Glennen.[169]

252 Afterwards, they both joined Glennen's parents in the kitchen, where Coffey "started

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164 T316.
165 T316.
166 T809.
167 Exhibit P7.
168 Ibid.
169 Ibid.

a conversation with [them]",[170] and the night proceeded without further incident.

253 GMP first met Coffey at his primary school and saw him each Sunday at Mass where he served as an altar boy. Coffey was a regular visitor at GMP's family home, usually for an evening meal.[171]

254 On each of these occasions, Coffey would play games with GMP and his younger brother, which variously involved Coffey pulling the boys' pants down and administering smacks on their bare bottoms "for each year", or checking to see if they were wearing underwear, or if their underwear was dirty. These "games" would take place in the passageway of the house, with all the doors in the passageway closed, while the boys' parents were in another room.

255 GMP described one night when, whilst "playing" with the boys in this way in the boys' bedroom after dinner, Coffey "went too far" and assaulted him with digital penetration.[172]

256 Coffey assaulted MJG from 1965 to 1967. Priests, including Coffey, would often attend his family home for dinner.[173] He was the subject of multiple assaults by Coffey, including on one occasion when Coffey came to his family home for lunch.[174]

257 Although DJ was not abused by Coffey at home, he gave evidence about priests' visits to his parents' house; "priests would visit my family at home, and they would stay for lunch or dinner".[175]

258 The common theme emerging from the evidence of DP and the other boys (as they were at the time) is that Coffey in his role as an assistant priest would regularly visit the homes of parishioners and interact with families. This was consistent with Father Dillon's description of the role of the parish priest which involved far more than

170 Ibid.
171 Ibid.
172 Ibid.
173 Ibid.
174 Ibid.
175 Ibid.

dispensing the sacraments.

259 Contrary to the implication in the Diocese's submissions, Catholic clergy in rural Victoria did not "punch the time clock" at 5:00pm, or after celebrating Mass or taking confession. Rather, as Father Dillon made clear, their role extended to pastoral care after hours and on weekends.

260 It is, in my view, both inconceivable and an affront to common sense to suggest (as the Diocese put it) that these visits to parishioners' houses and DP's home were unconnected with Coffey's pastoral role within the Church and merely social outings separate to his role as an assistant priest. It is not as though this is a case of an event that occurred at a civil social function (such as at a golf club or a football club unconnected with the parish or pastoral activities — as described by Father Dillon).

261 It is abundantly clear from the evidence of Father Dillon, DP and the other boys that pastoral visits to Catholic family homes were part of Coffey's duties as assistant priest. I am satisfied that Coffey made a practice of attending parishioners' homes as part of his pastoral role and this quite reasonably extended to attending social functions. To suggest otherwise (as the Diocese does by asserting that these visits were social visits unconnected with Coffey's role as an assistant priest) is sheer nonsense.

Coffey's relationship to DP's and his family: both generally and at the time of the assaults

262 There is no evidence that Coffey had any relationship with DP's family prior to his appointment to Port Fairy.

263 Coffey delivered Mass and taught religious education to DP during his preparatory year at the parish school. DP and his family attended Mass every Sunday which was, at times, officiated by Coffey.

264 Coffey, as we have seen, regularly visited Catholic families in the parish as part of his pastoral role. DP recalled him visiting the family home on five or six occasions.

265 DP's home was only a short distance from the presbytery — about3 blocks away.[176] DP described Coffey's visits to the house as follows:

> [Around the period 1970–1971] Father Coffey used to visit. When he visited, he used to sit on the end of our beds in mine and my brother's bedroom … I knew the problem … — there were marriage problems. We were never allowed to stay in the room to … witness what he was talking about to my parents but … that is the best of my knowledge.[177]

266 It is also clear from the evidence of the boys and DP that I have set out that the provision of unsupervised pastoral care to families, including that of DP, was part and parcel of Coffey's role. It was this position, closely connected to his task as a provider of pastoral care, that Coffey was able to take advantage of, in committing his abuse of young boys, including DP.

267 Whilst I have rejected the suggestion that the occasion of the first assault was that of a wake for DP's grandmother, it does not follow that the visit was unconnected to Coffey's pastoral role.

268 This was particularly so, it would appear, with DP's family. His parents were experiencing matrimonial problems and it was only natural for Coffey to visit them regularly given the location of their house in relation to the church and presbytery.[178] Even if his parents had not been experiencing such problems, it is clear that Coffey's practice was to establish a relationship of intimacy with Catholic families, such as that of DP, within the Diocese.

269 I am satisfied that Coffey's role as the assistant parish priest and his affinity with DP's family placed him in a position of trust and authority vis-à-vis DP and his family. It was in this position that he committed the assaults upon DP.

270 To adopt the words of McLachlin J in *Bazley*, the Diocese and the Bishop "significantly increased the risk of harm" by putting Coffey in a position to abuse DP.[179]

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176 T818.
177 T313.
178 T314-15.
179 *Bazley* [1999] 2 SCR 534, [42].

The vulnerability of potential victims to the wrongful exercise of Coffey's power

271 This is self-evident. Coffey preyed on young boys, whom he abused when separated from their parents.

The circumstances surrounding the assaults of DP

272 I have set out the circumstances of the assaults of DP at [83] – [90].

273 I am satisfied that on both occasions Coffey was engaged in a pastoral visit.

274 Merely because the occasion of the first assault was a social gathering does not, as I have just discussed, mean that it was outside Coffey's pastoral role. To the contrary, the participation in Catholic social life in a rural community was as much a part of a priest's role as was celebrating Mass.

275 The same can be said in relation to the second assault. The Diocese contended that there was some significance in the fact that it occurred on Boxing Day — contrasting it to Christmas Day. This goes nowhere — it was another example of maintaining the relationship of the Church with its parishioners in the context of a pastoral visit.

276 Finally, it is singular that DP's parents, quite understandably, permitted Coffey to take DP alone into his room and into the tent. I readily infer that they did so because of their implicit trust in Coffey in his role as a priest of the Church whose teachings and ministry they devotedly adhered to.

277 In *Maga*, Lord Neuberger said, tellingly and particularly appositely to this case:

> [T]he progressive stages of intimacy were to my mind only possible because Father Clonan had the priestly status and authority which meant that no one would question his being alone with the claimant. It is this that provides the close connection between the abuse and what Father Clonan was authorised to do.[180]

Conclusion

278 By reason of —

(a) the close nature of the relationship between the Bishop, the Diocese and the

180 *Maga* [2010] 1 WLR 1441, [84].

Catholic community in Port Fairy;

(b) the Diocese's general control over Coffey's role and duties within St Patrick's parish;

(c) Coffey's pastoral role in the Port Fairy Catholic community; and

(d) the relationship between DP, his family, Coffey and the Diocese, which was one of intimacy and imported trust in the authority of Christ's representative, personified by Coffey

— the Diocese is vicariously liable for his conduct.

279 The first question is answered affirmatively.

280 I am also satisfied that Coffey's role as a priest under the direction of the Diocese placed him in a position of power and intimacy vis-à-vis DP that enabled him to take advantage of DP when alone — just as he did with other boys. This position significantly increased the risk of harm to DP. He misused and took advantage of his position as a confidante and pastor to DP's family; this enabled him to commit the unlawful assaults upon DP.

281 The second question is also answered affirmatively.

282 It follows that I hold that, notwithstanding the unlawful nature of Coffey's acts, the Diocese is vicariously liable for his assaults on DP.

Is the Diocese liable in negligence (direct liability) for the assault of DP by Coffey?

283 It was not in issue that the Diocese owed a duty of care to DP in relation to the conduct of priests appointed to the Port Fairy parish in their dealings with parishioners and their families.

284 Part X of the *Wrongs Act 1958* applies to the issues of breach and causation. Section 48 reads as follows:

48 General principles

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

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

(b) the risk was not insignificant; and

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

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

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

(b) the likely seriousness of the harm;

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

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

(3) For the purposes of subsection (1)(b) —

(a) **insignificant risks** include, but are not limited to, risks that are far-fetched or fanciful; and

(b) risks that are **not insignificant** are all risks other than insignificant risks and include, but are not limited to, significant risks.

285 In *Erickson v Bagley*,[181] the Court of Appeal described the approach to be undertaken in the s 48 analysis:

> As with the common law, in defining the content of the duty of care, the section focuses on the identification of the risk, its foreseeability, the probability of the risk, and the reasonableness of precautions which are alleged to be required to address that risk. *Thus, the first step in the analysis requires the appropriate identification of the risk against which it is alleged that a particular defendant failed to exercise reasonable care.* Commonly, the proper identification of the risk can be difficult, if not problematic. Necessarily, the risk must be defined taking into account the particular harm that materialised, and the circumstances in which that harm occurred. However, the risk, referred to in s 48, is not to be confined to the precise set of circumstances in which the plaintiff was injured. It is well established that, in order that a defendant be held to be negligent, it is not necessary that that defendant should have reasonably foreseen that the particular circumstances, in which the plaintiff was injured, might occur. Rather, what must be reasonably foreseeable is the nature of the particular harm that ensued, or, more relevantly, the nature of the circumstances in which

181 [2015] VSCA 220 ('*Bagley*').

that harm was incurred.[182]

286 The Court went on to emphasise the need for a judicial synthesis of the provision:

> It is important that the court not adopt a mechanical or formulaic approach in applying the three prerequisites specified in s 48(1). Ultimately, the content of the standard of care, required of an alleged tortfeasor, is an issue of fact, which is to be resolved by an exercise of common sense, taking into account the jury's (or, in the relevant case, the judge's) worldly experience.[183]

287 So, the first step here is to identify the risk of harm. As was explained in *Bagley*, there must be a degree of precision which takes into account the harm that materialised so as to enable a determination of the appropriate response — if any. However, the identification should not be so precise so as to obscure the true source of the potential injury.[184]

288 I think that the relevant risk of harm here was as follows: that Coffey in the course of his pastoral duties might assault a parishioner's child.

289 The next step is to determine whether that identified risk was foreseeable — did the Diocese know or ought it have known of the risk I have just identified?

290 The third step is whether that identified risk was "not insignificant".

291 Finally, if these three questions are answered affirmatively, the Court is then to determine the reasonable response of the Diocese to the identified risk.

292 As I see it, the critical issue is the second question — that of foreseeability: Did the Diocese or the Bishop, or both, know or ought they have known that Coffey in the course of his pastoral duties may unlawfully assault a member of a parishioner's family?

293 Returning to the evidence, there is none which demonstrates that Bishop Mulkearns (the Bishop of Ballarat at the relevant time) or the Diocese knew of Coffey's unlawful conduct prior to 1971 or during that year. Nor is there any evidence that it was known

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182 Ibid [33] (emphasis added) (citations omitted). See also *Menz v Wagga Wagga Show Society Inc* (2020) 103 NSWLR 103, [49]–[54] (*'Menz'*).

183 Ibid [37].

184 *Menz* (2020) 103 NSWLR 103, [52].

that there was a risk of him assaulting young boys from Catholic families in the Diocese in the course of his pastoral visits.

294 However, whether it *ought* to have known of the risk posed by Coffey to those young boys is a different question. There are two pieces of evidence which DP argued should have put the Diocese on notice of the risk of Coffey assaulting a parishioner's young child.

295 First, there were the multiple assaults of seven young boys by Coffey during the period between 1966 and 1971. Four of these occurred at the family homes of Catholic parishioners. These are set out in the table at [92] above.

296 Second is evidence of a discussion between then Father Gerard Ridsdale ('Ridsdale'), a now notorious paedophile, and Bishop O'Collins, then Bishop of Ballarat, in 1994.

297 As to the first basis, there is no evidence that any information concerning the assaults by Coffey on the seven boys was provided to the Diocese, the Bishop or Father O'Dowd. Indeed, most of the boys did not disclose Coffey's conduct to anyone until many years later. Those who did disclose it notified their parents, but there is no evidence that the complaints of the boys ever reached any member of the Church hierarchy in the Diocese ranging from the parish priest to the Bishop.

298 The fact that there were multiple assaults of young boys by Coffey over a number of years prior to 1971 cannot of itself create an inference that the Diocese should reasonably have known of his conduct or the risk of Coffey behaving as he did. If there was evidence of Coffey's actions being reported to other members of the Diocese (lay or clergy), then the position would be different, as it would if there was evidence that Coffey's proclivities were common knowledge in the community. But none of this was adduced.

299 The presence of a body of knowledge of Coffey's conduct held by a number of young boys, but not disseminated, is insufficient in my view to create an inference that the Diocese should have known of Coffey's proclivities and potential risk to young boys.

300 As to the second basis, Ridsdale was ordained as a priest in 1961.

301 DP adduced in evidence an extract of an interview of Ridsdale with a representative of Catholic Church Insurance conducted on 6 June 1994:

> The first complaint that ever came in was in my first year as a Priest and that would have been in Ballarat North, because part of my responsibility was Villa Maria a little school run by the Mercy, it was a little boarding school for boys out near Xavier Golf Course, Mt. Bogey and it was in Ballarat East area, but in those days Ballarat was just the one Parish and I drove a lad home to down near Winchelsea and while I was there I remember going into his room and fondling him while he was showing me something in the cupboard, toys or whatever and putting my hand down his trousers and touching his penis. It would have been a fairly brief kind of thing, then later on the Bishop called me in, Bishop O'Collins, and said there had been a complaint and he said "If this thing happens again then you are off to the Missions" and he sent me to Mildura.
>
> Is that why you went to Mildura from North Ballarat?
>
> Yes, transferred to Mildura?[185]

302 I do not accept the Diocese's criticisms of the content of this extract. This is a record of Ridsdale's own description of his conduct towards a young boy and his account of a conversation with the Bishop. It was recorded by a representative of a company which insured the Catholic Church and its clergy.

303 I accept that the conversation occurred in the terms set out by Ridsdale. I also accept that Bishop O'Collins should have known from the time of the conversation that Ridsdale posed a threat to young boys. But this was Ridsdale specific.

304 DP argues that this conversation should have put the Bishop and the Diocese on notice as to Coffey's potential misconduct. But how could it? There was no link between Ridsdale and Coffey. Ridsdale might rightly at the time have been considered to be a rogue element. It is impossible to conclude that a discussion between Bishop O'Collins and Ridsdale should have led the Diocese on a path to reasonably suspect other priests, and more particularly Coffey, as being potentially responsible for similar conduct towards young boys.

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185 Exhibit P13.

305 What is needed is some evidence over and above Ridsdale's conduct which would render it reasonable for the Diocese to consider Coffey, specifically, as a potential risk to young boys, including DP. This is not an exercise in hindsight, now knowing the extent of Coffey's unlawful conduct, but rather what the Diocese or the Bishop should reasonably have foreseen in 1971 based on the knowledge available to them at that time.

306 Ultimately, neither piece of evidence leads to an inference that the Diocese or the Bishop should have known of the potential misconduct of Coffey. I am not satisfied that there is sufficient evidence to demonstrate that there was a foreseeable risk in 1971 that Coffey might assault young boys such as DP.

307 The end result is that the second condition of DP's case on liability in negligence — foreseeability of risk — is not met. Therefore, his case under this head must fail.

308 The Diocese is not liable for breach of the duty it owed to DP.

What is the appropriate assessment of DP's compensatory damages?

The asserted psychological sequelae of the Coffey assaults

309 The particulars of injury alleged by DP were as follows:[186]

(a) psychiatric injury, including:

(i) complex post-traumatic stress disorder;

(ii) chronic anxiety disorders — social and agoraphobic;

(iii) chronic depressive disorder;

(iv) enduring (post-traumatic) personality change; and

(b) psychological sequelae.

310 For reasons that I hope have become clear, determining cause and effect in this case is

186 Particulars of Special Damages dated 27 May 2021 [2].

especially difficult. First, there is the passage of time and the consequent limited ability to test witnesses on aspects of their evidence. Second, is the unreliable testimony of DP as to the effects of the Coffey assaults upon him. This means that, in making such findings, statements of DP ptior to this litigation and the opinions of treating professionals at that time are particularly relevant.

DP's evidence as to the effects of the Coffey assaults

311 DP said that the Coffey assaults have been "with [him] every day"[187] "for the last 50 years".[188] He feels "dirty",[189] "isolated"[190] and "taken advantage of".[191] He has "lost all faith or confidence in the Catholic Church"[192] and said that "life would have been a lot easier to pursue if this had not happened".[193]

312 DP asserted that the assaults affected his schooling in that he was distracted, "always in a daze",[194] and avoidant. He thought it was "natural that men touched you in that way" and avoided changing in front of his peers at school "in case anybody touched [him] in the wrong way".[195]

313 DP said that these difficulties continued during his high school years at Warrnambool Technical School. He deliberately forgot his physical education uniform to avoid using the school change rooms.[196] DP performed poorly academically, truanted from school and was sent to Warrnambool Community School, which he described as a "casual school with about 20 students … for troublesome children".[197] He withdrew from the school after the first month of year 11, at 17 years of age.[198]

314 DP keeps a "very, very limited group of friends", is "introverted" and is afraid

187 T372.
188 T372.
189 T370.
190 T370.
191 T374.
192 T374.
193 T374.
194 T825-26.
195 T332.
196 T334–35.
197 T336.
198 T336.

"they're [people] are going to touch me".[199] His distrust of people has impacted his sense of self and sexuality, including his intimate relationship with Peter.[200]

315 DP found work "difficult" as he did not like being physically close to others[201] and at times in his employment had minimal interaction with colleagues and kept to himself during breaks.[202] He was able to find work which allowed him to manage his social difficulties, such as a tram driver in the 1980s where he was alone in the driver's cabin[203] and at Canon in the early nineties where he "dealt out of a partition".[204]

316 DP has experienced poor sleep and nightmares from the time he was a child. He has felt, and continues to feel, socially anxious, avoidant and has difficulty trusting others, particularly males.

317 At the time of trial, DP said he was taking the antidepressant Pristiq and the antipsychotic Zypine. He was also seeing Dr Pagano for psychological treatment. DP said that he continues to have "a lot of problems with people in general … socialisation, afraid they're going to touch me".[205] He said that he feels anxious and uncomfortable in crowds, experiences panic attacks[206] and most days feels no pleasure in life.[207]

The evidence of DP's friends as to his psychological state

318 Several of DP's friends gave evidence as to his psychological state over the past years. Generally (with the exception of precision as to dates) I accept their evidence.

Archibald Cording-Whyte

319 Mr Whyte said that he first met DP in the early 1990s through a mutual friend while he was visiting Melbourne from Sydney. He had regular social contact with DP

199 T372–73.
200 T400; T483.
201 T347.
202 T356.
203 T349.
204 T357.
205 T373.
206 T831.
207 T830.

during the period he was living in Sydney up until approximately 2001 when DP moved back to Melbourne.[208]

320 Mr Whyte described DP as "socially awkward" and withdrawn.[209] He said that DP did not mix very well with his circle of friends.

321 DP told Mr Whyte about the death of his parents approximately two or three years after they became friends. DP said that his parents had been killed in a motor vehicle accident[210] and that his father was violent towards him and his sister.[211] The effect of his parents' death on his life had been devastating and had caused family dysfunction.[212] At the time, DP told him that he was seeking information about the coronal inquest into his parents' death.

322 Approximately two years ago DP told Mr Whyte, by telephone, that he had been "interfered with by the priest or brother".[213] He could not recall the exact words used by DP but believed he said words to the effect of "repeatedly assaulted by one of the priests at his school or church" and that the assault had gone on "for some considerable time". Mr Whyte said DP was "crying and choked up" as he told him about the assault.[214]

323 Mr Whyte said that after DP told him about the assault he spoke with DP "virtually daily" and that these conversations always included reference to the assault.[215]

324 Mr Whyte also said that approximately two years ago DP told him he had been abused by a teacher at school in grades 5 and 6.[216]

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208 T550.
209 T557
210 T551; T558.
211 T559.
212 T558.
213 T552; T554.
214 T555.
215 T555.
216 T562.

Christopher Harrison

325 Mr Harrison said that he met DP approximately 20 years ago.[217] He was a frequent customer of the café operated by DP and his partner.[218] He has been "close friends" with DP for "a long time" and speaks to DP on the phone frequently, although they only see each other once a month.[219]

326 Mr Harrison described DP as a "very quiet", "all to himself type of person".[220]

327 Mr Harrison said that DP told him about the Coffey assault approximately five or six years ago. DP told him he was "touched up"[221] when he was younger by "someone in the Catholic Church".[222] He said DP appeared "depressed" and he could see it was "eating at him".

328 DP also told Mr Harrison that his parents passed away in a "horrific car accident", that "he misses them" and that it was "really hard growing up". DP also relayed the death of his sister and expressed how much she had meant to him.[223]

329 Mr Harrison said DP did not tell him about being abused by his teacher at primary school or his father's violence.[224]

Margaret Jago

330 Ms Jago has known DP since primary school. Ms Jago said that she met DP at St Patrick's Primary School in Port Fairy. They were in the same year, although Ms Jago started at the school in 1974 when she was in grade 4.

331 Ms Jago said that she did not have much contact with DP after primary school until her late teens or early 20s. After this time she was in contact with DP until he moved away in or around 2008. Ms Jago was not in contact with DP again until DP contacted

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217 T564.
218 T569.
219 T567.
220 T567.
221 T568.
222 T567.
223 T892.
224 T892.

her after the passing of her son in 2009.[225] Since then she has been in regular contact with DP via social media and telephone.[226]

332 Ms Jago said that DP was a "shy", "very timid" child. He did not share common interests with other boys his age and did not have many friends;[227] he was self-conscious and teased about his weight.[228]

333 Ms Jago described DP as a "very nice person" who is "a bit socially awkward".[229] He is sometimes angry and has "perhaps struggled emotionally".[230] She said that he was "sort of the same person" from when she knew him as a child, although she did not know him at the time of the assault.[231]

334 Ms Jago said that DP told her his father had been "an arsehole and a pig" to his mother in the 1970s and threatened to find the mother and "shoot us all".[232] She was also taught by the teacher whom DP alleges abused him. She said the teacher would single out boys that were not "academically inclined" and that this included DP. She discussed the teacher's behaviour with DP in or around 2018.[233]

335 In or around 2018, DP told her by telephone about the Coffey assault.[234] Ms Jago could not remember Coffey.[235] Ms Jago said DP told her that when he was a child Coffey had attended his home for his grandmother's wake.[236] Coffey sat on the end of his bed and his brother's bed.[237] DP told her Coffey had "done something to him" when everybody else was in another room,[238] and that the abuse took place away from

225 T892.
226 T893.
227 T893.
228 T900.
229 T893.
230 T895.
231 T898.
232 T896.
233 T897.
234 T894.
235 T895.
236 T894.
237 T896.
238 T894.

everyone else.[239]

336 DP was "very distressed" and "in pain" when he told her about the assault. Since DP told her about the assault, they have discussed it "off and on".[240]

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

Claims made by DP of psychological injury as a result of other alleged trauma

338 I have already mentioned these at [42] – [49] but some detail should be added here.

339 In cross-examination, DP said as follows in relation to the school abuse:

> Counsel: And you mentioned, I think, as I've understood your evidence to date, you've mentioned two, at least two types of abuse. One was in the classroom when she, when would ---?
>
> DP: Well she would… walk up behind – I sat in a desk by myself at the front near the door of the classroom and she would come from the back of the room – I was never allowed to sit with anybody else for some reason – and she would walk up behind me, crack me over the back of the head for no reason sometimes, then she had a thing of throwing blackboard dusters at me as well, and then she'd come sometimes, grab me by the ear, drag me outside, made me sit down on a seat outside and tell me to stay there and I, at the end of it, I, as a child, I got jack of it. One day I ran away from school and I ran over to the shelter shed and I hid in the little cracks of the boards in the shelter shed, the weather boards, and I could see her out looking for me out in the yard and I felt like I was, she was like a predator looking for me in the yard so I hid between the jumping bags from the sports equipment and then, anyway, when she went – because we only lived a few doors from the school, she went up to my mother and said that I was missing. So my mother was driving around town looking for me madly everywhere to find me and when lunchtime came I emerged out of between the beanbags in the shelter shed, started to walk down the street towards home, then [the teacher]

239 T901.
240 T894.

appeared from behind the hedge that used to be near the front of the school where the old convent used to be positioned before it was moved and she appeared out from behind the hedge and I remember I had shorts on and she cracked me over the legs so hard and told me to get home, "Your mother's been looking for you", and so I went home and then I copped… a mouthful of abuse off my mother. You know, she said, "I've been around town looking for you everywhere", rah rah rah, "why are you doing this?", and I said because I'm just over it, the abuse I was getting off [the teacher]. And then… I said to her, "Can you do something?" She said, "No, I can't do anything", she said, you know, "because I don't want to go up and confront her" because being a Catholic school, and so I just lived with the physical abuse.241

Counsel: This behaviour towards you, was it constant over the two years was it intermittent, or what?

DP: Yes, it was constant over the two years, that's correct.

Counsel: There was another incident that's been referred to that happened at a school camp?

…

DP: At the camp, yep, okay, I'll give you the cabin – a couple of incidents. We used to go for mountain walks and if we were slow at the back she would come up and crack you over the back of the legs to make you walk faster. Then she – I was in a cabin with, there might have been five or six other boys in the cabin, and it was a bunk cabin with bunks down one side, bunks the other side, and I had the front bunk near the door of the cabin. And she – and anyway, the boys, as boys are, the boys got one of the boys down the back of the cabin at night about, would have been ten o'clock, 11 o'clock at night, and [the teacher] was doing her patrols along the cabin and the boys said to me, 'Oh we're going to belt up' – I forget, I think it was [another student] if I remember – 'we're going to belt up him down the back. You keep an eye out the door to see if [the teacher's] coming'. So me being silly in my little bunk near the door, I opened the door and she was standing there, so I slammed the door in her face like this and she came in the door and she didn't go to the boys down the back of the cabin, she just jumped on me and just smacked me across the front of the head and jumped on me, you know, like whack, whack, whack. The boys got away with it at the back of the cabin. I could never figure it out.[242]

340 In November 2014, DP lodged a complaint with Towards Healing, an organisation established by the Catholic Church to deal with abuse claims within the Catholic community. This complaint was solely concerned with the school abuse. In a document signed by DP (and apparently compiled by a representative of Towards

241 T495-97.
242 T497-99.

Healing at DP's home on 27 October 2014), he described the complaint as "corporal and psychological abuse at St Patrick's Primary School in Port Fairy".[243]

341 The substance of the allegation was that DP was the subject of continued abuse over a period of two years by a particularly aggressive female teacher. The relevant parts read as follows:

> 2. I grew up in Port Fairy and was raised in William Street only a few doors from the school. I was raised in a strict Catholic household; we went to church every Sunday. *My childhood was straightforward and quite normal*. I suffered from severe asthma as a young child and was absent from school for much of grade prep …
>
> 4. This present complaint concerns a number of incidents of severe corporal abuse and brutality perpetrated by a lay teacher [name removed] whilst I was a grade 5–6 student, between 1976–1977, when I was approximately 10 to 11 years of age.
>
> …
>
> She treated me quite abusively and victimised me from the outset. She singled me out and would often yell at me and I was made to sit by myself rather than share a desk and made to sit in front of the class alone nearest the door for no good reason. She would regularly clip me over the head/ears and threw feather dusters at me …
>
> Over time, I developed a severe anxiety due to her abuse towards me. On one occasion I became so fearful that I ran away from class and hid in a shelter shed. Eventually [the teacher] discovered me and she struck me on the head and legs and sent me home from school. In fact, I became so fearful and anxious that I abandoned school every Friday after lunch for an entire term go home and hide under the bed in the front room so no one can find me.
>
> 5. I recall another occasion when I was at school camp at Halls Gap in 1977 … Unbeknownst to me, [the teacher] was standing and listening at the door and she suddenly burst into the cabin and verbally abused and belittled me in front of my mates, whilst I lay in my bunk. On another occasion, she burst in unannounced in the boys' showers and disciplined some children. Over time, I become so fearful and anxious of her psychological and corporal abuse that I tried to avoid school. I felt I was under contact [sic] surveillance and was pressured by her. This school avoidance continued even after I left St Patrick's Primary School. I was put off schooling altogether and went truant for a number of years. Owing to my truancy and absenteeism I was eventually transferred to a local community school. Even though I was an average student I was often placed in remedial classes. As a young, adolescent high school student because of my abusive history at the hands of [the teacher] I developed a tendency to avoid school for fear of being abused

[243] Exhibit D9 (emphasis added).

and getting into trouble.

…

7. I was not coping. I became depressed and was diagnosed with depression and anxiety in 2006. I take antidepressant medication. I continue to suffer from low mood and poor motivation, as well as low confidence and self-esteem. I fear confrontation. I have been regularly consulting with a psychologist since mid-2013. I have been receiving a Centrelink Carers benefit since 2008. I suffer from high blood pressure. I also suffer from severe headaches and the most lightest bit of stress and have very bad nerves that cause me to tremble.

8. Though I have been in a long term friendship, and have a small circle of friends. I generally have social anxiety and tend to keep mostly to myself. Because of my lack of confidence, I have been unable to form and maintain new relationships. I have some limited contact with my older sister, [deleted] who lives in Geelong. I have not kept in touch with my other siblings. I feel I have potential but I have underachieved owing to my negative experiences at primary school. I believe I have not fully realised my potential. I wish I could turn back the clock.

9. As for my desired outcomes from this current process, I feel I would like to achieve the following:

* A formal apology and acknowledgement, and sense of justice being done in this matter.

* I would like someone from the Sisters of the Good Samaritan to take responsibility for what happened to me whilst at St Patrick's Primary School in Port Fairy. I would like some formal acknowledgment and apology about what took place and acknowledgment of the impact it has had on me, so I can obtain some sense of closure and moving forward.

* I would like the Church to fund my ongoing psychological treatment (my Medicare funding has expired for 2014); I would also like the Church to refer me and to fund formal psychiatric assessment and treatment.

* Though I firmly believe that money cannot compensate for the abuse I was subjected to, I nevertheless believe I have some entitlement to an offer of financial compensation and restitution from the Sisters of the Good Samaritan. I continue to suffer financial hardship and ongoing mental stress as well as being on a Centrelink benefits [sic].

* I expect the Sisters of the Good Samaritan/Church to exercise compassion and understanding towards me in assessing this complaint.[244]

342 After receiving a negative response from Towards Healing, in March 2016 DP wrote to his then solicitors in the following terms:

> From 2011 after starting to attend Mr Pagano's clinic after several consultations and years of talking about things with them, decided it was time to face up to

[244] Exhibit D9 (emphasis added).

> the things that I have not resolved from my past life.
>
> The first thing was to face the abuse from the school and the second thing was to face my tragic parents' death once and for all. I will never come to closure on any of it, but seeking treatment has helped.
>
> After reading the Towards Healing report on page 2 of the report, she states that I was a big boy. Yes I was fat and always have been till I had lap band surgery two years ago. I find that quite offensive. It was not my choice to be built that way and for me no socialising with the other kids well if she had noticed that there was some disability with me she should have approached my parents and discussed it with them now. I feel like I have been classed as a retard and the duty of education has been broken I feel from the school considering it was a private Catholic school.[245]

343 As I mentioned earlier, DP lodged a TAC claim in respect of the death of his parents. After VCAT dismissed this claim in 2016, DP explored whether there was any opportunity to obtain compensation from the New South Wales Government. He wrote to Mr Adrian Piccoli MP and Ms Jodi McKay MP who referred him to the Minister for Roads, Maritime and Freight to investigate his concerns.[246]

344 DP apparently wrote to the two politicians (the letter was not tendered) seeking:

(a) changes to the law to ensure families of motor vehicle accidents victims are informed of what claims they have;

(b) better sidings on main highways, including abolishing loose gravel shoulders; and

(c) an ex gratia payment of $780,000.

345 On 9 September 2016, DP received a response from an officer of the New South Wales Transport Roads and Maritime Services noting that "the tragedy was devastating for you and has had a serious impact on your life".[247]

The evidence of DP's treating professionals

346 The treating general practitioner, Dr Watson, was not called nor were any of the treating psychologists. However, a number of reports and emails of the psychologists

245 Exhibit D1.
246 T448; Exhibit D8.
247 Exhibit D8.

(Ms Marr and Dr Pagano) were tendered.

347 There are two aspects to this body of evidence. One is the accounts given by DP as to the cause and progress of his psychological problems. The second is the diagnosis made by a particular professional as to DP's psychological condition.

348 In 2013, DP was referred to Ms Marr, a psychologist at WPS, by Dr Watson. The history given to her by DP was as follows:

> He presented with the following symptoms: low mood, anhedonia, fatigue, feelings of emptiness and anger and grief regarding the recent death of his closest sibling. [DP] has a history of significant childhood loss and his difficult relationships with his remaining siblings, often feeling powerless and passive, and as a result, angry. [DP] also has a stressful home situation with financial and relationship strain with his partner.[248]

In relation to the treatment and management of DP's symptoms, Ms Marr reported:

> Our sessions have focused on:
>
> - psychoeducation about depression
> - processing of grief
> - communication strategies (including assertiveness)
> - increasing pleasurable activities
> - changing unhelpful thought patterns.[249]

349 In August 2014, Ms Marr wrote to Dr Watson in the following terms:

> [DP] has attended six further sessions with me … since your last review on 30 January 14. He continues to present with somewhat low mood, low energy, low motivation, social isolation and feelings of emptiness and anger.
>
> As you are aware, [DP] has a history of significant childhood loss and has difficult relationships. He tends to isolate himself because of mistrust and fear of being abused or taken advantage of by others. These beliefs are highly entrenched. He is very focused on past events and struggles to engage in thought about his future.[250]

350 Dr Pagano also wrote to Dr Watson regularly after taking over DP's psychological management in 2014. He referred on a number of occasions to DP telling him of the

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248 Exhibit D2.
249 Exhibit D2.
250 Exhibit D2.

school abuse, the loss of his parents and the death of his sister as all playing a significant part in his psychological problems.

351 For instance, in April 2015, Dr Pagano wrote to Dr Watson in the following terms in relation to the claim lodged by DP with Towards Healing (In March 2015 Dr Pagano had written a letter to Towards Healing in support of DP's claim relating to the school abuse):

> I have written his solicitors a report on the abuse that occurred between 1976 and 1977 while [DP] was a student at St Patrick's Primary School, Port Fairy.
>
> … I have consulted him on 8 occasions, most recently today. [DP] is living with and is a full time carer for his friend Peter who was in a serious motor vehicle accident such that he was run over by a car at 24 years of age. [DP] receives a carer's payment and allowance.
>
> **Assessment**
> - 296.32 Major Depressive Disorder
> - Recurrent, Moderate 300.40
> - Persistent Depressive Disorder 300.01
> - Panic disorder 300.22
> - Agoraphobia (chronic)
> - Substance Use Disorder
> - Alcohol Use Disorder (History of ages 16-30)
> - Substance Use Disorder
> - Stimulant Use Disorder
> - Drug Abuse (History of, ages 20-22)
> - Morbid Obesity
> - Hypertension
>
> … At initial interview, [DP] reported that he had been subjected to "childhood abuse and isolation" while a student at St Patrick's Primary School, Port Fairy.
>
> **Relevant History**
>
> [DP] was born [DP] and had his name changed by deed poll in 2006 (mother's second name). He is the youngest born of 5 siblings. He has two sisters Sandra and Rhonda, 6 and 12 years older, and a brother Brendan, 13 years older. The latter resides in Western Australia, his sister Kaye, who was 11 years older, was deceased on March 21 2013 subsequent to a brain tumour. She worked for Telstra. He learnt of the tumour when the operation was problematic and she died 3 days post-surgery. He spent his childhood years in Port Fairy. He reported that his parents were strict Catholics and that he attended church on Sundays; otherwise it was a relatively normal early childhood.
>
> He suffered severe asthma throughout grade prep and missed much of the school year due to ill health. He ceased attending school in year 10. [DP] parents died in a car accident whilst on holidays on March 19, 1985 on the Sturt highway when he was 19 years of age and one of his sisters Kay died some years later. [DP] reported that he felt somewhat neglected during his

childhood. He maintains some anger about his parents not having protected him from the teachers abuse outlined below and that he was often left on his own at home. [DP] reported that his parents were compliant Catholics who did not question the church.

Treatment

Cognitive behavioural therapy (CBT) and interpersonal therapy (IPT) are effective for symptom treatment of patients with the disorders named and research indicates that schema therapy and Eye Movement Desensitisation and Reprocessing (EMDR) can be effective in the treatment of adults with histories of childhood trauma. The rate of relapse/recurrence of symptoms has been shown to be reduced by long-term treatment with antidepressant medication and with long-term use of specific psychotherapies. In addition, it is strongly recommended that [DP] also receive schema therapy.

Please do not hesitate to contact me should you wish to discuss your client's condition or treatment further, or if I can assist in any way. [251]

352 Following this, in March 2016 Dr Pagano wrote to TAC a "letter of support documenting the ill health suffered [by DP] following the death of his parents":

Thank you for your letter to [DP] dated 24 March in response to his query about dependency benefits regarding a historical motor vehicle accident. [DP] has furnished a copy of that letter to me and requested I write a letter of support as a way of documenting the ill health suffered following the death of his parents in a motor vehicle accident on March 19, 1985 on the Sturt Highway when he was 19 years of age. …

Introduction

… My first consultation was on the 24th November 2014. I have consulted him on some 15 occasions, most recently today.

Assessment

- 296.32 Major Depressive Disorder
- Recurrent, Moderate 300.40
- Persistent Depressive Disorder 300.01
- Panic disorder 300.22
- Agoraphobia (chronic)
- Substance Use Disorder
- Alcohol Use Disorder (History of ages 16-30)
- Stimulant Use Disorder
- Drug Abuse (History of, ages 20-22)
- Morbid Obesity
- Hypertension

Relevant History

[DP] was born [DP] and had his name changed by deed poll in 2006 (mother's second name). He is the youngest born of 5 siblings. He has two sisters Sandra

[251] Exhibit D23.

and Rhonda, 6 and 12 years older, and a brother Brendan, 13 years older. His brother resides in Western Australia, his sister Kaye, who was 11 years older, was deceased on March 21 2013 subsequent to a brain tumour. She worked for Telstra. He spent his childhood years in Port Fairy. He reported that his parents were strict Catholics and that he attended church on Sundays; otherwise it was a relatively normal early childhood without significant trauma prior to physical and psychological abuse at St Patrick's school. [DP]'s parents died in a car accident whilst on holidays on March 19, 1985 on the Sturt highway when he was 19 years of age and one of his sisters Kay died some years later.

[DP] reports that he suffered mental health issues with regard to this tragic event and added to his burdens in relation to an already traumatic history. He reports experiencing symptoms of chronic depression and post traumatic sequelae that have impacted his life significantly in relation to capacity to function. [DP] noted that he tended to have a lot of anger built up inside him.

He is very focused on past events and struggles to engage in thought about his future.

Although having already developed a depressive disorder pre-accident, the death of his parents increased his sensitivity to psychiatric comorbidity particularly for the depressive disorder which had chronic and severe negative effects on his quality of life. In addition, [DP] has tended to avoid of [sic] relationships. This has impacted his capacity for work and the development and maintenance of intimate and social relationships. Other than a few friends, he is relatively isolated and has found relationships difficult when in a work capacity.

The recovery rate is significantly better with active treatment for individuals with the disorders named above, namely anxiety and mood disorders. Such clients may respond to psychotherapy, pharmacotherapy, or a combination of both. The medications that are effective in treating Major Depressive Disorder are also effective in the treatment of Persistent Depressive Disorder and the anxiety disorders named. Individuals with chronic and persistent mood and anxiety disorders such as [DP] (30 years plus) require a longer treatment period, more psychotherapy sessions, and/or higher doses of antidepressant medication than do patients with acute forms of depression and anxiety. Cognitive behavioural therapy (CBT) and interpersonal therapy (IPT) are effective for symptom treatment of patients with the disorders named and research indicates that schema therapy and Eye Movement Desensitisation and Reprocessing (EMDR) can be effective in the treatment of adults with histories of childhood/adolescent trauma. The rate of relapse/recurrence of symptoms has been shown to be reduced by treatment with antidepressant medication and with long-term use of specific psychotherapies.

The trauma and subsequent symptoms cited above cause [DP] clinically significant distress and impairment in social, occupational and other important areas of functioning.

[DP]'s social skill development was hampered by experiencing a complex set of It is highly probable that [sic] [DP]'s employment and economic functioning has been impaired due to the Depressive and anxiety disorders cited and effects on symptoms and interpersonal problems cited in the body of the report

above.[252]

353 In January 2016, Dr Pagano reported to Dr Watson that "We continue to work on issues pertaining to the alleged abuse between 1976 and 1977 while [DP] was a student at St Patrick's primary school, Port Fairy".[253]

354 In October 2016, May 2017 and January 2018, Dr Pagano again reported to Dr Watson. On each occasion, he added a reference to "the tragic MVA related death of his parents in his late teens".[254]

355 In September 2018, Dr Pagano wrote to Dr Watson and detailed an overall account of DP's condition. He reported:

(i) We continue to work on issues pertaining to trauma including:

> The alleged physical abuse by a lay teacher between 1976 and 1977 while [DP] was a student at St Patrick's Primary School, Port Fairy. He reports this affects him socially, his interactions with others indicating that this has long term consequences. [DP] reports that he finds it difficult to separate those times and person from his current situation. As you are aware, [DP] is seeking legal recompense. He tries not to think about this experience. He reports feeling angry when ruminating about the alleged events.

[DP] reports current conflict at home with his partner, and notes he is calmer when he deals well with tension.

The tragic MVA related death of his parents in his late teens.

(ii) He noted the effects of the lap band were stable.

Current Assessment

Major Depressive Disorder, Recurrent, Moderate Panic disorder & Agoraphobia, Substance Use Disorder – Alcohol Use Disorder (History of ages 16-30), Stimulant Use Disorder – Drug Abuse (History of ages 20-22), Morbid Obesity; Hypertension; Diabetes, Cholesterol, Central Serous Chorioretinopathy (CSC R. eye condition), Lap Band Surgery – 2018, Diabetes Non-insulin dependent

Treatment

[DP] has engaged in supportive counselling. Please do not hesitate to contact me should you wish to discuss your client's condition or treatment further, or

252 Exhibit D6.
253 Exhibit D23.
254 Exhibit D23.

if I can assist in any way.

Recommendations

[DP] may see you MHCP review.[255]

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

The evidence of the two consultant psychiatrists

357 Both DP and the Diocese engaged consultant psychiatrists to express an opinion as to DP's psychological condition and its relationship to the assaults by Coffey.

358 As I mentioned earlier, Associate Professor Carolyn Quadrio examined DP in her rooms in Sydney in February 2020. She provided the first report on 26 February 2020 ('first report').

359 On 3 June 2021, she conducted an interview by video-link with DP and provided a supplementary report dated 1 July 2021 ('supplementary report').[256]

360 Dr Alan Jager is a forensic psychiatrist based in Melbourne. He conducted a Skype interview with DP on 31 December 2020 and provided a report of that date.

361 After Associate Professor Quadrio's first consultation, which lasted over three hours, she gave the following answers to the questions posed by DP's solicitors in her first report:

> **(a) Does our client now, or has he at any time in the past suffered from a psychiatric condition?**
>
> Since the abuse, [DP] has had psychosocial difficulties. In the aftermath he became much preoccupied with the abuse and at school he had difficulties with learning and socialising. These are typical post traumatic symptoms following

255 Exhibit D23.
256 Exhibit P11.

childhood sexual abuse (Blanco et al, 2015; Cook et al, 2017; Canton-Cortes et al, 2012; Finkelhor et al, 1987; Shapiro et al, 2012).

Other factors may have contributed to his learning difficulties, including his asthma, which led to a lot of time off school. There may have been premorbid temperamental factors that contributed to his early difficulties with socialising. However, the abuse occurred at the very start of [DP]'s school life so there was not an established developmental trajectory that can be compared with his post abuse development.

Later in childhood, [DP] suffered some homophobic teasing at school, which intensified his social withdrawal and so set up a vicious cycle. As a pre-gay boy, he may have been vulnerable to some teasing but, equally, having suffered sexual abuse would also have rendered him highly vulnerable in that regard (Day et al, 2016; Espelage et al, 2019; Espelage et al, 2018a; Poteat et al, 2007; Tucker et al, 2016).

In later childhood and adolescence, [DP] suffered sexual identity issues; again, this is entirely typical: childhood sexual abuse creates a sense of stigmatisation (Finkelhor et al, 1987) and can lead to sexual identity confusion, especially in boys (Aaron, 2012; Kia-Keating et al, 2005; Lisak, 1994; o'Leary et al, 2017). Such confusion is sufficient to trigger peer victimisation and exclusion, which greatly magnifies the sense of stigmatisation. This was certainly the sequence of events that derailed [DP]'s development. In my view, the abuse was the most critical factors in this, or at least a major factor.

The punitive school environment added to [DP]'s difficulties: there he suffered both physical and emotional abuse. Because of this and because of Coffey's close connection with it, he became alienated from school and wanted only to escape (Hyman et all, 2003; Morinaj et al, 2019). The intervention of his parents, involving a threat from police, only intensified his alienation, anxiety and sense of stigmatisation and need to escape. This aversion to or alienation from school generalised to other educational settings so that further education or training became impossible for him.

In his early years of employment, [DP]'s post traumatic symptoms of avoidance, social withdrawal; and his sense of difference or stigmatisation, blocked progression in his career path and intensified his sense of failure. At this time the sudden death of his parents caused a great upheaval in his life, compounded by the lack of support from his siblings and the recent death of a partner. Notably, [DP] reported these dramatic events with manifest detachment and numbing that are particularly characteristic of trauma (Asmundson et al, 2004; Feeny et al, 2000).

From his teenage years, [DP] was using substances to reinforce post traumatic numbing and avoidance. This is a typical outcome in abused youth. In recent years he has been able to limit these problems.

(b) If so, what was that condition or conditions?

Complex Post Traumatic Stress Disorder (CPTDSD)

Chronic Anxiety Disorders: Social and Agoraphobic

Chronic Depressive Disorder

Enduring (Post Traumatic) Personality Change

Fundamentally [DP] suffered "complex trauma" in his childhood: the sexual abuse of Coffey; the physical and psychological abuse of [the teacher]; a general punitive school context; and peer harassment. It appears also that his family environment was problematic: his parents were perhaps not optimally available psychologically and his father's parenting style was somewhat harsh. Complex trauma is defined as multiple traumas that have a cumulative impact (Cloitre et al, 2009, 2013, Putnam et al, 2013).

Complex trauma becomes manifest as Complex PTSD, a combination of simple or classical PTSD with the added features of disruption in the domains of affect regulation, relationships, and self organisation (ICD criteria). This has occurred with [DP]; he began to develop these symptoms in the post abuse period and over time they have either persisted or have developed into the characteristic CPTSD profile.

[DP] presents typical PTSD symptoms; hyperarousal with anxiety, insomnia, heightened reaction to cues; reliving with intrusive preoccupation and rumination; avoidance phenomena with numbing, dissociation and withdrawal; a sense of helplessness, hopelessness and foreshortened future.

[DP] also presents the typical profile of complex trauma: affect dysregulation with anxiety and depression; difficulties with interpersonal relationships; and a pervasive sense of shame and a disorganised self.

Comorbidity

Depression and Anxiety are frequently comorbid with PTSD and may be regarded as part of the PTSD complex (ICD criteria) or as separate comorbid conditions. In this case, [DP]'s anxiety is extremely prominent and disabling and in my view warrants separate consideration. Similarly, his depressive condition is particularly chronic and entrenched and will also be considered separately.

Chronic Anxiety Disorders: Social and Agoraphobic Anxiety

Since the time of the abuse, [DP] has suffered from severe social anxiety and has had difficulties with relationships, including socially, in the workplace, and in terms of intimacy and sexual relatedness. Consequently, he has pursued an avoidant adjustment throughout his life.

The sexual abuse and then the abuses [DP] experienced at school, led to difficulties with learning and attention, and to feelings of guilt, shame and self blame and to alienation from or aversion to school and thence to truanting. By secondary school his difficulties had reached the intensity of phobic anxiety with an intense need to escape the situation. This brought an end to school and to further education and continued then to compromise his employment prospects throughout his adult life.

Currently [DP] suffers from severe anxiety in most situations of interpersonal relating but most especially in social situations or interacting with strangers. He avoids these situations and so leads an isolated life. At the same time, he suffers prominent numbing and dissociation as part of the PTSD profile so that his manifest distress is understated.

Depressive Disorder

[DP] suffers from chronic depression, manifest as persistent depressed and irritable mood, insomnia, loss of drive and motivation, depression rumination, suicidality and sense of hopelessness and of foreshortened future.

Enduring Personality Change/Avoidant Personality Disorder

The symptoms of chronic and complex PTSD became entrenched over time and irreversible and are then described as "enduring personality change" (ICD criteria). Thus, [DP] presents the characteristic features of: a mistrustful attitude towards the world, edginess and sense of estrangement or alienation. However, the avoidance phenomena that are a central feature of PTSD, have become so entrenched and are causing such impairment that they also constitute an Avoidant Personality Disorder. This is not uncommon: the symptoms of chronic social anxiety overlap with those of avoidant personality (Cougle et al, 2010), hence they also reflect enduring personality change.

The features of Avoidant Personality Disorder are manifest in [DP] as: feelings of tension and apprehension, insecurity and inferiority; hypersensitivity to rejection and criticism with restricted personal attachments, avoidance and overestimation of potential risks in everyday situations.

Sexual dysfunction

At present, [DP] has no interest in sex with his partner but has occasional binges of a casual nature. His preference for sex with older men may be related to the abuse and may signify vulnerability to revictimisation (Finkelhor et al, 2009 2011). Notably his first sexual relationship was with an older man and [DP] was only 14 when that began. He reports this with little affective response that indicates numbing or detachment, which is a post traumatic phenomenon and, notably, is associated with a risk of revictimisation (Ghmire et al, 2012; Risser et al, 2006).

While he was living in the small community of Port Fairy, [DP] had difficulties coming to terms with his gay identity but after moving to Melbourne and then Sydney it has become less of an issue in social terms; however, it remains an issue in terms of his sense of self and stigmatisation.

Substance abuse

During his 20s, [DP] had a period of severe drug abuse and some alcohol abuse but mostly this is no longer an issue. He also had a long period, 13 years, of drug dependency in relation to Duromine (phentermine), an appetite suppressant with powerful addictive properties. This too is no longer an issue. Thus, substance abuse is not currently a problem for [DP] but his history, plus his occasional gambling, indicate a vulnerability to addictive behaviours.

(c) If he does have a condition or conditions, has the abuse had a material contribution to its or their cause?

As has been detailed already, the sexual abuse was a fundamental issue that made a material contribution to [DP]'s lifelong difficulties. There was then a cascade of events that served to intensify his symptoms of anxiety and his avoidant behaviour and his difficulties with trust and his interpersonal

relationships. Those events included childhood asthma, physical and psychological abuse at school, including peer harassment; the death of his parents and lack of support from his family at that time; and the death of his sexual partner also around that time. As a pre-gay boy and a child with severe asthma he was particularly vulnerable to trauma (Burlew, 2014). Similarly, it seems that his family context was not optimal and this too would have heightened his vulnerability (Fleming et al, 1997).

Complex trauma refers to multiple traumas, particularly in childhood, and particularly involving sexual abuse, and it is cumulative and additive, meaning that the ultimate impact is greater than the sum of the individual events (Briere et al, 2015, 2016; Putnam et al, 2013). It is evident that this would apply to [DP].

Throughout his school years, [DP] experienced learning difficulties including inattention and daydreaming. Complex trauma and anxiety and depression, childhood illness (asthma) and pre-gay identity issues are all associated with cognitive difficulties, so it is possible that [DP]'s problems in this regard are chiefly or even entirely post traumatic phenomena. However, there may also be a pre-abuse developmental factor in this.

(d) Have any of the psychiatric conditions or symptoms caused by the abuse had an adverse effect on his education, or on his capacity to function in the workplace, or to seek advancement in his career. If so, in what way?

[DP] was unable to continue his education beyond the School Certificate and this difficulty was chiefly a consequence of his progressive alienation from and aversion to the school environment, because of the abuses he had suffered in that context. This remained a lifelong problem so that he was never able to return to education. He has continued to fear and avoid relationships and, as a consequence, has had difficulty maintaining employment. In particular his severe social anxiety greatly limits his capacity for dealing with people in a face to face situation.

(e) Have any of the psychiatric conditions or symptoms caused by the abuse had an adverse effect on his social and personal relationships? And if so in what way?

[DP] has had unusual relationships throughout his life. His first sexual partner was an older man and this may reflect the abuse issues or it could relate to what appear to have been parenting issues (Durrant et al, 2012; Meyerson et al, 2002). Then his only long term relationship, with his current partner, is one in which [DP] functions as carer and it has become platonic, while [DP] has a preference for casual sex with older men. This latter pattern is likely to reflect his experience of abuse and, as noted earlier, it may be related to post traumatic numbing and a tendency to victimisation. Also, male survivors are more likely to develop sexual disorders that may reflect the nature of their abuse (Dhaliwal et all, 1996).

(f) Has he required medical treatment for conditions or symptoms caused by the abuse?

Currently [DP] is taking antidepressants prescribed by his GP and is receiving psychological treatment from Dr Pagano in relation to the abuse. This therapy has addressed the abuse only recently. In the first years of his relationship with

Dr Pagano, [DP] did not disclose details of the sexual abuse. This is a typical avoidance in male survivors, it reflects that shame that is almost universal, and it is a barrier to help seeking (Easton et al, 2014; Romano et al, 2019), as has been the case with [DP]. Similarly, he had a short period of counselling when he was working for the tramways but again focused on his difficulties in relating to the public.

(g) Does he require medical treatment in the future and if so, what is the likely nature, and cost of such treatment.

In order to ameliorate his symptoms and his avoidant adjustment, [DP] needs to continue his current treatment regime of antidepressants and psychological therapy. Because his symptoms and his avoidance adjustment are entrenched he will need long term treatment and possibly indefinite support.

The cost of psychological therapy is between $250 and $350 per session. Medicare will cover a considerable part of this if the treating clinician is a psychiatrist, around $167. The Medicare rebate provided to psychologists is about $100 a session for ten sessions per year; some private health funds will pay an additional portion of the fee.

Medication becomes less helpful in very chronic psychiatric conditions, but [DP] will be vulnerable to more acute exacerbations of his symptoms and at those times antidepressant medication may be needed. Antidepressants are not only helpful with depression, they are also useful in the management of anxiety and PTSD symptoms.[257]

362 In preparing the supplementary report, Associate Professor Quadrio was provided with a variety of documents unavailable to her at the time of preparing her first report (including Dr Jager's report and a report of Dr Pagano). She adhered to the opinions in her first report and commented on Dr Jager's opinion — mostly disagreeing with him.

363 Dr Jager was provided with Associate Professor Quadrio's first report, a report of Dr Pagano and Towards Healing documents.

364 Dr Jager expressed the following opinions (irrelevant parts omitted):

2. Symptoms, Conditions and/or Disorders

(a) Your professional opinion as to [DP]'s past and current symptoms, and any specific conditions or disorders he is or has been affected by, including any relevant diagnosis in accordance with DSM-V

DSM-5 has not been generally accepted by the profession in this country and I instead refer to DSM-IV diagnostic criteria.

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257 Exhibit P11.

(i) *the type of condition or disorder;*

The most likely explanation for the plaintiff's anxiety and fear of crowds is **Panic Disorder with Agoraphobia**. He has a past history of Polysubstance Abuse. There is significant avoidant personality dysfunction but insufficient material upon which to diagnose a personality disorder.

(ii) *the approximate period of onset of the condition or disorder:*

It stems from childhood, according to the history obtained.

(iii) *the symptoms by which the condition or disorder has manifested;*

Over the years the plaintiff has reported panic attacks and considerable anxiety in relation to crowds and people.

(iv) *the treatment, past and future, for the condition or disorder;*

He has received psychological counselling and a moderate dose of antidepressant medication which he still takes. He requires ongoing treatment with antidepressant medication, psychological assistance and occasional use of short acting sedative medication.

(v) *your prognosis; and*

He is likely to experience the anxiety condition for the remainder of his life.

…

(c) ***Your professional opinion as to the extent that [DP] has had and/or still has psychopathology, the extent to which each of the following are likely to have caused or contributed to the psychopathology:***

(i) ***the alleged abuse by Coffey:***

Based on the nature of the trauma, it was insufficient to case Posttraumatic Stress Disorder but predisposed the plaintiff to anxiety and I attribute one sixth of his anxiety condition to the alleged trauma.

(ii) ***any other traumatic incidents or other events/stressors experienced by [DP]:***

Based on the early age of onset and the significant relationship of father to son and the threat of death by the father, I attribute a high degree of significance to the trauma perpetrated by the father and consider that it predisposed him to the development of anxiety and I therefore attribute one third of current condition to the abuse by the father. Although the alleged abuse by the teacher … was upsetting at the time and was likely to have caused transient distress, it was not sufficient to cause PTSD and in my opinion does not contribute in a significant way to his current anxiety disorder. The suicide of his first long-term partner was a severe trauma but the plaintiff reported no significant ongoing distress from that bereavement.

(iii) any constitutional or genetic psychiatric or psychological conditions suffered by [DP], and predisposition to such conditions; and

Anxiety disorders and a Panic Disorder with Agoraphobia are underpinned by genetic/constitutional factors and I attribute 50% of his anxiety condition to constitutional factors.

(iv) any other factors

Although he has a somewhat stressful existence acting as a carer for his ex-partner, nothing revealed in the materials or at the interview suggested that he does not cope well with that role and he is indeed a paid a [sic] carer. I attribute none of his anxiety condition to current stressors.

3. Educational History

(a) Specifically in relation to [DP]'s education, please state whether any failure to achieve academically (including tertiary) has been contributed to or caused by:

(i) the alleged abuse by Coffey;

No.

(ii) some other injury or condition, and if so, what injury or condition; or

No.

(iii) any relevant life events, circumstances and/or choices of [DP].

No.

(b) In the event that several factors have contributed to any impact upon [DP]'s educational achievement, please comment on the relevant role of each individual factor and provide percentages (if possible).

N/A

4. Employment History

(a) Specifically in relation to employment history, please explore the extent to which the alleged abuse by Coffey has caused or contributed to a past history of unemployment or sporadic employment (if applicable)

The alleged abuse by Coffey help predispose [sic] the plaintiff to experiencing anxiety and it is possible, that in some small way, that contributed to his history of sporadic employment but other constitutional/personality factors are of more importance in that causative chain.

(b) When did [DP]'s condition and/or disorder first result in him suffering an incapacity for work (if any) or a negative impact on his earning capacity even though capable of work

The plaintiff's psychiatric condition of **Panic Disorder with Agoraphobia** has not specifically caused an incapacity for work.

(c) Other than the alleged Coffey abuse, have there been any other stressors or incidents which have impacted on [DP]'s earning capacity.

The plaintiff does engage in work as a carer and I note that he was working until becoming a carer and that it was his ex-partner's incapacity which caused him to leave other paid employment to become a carer.

(d) In relation to future employment capacity, please explore the effect of the alleged Coffey abuse on future employment capacity between now and retirement (if applicable), as well as the effect of any other stressors or incidents.

Over the course of the last 20 years in his role as carer, the plaintiff has disengaged from other employment and still suffers anxiety. He is not precluded from returning to other employment should his carer role cease. In particular, his Panic Disorder with Agoraphobic is treated and does not cause a significant incapacity for employment.

5. Prognosis, Treatment and/or Cost

(a) Your opinion as to the prognosis of [DP], and apportioning, where possible, between the alleged abuse and any other identified incidents and/or stressors

He is likely to continue to experience the same level of symptoms indefinitely and I apportion ongoing causation in the same proportion as noted above, ie one sixth to Coffey one third to the abuse by the father and one half to the constitutional factors.

(b) Whether [DP] has in the past received any psychological or psychiatric treatment (including medication and/or therapy) in relation to the abuse, and if so:

(i) What was the nature of the treatment received:

He has received counselling and antidepressant medication.

(ii) the duration and extent of the treatment provided:

See the body of the report.

(iii) the name of the person who provided said treatment; and

See the body of the report and the materials.

(iv) your opinion as to whether this treatment has been appropriate

The treatment has been appropriate.

(c) Any specific treatment recommendation for [DP] including the nature, duration and frequency of the proposed treatment (if any)

I recommend continuation of the current treatment.

(d) An estimate of the cost of any recommend treatment regime, in present day terms

I estimate monthly psychological consultations to cost $160 and monthly medication costs to amount to $30

(e) To what extent does the treatment relate to the alleged abuse by Coffey.

One sixth of the treatment relates to the alleged abuse by Coffey.

(f) What is the probable outcome of the treatment

The probable outcome of treatment is palliative, i.e. amelioration of symptoms without extinguishing them.

7. Medico-Legal Report of Associate Professor Carolyn Quadrio dated 28 February 2020

(a) Your professional opinion as to conclusions drawn by Associate Professor Carolyn Quadrio.

There was little agreement between my findings and that of A/Prof C Quadrio.

(b) Please comment on which aspects you agree with and which aspects you disagree with, and why.

In terms of agreement, I have diagnosed **Panic Disorder with Agoraphobia** and she has diagnosed Chronic Anxiety Disorders: Social and Agoraphobic. In my opinion, Criterion a was not fulfilled for a diagnosis of PTSD. The level of depression does not reach the threshold for a diagnosis of Major Depressive Disorder/Chronic Depressive Disorder. We agree on the presence of many features of Avoidant Personality Disorder. To attribute the Avoidant Personality Disorder to enduring personality change caused by abuse, in my opinion is highly speculative.[258]

365 Each psychiatrist gave evidence by video-link at trial. I make the following observations as to their expertise and the manner in which they reached their

[258] Exhibit D19.

respective opinions.

366 First, in terms of expertise, it is clear that Associate Professor Quadrio has far greater specialist knowledge in the area of institutional and child abuse than Dr Jager. Not only has she specialised in this area for multiple decades, but she has also lectured in the field of institutional abuse and its psychological consequences. She has practised as a clinician and forensic specialist in the assessment and management of sequelae of trauma, including with clients who have been abused by clergy members since 1990.[259] She has provided independent medical examinations in a number of proceedings involving historical abuse, including the Bindoon case in Western Australia.[260] In addition, she has consulted to a number of bodies including the Royal Commission into Institutional Responses to Child Sexual Abuse ('Royal Commission'). It was also clear from the way in which she gave her evidence that she is a true expert in this field.

367 Dr Jager is a general forensic psychiatrist who provides many reports covering a wide range of subjects, often in the course of litigation. He has no specialised experience in institutional or child abuse and if this was a simple contest based on expertise, then Associate Professor Quadrio would start well ahead.

368 Second, I do not think that Dr Jager's 43-minute Skype conference with DP could give him anything near a proper understanding of DP's condition and the factors that influenced his current psychological condition. This is to be compared to the initial in-person meeting between Associate Professor Quadrio and DP, which took over three hours.

369 Moreover, Dr Jager, for reasons that I find incomprehensible, did not read any of the accompanying material provided to him by the Diocese's solicitors prior to interviewing DP, including the voluminous first report of Associate Professor Quadrio.[261] By not reading the material, much of which went to the complex issues of DP's psychological state (as I have discussed), Dr Jager placed himself at a

259 T934.
260 T934–35.
261 T1028.

considerable disadvantage when conducting the interview. This is all the more accentuated given that this was a forensic psychiatric examination (produced by audio visual link) which relied primarily upon his assessment of the history provided by DP, and its veracity.

370 Indeed, in determining cause, effect and prognosis, a psychiatrist's assumption of fact (either based upon the history given by the patient or by external material or by a combination of both) is critical to that opinion.

371 This takes me to the third and critical observation in relation to Associate Professor Quadrio's opinion, which I referred to earlier at [66] – [70].

372 Prior to the initial meeting and the first report, DP's solicitors chose not to provide Associate Professor Quadrio with any material (apart from a statement of DP made well after he had consulted his lawyers) relating to DP's past life or treatment; in particular, no material from Dr Watson or WPS (and particularly Dr Pagano). This is incomprehensible; perhaps it is comprehensible in that they may have sought to shield Associate Professor Quadrio from information that may have cast a different perspective upon the cause of DP's symptoms.

373 So, Associate Professor Quadrio simply relied upon DP's account. To put it bluntly, this makes her assessment close to impossible to accept in light of the evidence adduced at trial: she had only the account of a witness whom I regard as significantly unreliable, particularly when attributing his psychological symptoms to a particular cause.

374 Whatever the intention of the solicitors, it made Associate Professor Quadrio's task particularly difficult, especially if her assumptions of fact were not adopted by the Court. It may be, in hindsight, that Associate Professor Quadrio should have, given her obligations under the Expert witness code of conduct, sought further information from the solicitors.[262] Alternatively, she may have considered that the opinion was

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262 *Supreme Court (General Civil Procedure Rules) 2015* Form 44A 3(i): an expert is required to make a declaration that he or she has made "all the inquiries which the expert believes are desirable and appropriate …".

based on insufficient research or data and was therefore "not a concluded opinion".[263]

375 I do not accept that the provision by the solicitors of some relevant material (of which one report of Dr Pagano from March 2015 was provided, along with Dr Jager's report), at the time of Associate Professor Quadrio's supplementary report remedies the situation. By that time, Associate Professor Quadrio's opinions had been formed and were in print and were patently influenced by her acceptance of DP's account.

376 I will shortly identify a number of matters in addition to those I set out at [54] – [76] which cause me to reject DP's account of the onset of symptoms related to the Coffey assaults. A couple of examples of these incongruities suffice.

377 DP told Associate Professor Quadrio that in the aftermath of the abuse he had become much preoccupied with it and at school he had difficulties learning and socialising. I am not satisfied that he had any such difficulties and consider that it is far more likely that his problems at school and their causes were those set out in the accounts that he gave to Dr Pagano in a setting far removed from this litigation.

378 Similarly, in relation to Associate Professor Quadrio's diagnosis of complex PTSD, she relies upon the assertion of DP that these symptoms commenced directly or shortly after the assaults. This can be contrasted with DP's statements to Dr Pagano and Towards Healing that he had a normal childhood up until the school abuse, and his attribution of his psychological symptoms to a completely unrelated cause.

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

380 Even if I were to accept the validity of Associate Professor Quadrio's opinion based upon DP's account, I think it faces one other formidable hurdle — the opinions of the treating professionals, which I have just recited. It is no easy thing for a trier of fact,

263 Ibid 3(k).

whatever the expertise of the medico-legal psychiatrist, to dismiss the opinions of the treating psychologists who have attributed DP's psychological symptoms to other causes. Whilst they may not have the expertise of the Associate Professor, they have a significant advantage in that they have seen DP in a clinical setting without the influence of litigation — as opposed to the setting in which a medico-legal consultant carries out an examination with a focus on the subject of the litigation. It is of real significance that neither of the treating psychologists diagnosed DP as suffering from any form of PTSD, whatever the cause, bearing in mind that DP did not tell Dr Pagano of the Coffey abuse until after reading the December advertisement and contacting the solicitors.

381 Moreover, it appears that Associate Professor Quadrio agrees with Dr Pagano's assessment. In her supplementary report she refers to Dr Pagano's March 2015 report relating to the school abuse and notes "In essence I would concur with Dr Pagano's assessment of [DP]".[264]

382 I should conclude by expanding on an earlier comment: neither psychiatrist had anything like the picture of DP and his life that emerged in the course of the trial. DP gave evidence over a number of days both in person and by video link and, as has been seen, there was a raft of other material available to the Court. It is on this basis that I have formed a conclusion which does not square with either of the psychiatrists' opinions. This, I am afraid, is part and parcel of the judicial evaluation process.

383 With one exception I am not satisfied that DP has established on the balance of probabilities the underlying factors which underpin Associate Professor Quadrio's opinion attributing his PTSD, depression, anxiety and agoraphobia to the Coffey assaults. That exception, which I will explain in a moment, relates to his psychological symptoms, particularly depression and anxiety, after reading the December advertisement.

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264 Exhibit P11.

The failure to call relevant witnesses

384 In *G v H*,[265] Brennan and McHugh JJ said:

> [W]hen a court is deciding whether a party on whom rests the burden of proving an issue on the balance of probabilities has discharged that burden, regard must be had to that party's ability to adduce evidence relevant to the issue and any failure on the part of the other party to adduce available evidence in response.[266]

385 More recently in *Australian Securities and Investments Commission v Hellicar*,[267] the plurality of the High Court said:

> Disputed questions of fact must be decided by a court according to the evidence that the parties adduce, not according to some speculation about what other evidence might possibly have been led. Principles governing the onus and standard of proof must faithfully be applied …
>
> …
>
> This Court's decision in *Jones v Dunkel* is a particular and vivid example of the principles that govern how the demonstration that other evidence could have been called, but was not, may be used … [T]he Court held "that any inference favourable to the plaintiff for which there was ground in the evidence might be more confidently drawn when a person presumably able to put the true complexion on the facts relied on as the ground for the inference has not been called as a witness by the defendant and the evidence provides no sufficient explanation of his absence".[268]

386 In this case, given the paucity of evidence led by DP as to the onset and continuation of psychological symptoms, there was a debate between the parties as to what should be made of the failure of DP to call two classes of evidence: —

(a) evidence from family members or friends corroborating his account of the immediate effect upon DP of the assaults and his asserted change in behaviour from that time onwards; and

(b) evidence from the treating general practitioner, Dr Watson, and the three psychologists — in particular, Dr Pagano, who has treated DP for the past seven years.

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265 (1994) 181 CLR 387.
266 Ibid [391–2].
267 (2012) 247 CLR 345.
268 Ibid [165], [167] (citations omitted).

387 For the *Jones v Dunkel* principle to be applied, the following must be established:

(a) first condition — a missing witness who would be expected to be called by one party rather than the other;

(b) second condition — the evidence of that witness would elucidate a matter relevant to the determination of the issues at trial; and

(c) third condition — his or her absence is unexplained.

388 If these three conditions are satisfied, then the tribunal of fact may:

(a) infer that the evidence of the absent witness, if called, would not have assisted the party who failed to call that witness; and

(b) draw with greater confidence any inference unfavourable to the party who failed to call the witness.

389 In this case, the dispute between the parties was as to the application of the first condition in relation to the medical witnesses. Each party contended that the other should have called one or more of these potential witnesses — Dr Watson, the treating general practitioner, and the three psychologists (particularly Dr Pagano).

390 DP asserted that as the Diocese had subpoenaed Dr Pagano then it should have called him. The Diocese countered that as Dr Pagano was the current treating psychologist, it was only reasonable to expect DP to call him. DP also contended that the Diocese could have subpoenaed Dr Watson.

391 In *Payne v Parker,*[269] Glass JA said as follows of the first condition:

> The first condition is also described as existing where it would be natural for one party to produce the witness … or the witness would be expected to be available to one party rather than the other … or where the circumstances excuse one party from calling the witness, but require the other party to call him … or where he might be regarded as in the camp of one party, so as to make it unrealistic for the other party to call him … or where the witness' knowledge may be regarded as the knowledge of one party rather than the other … or where his absence should be regarded as adverse to the case of one

269 [1976] 1 NSWLR 191.

> party rather than the other … It has been observed that the higher the missing witness stands in the confidence of one party, the more reason there will be for thinking that his knowledge is available to that party rather than to his adversary … If the witness is equally available to both parties, for example, a police officer, the condition, generally speaking, stands unsatisfied. There is, however, some judicial opinion that this is not necessarily so …. Evidence capable of satisfying this condition has been held to exist in relation to a party's foreman … his safety officer … his accountant … his treating doctor …[270]

392 As to the failure by DP to call any witness from his family — the first class of evidence — each of the conditions for the application of the *Jones v Dunkel* principle is established. DP's case is that his life was thrown upside down by the assaults. The Diocese's case is that it was only after DP saw the December advertisement that he related his psychological symptoms to the Coffey assaults; previously he never once asserted that the assaults had any effect upon him, rather, he blamed other incidents for his psychological issues.

393 Three of DP's four siblings are alive and available. It can be accepted that their relationship with DP is strained but this would not prevent DP calling one or more of them. For instance, he spoke to his brother, presumably in early 2019, about Coffey after reading the December advertisement.[271] The evidence of one or more of his siblings would have been particularly germane as to what, if any, psychological problems DP suffered directly after the Coffey assaults and during his early and teen years. His siblings could have shed light on not only whether he experienced any of the problems he alleges but also when those problems arose. In my view, it would have been natural for DP to call one or more of his siblings notwithstanding their relationship. Not one was called and no satisfactory explanation was proffered for their absence.

394 It follows that I am able to more confidently accept inferences put by the Diocese and contrary to the evidence advanced on behalf of DP — namely that his psychological symptoms (if accepted) from an early age were not due to the Coffey abuse but related to the school abuse or, alternatively, that those symptoms at later points in time were

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270 Ibid [201–2] (citations omitted). Although, in dissent this extract was cited with approval by Campbell J, with whom Beazley JA and Pearlman AJA agreed, in *Manly Council v Byrne* [2004] NSWCA123, [53].

271 T798-99.

caused by other trauma in his life.

395 I should mention that the Diocese produced a lengthy list of potential witnesses who were not called by DP. Most were peripheral family members or friends. *Jones v Dunkel* must be applied with a modicum of common sense — there was no genuine expectation that DP would call a cast of thousands who may, by accident or design, have rated a mention in the evidence.

396 The position in relation to the second class of evidence — that of the treating professionals — is different. It would have been natural and expected for DP to call both Dr Watson and Dr Pagano — in fact, both treated DP during the trial. Each could have given evidence as to whether DP suffers from any form of PTSD, and if so, its relationship to the Coffey assaults. They could also have given evidence as to the current state of the established conditions of anxiety and depression, their severity and any relationship to the Coffey assaults. This is particularly so with Dr Watson, who has seen DP for a period of nearly 20 years. The failure to call the treating general practitioner in those circumstances is stark.

397 On the other hand, despite their absence there is a significant body of material adduced from Dr Pagano and also from Ms Marr in the form of reports and communications which convey, at least, a picture of DP's psychological problems, their asserted causes, the treatment of DP, and the treating professionals' opinions. So, to that extent, the inference is not as powerful as that associated with the failure to call Dr Watson. Nevertheless, Dr Pagano's opinion as to any causal connection between the Coffey assaults and the development of PTSD, or the other psychological symptoms experienced by DP, would have been of real relevance to a critical issue in the case and was not adduced.

398 I do not accept that the Diocese should have been expected to call Dr Pagano as part of its case. True it is that it served him with a subpoena, but that is irrelevant to the *Jones v Dunkel* test. One would have expected, and it would be natural for, the patient to call his or her treating doctor where there was a contest about diagnosis and

causation. It would not have been natural or expected for the Diocese to call the treating professionals.

Findings as to the effects of Coffey's assaults upon DP

399 DP carries the burden of proof on this issue, just as he does on the liability of the Diocese.

400 There are multiple problems with acceptance of DP's case as to both the onset of psychological symptoms caused by the Coffey assaults and determining the relationship of his current symptoms to those assaults.

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

402 I will not repeat my findings as to DP's reliability set out at [54] – [77].

403 But I will briefly emphasise several things that emerge from the material I have referred to.

404 First, DP's account of the relationship between the Coffey assaults and the onset of lifelong symptoms attributable to them is squarely contradicted by several out-of-court statements made by him and histories to treating professionals which I have referred to. Not only did he not refer to the assaults, but he described a normal childhood up until the school abuse. In this regard, I accept the statements and reports of each of the psychologists, both as to the history given by DP and their opinions. These are treating professionals with no vested interest in the outcome of this litigation.

405 It is not just an omission of a reference to the Coffey assaults and his repeated description of a normal childhood up until the time of the school abuse; it is also

significant that the statements of DP to his treating professionals and to various organisations emphasised the relationship of his major psychological issues to a totally different event or events and were nuanced or skewed to fit the context in which those statements were made.

406 Second, on the material adduced from the treating psychologists, there is no connection between the Coffey assaults and DP's psychological condition. It cannot be overlooked that his current treating psychologist (who has seen him over 40 times) acting upon DP's account to him opined in several comprehensive reports that DP's complex psychological condition was due to causes other than the Coffey assaults.

407 Third, for reasons already expressed, I have little confidence in the opinions of the consultant psychiatrists who, in the main, relied upon an illusory picture of the effect of the Coffey assaults upon DP.

408 Even if I accepted Associate Professor Quadrio's opinion as to the effect of the Coffey abuse, which I do not, it has significant limitations given the other factors which have impacted upon DP's psych: —"Any and all traumas impacting on a young child have… the potential to compromise their functions".[272] She described the school abuse as "significant"[273] and the family as "dysfunctional".[274]

409 The result to this point is that the case for DP falls far short of establishing on the balance of probabilities that any psychological condition that he had (whatever its nomenclature) prior to December 2018 is related to the Coffey assaults.

410 Fourth, connected to the second point — and as just discussed — there is a powerful *Jones v Dunkel* inference pointing to a contrary conclusion, namely that, prior to December 2018, DP did not suffer from any psychological condition related to the Coffey assaults. It is far more likely that his psychological issues were related to the other factors in his life, particularly the school abuse, the death of his parents, the tribulations of his business and his relationship with his partner. I draw this inference

272 T1016.
273 T916.
274 T966.

with greater confidence given the failure to call Dr Watson and, to a lesser extent, Dr Pagano, for the reasons set out earlier. If either attributed his current symptoms (or those over recent years) to the Coffey assaults then surely they would have been called by DP.

411 Indeed, I conclude that when DP told Dr Pagano and the Towards Healing representative that he had enjoyed a normal childhood up until the school abuse that was, indeed, his perception at the time.

412 In *Ho v Powell*[275], Hodgson JA said:

> In considering [whether the limited material which the court has is an appropriate basis on which to reach a reasonable decision], it is important to have regard to the ability of parties, particularly parties bearing the onus of proof, to lead evidence on a particular matter, and the extent to which they have in fact done so.[276]

Simply put, it was in DP's power to quell the controversy as to the effects of Coffey's unlawful assaults upon him by calling the professionals who had treated him for years and knew him well. This is particularly so given that he asserted that his whole life and his ability to engage in employment had been significantly diminished by Coffey's behaviour. He instead called a forensic psychiatrist who saw him for the first time in 2020 and elected not to call the two treating professionals who had treated him for a combined total period in excess of twenty-five years. In addition, not one member of his family or his partner was called. The whole of the evidence and the onus of proof needs to be viewed in that light.

413 This consideration reinforces (if it was needed) the proposition that DP has not established to the requisite standard a causal link between the Coffey assaults and any psychological symptoms prior to December 2018.

414 I am, however, satisfied that since DP saw the December advertisement his psyche has been detrimentally affected by the reawakened memories of those two incidents. I accept the evidence of his friends that over the past three years he has been distressed

275 (2001) 51 NSWLR 572.
276 Ibid, [15].

when describing Coffey's behaviour and that he ruminates over it.

415 The Diocese submitted, and I accept, that "his current crusade… is his blaming the symptoms and the experiences in relation to this [abuse] and that's been a focus since 2019".[277]

416 Indeed, this now appears to be his focus, just as the school abuse and the cause of the death of his parents were in the past. Dr Pagano and Ms Marr both reported DP's focus on past events[278] and now, with reawakening (as I see it) of the memory of the Coffey assaults, this has become centre stage.

417 I appreciate that in reaching this conclusion there is no psychiatric opinion in direct support of it. I hope that the reason for that is apparent — neither psychiatrist had anything like the true picture and the treating psychologist and general practitioner were not called.

418 Whilst I regard the opinion of Dr Jager as less than satisfactory, I consider that he is right in ascribing some portion of DP's current psychological symptoms to the Coffey assaults. I think that given DP's personality Coffey's conduct has, in a way similar to the close to obsessive behaviour demonstrated by him in relation to his parents' deaths, become his focus and continues to play a part in his ongoing depression and anxiety.

419 But I repeat that I can only be satisfied that this dates from the time DP became aware of the Coffey assaults on other boys and then placed the matter in the hands of his solicitors. That, of course, is not to say that the effects of the Coffey assaults upon him are not a genuine cause of his current symptoms.

420 Endeavouring to anticipate the future course of his symptoms related to the Coffey assaults is difficult. Neither psychiatrist reached the conclusion I have reached. Associate Professor Quadrio did, however, say the following as to the effect of this

277 T1328.
278 Exhibits D2 and D23.

litigation upon DP:

> Litigation itself is very traumatising because of a lot people will have managed by deliberately trying to not think about it, remember it, talk about it, avoid any – avoid any triggers, and then becoming involved in litigation means you've got to tell the story, then begin reliving the experiences, and people can be seriously re-traumatised.
>
> You never know how someone is going to react. They can be – they can be severely symptomatic in the immediate aftermath and make a good recovery, or they can go on and become extremely chronic, or every shade of grey in between.[279]

421 As best I can estimate and notwithstanding the removal of the litigation trigger, it is likely that the symptoms attributable to the Coffey assaults will persist for some time, if not indefinitely. This is consistent with the opinions of both Associate Professor Quadrio and Dr Jager — indeed this seems to be one of the few issues that they could agree upon. So, whilst I do not accept Associate Professor Quadrio's evidence on attribution I think her prognosis as to the continuation of the symptoms of anxiety and depression can be accepted, particularly in light of DP's longstanding symptoms — whatever the cause.

422 DP will remain aggrieved and will continue to blame Coffey (rationally or irrationally) for his actions and for what he perceives to be the effect upon his life, just as he did with fixing blame on others in relation to the school abuse and the death of his parents. This will translate into heightened anxiety and depression into the foreseeable future.

423 Whilst I accept that there will be other contributing factors to DP's condition, I am reasonably satisfied that a cause of his ongoing symptoms is, and will be, the Coffey assaults.

Pain and suffering damages

424 I do not accept that DP suffered any form of PTSD as a result of the Coffey assaults. I reject Associate Professor Quadrio's opinion which proceeded on an incorrect factual basis and is inconsistent with the opinion of the treating psychologists.

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279 T1012.

425 As I have just mentioned, I conclude that since December 2018 DP has become fixated with the Coffey assaults and their effect upon him. This has meant that they are, in part, responsible for the anxiety and depression that he now suffers. The other events, described in the psychologists' reports as being causative over the years in his psyche, also play a part in his array of symptoms. I do not accept that his agoraphobia has in any meaningful way been aggravated or influenced by the Coffey assaults. This was a feature in the years before 2019 and there is no evidence that it has worsened since that time. I cannot find any evidence that supports a suggestion that he has sustained a personality change as a result of the Coffey assaults.

426 As to the future duration of his symptoms attributable to the Coffey assaults I have, for the reasons just set out, concluded that these will persist indefinitely, and the effects of the Coffey assaults will continue to play a part. In reaching my conclusion as to the appropriate assessment of damages, I have taken into account that other factors unrelated to the Coffey assaults will from time to time be causative of symptoms but that the effects of the Coffey assaults will be ongoing.

427 Counsel for DP put a figure of $300,000 - $400,000 for pain and suffering damages and counsel for the Diocese a figure of between $100,000–$150,000. No doubt the estimate by counsel for DP was based on his case on the duration of symptoms related to the Coffey assaults over a 50-year period in the past and indefinitely into the future succeeding.

428 In my view, the proper assessment of pain and suffering and loss of enjoyment of life damages — past and future — is $200,000.

Loss of earning capacity (past and future) damages

429 Notwithstanding the bold nature of DP's claim for earning loss (in final submissions in a sum of just over $1,500,000), it received little support from Associate Professor Quadrio — even on the limited and selective information that she had.

430 In her first report, she opined that it was possible "in some small way" that the Coffey

assaults contributed to DP's history of sporadic employment.[280]

431 In evidence in chief, Associate Professor Quadrio said as follows:

> I think he's been able to maintain employment over – over most of his adult life, and – but, um, what I talked about was his mistrust and avoidance has probably limited him, um, but it hasn't stopped him.[281]

432 When asked during cross-examination whether it was fair to say she was simply unable to, with any reliability, put any weight on the effect of abuse by Coffey in relation to DP's employment, she said:

> I couldn't put a precise estimate on it, no.[282]

433 Given my conclusion as to the onset of symptoms in December 2018, there is, in my opinion, no scope for any award of damages for past loss of earnings. This is for the following reasons.

434 First, on my findings as to actionable damage to DP as a result of the Coffey assaults, the only arguable period of loss is between December 2018 when he read the December advertisement and the present time. During that period DP has been in receipt of the carer's pension. He has been on that pension for nearly 20 years. He has not worked since the café business closed and forced him into bankruptcy some 10 years ago. He did not exercise any earning capacity in the ensuing period when he was free of symptoms referable to the Coffey assaults. In short, any residual earning capacity that he possessed after the café business closed was not exercised for reasons other than the Coffey assaults.

435 Second, in any event, even if one accepted DP's account, it is unclear what, if any, effect the Coffey assaults have had on his earning capacity. I have already referred to Associate Professor Quadrio's opinion. That evidence, when combined with the other undisputed issues in his life which have affected his psyche, make it well-nigh impossible to ascertain whether there has been a discernible loss of income.

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280 Exhibit P11.
281 T1008.
282 T1009.

436 Third, it follows that I regard the reports of the forensic accountants on behalf of DP and the Diocese as irrelevant.[283]

437 In short, I am not satisfied on the balance of probabilities that DP has suffered any past loss of earnings attributable to the Coffey assaults. I have conducted this analysis on the traditional basis — estimation of past loss reduced by past contingencies. I reach the same conclusion applying a *Malec v JC Hutton Pty Ltd*[284] approach to past hypothetical loss,[285] for the reasons I will now set out in relation to future loss.

438 In relation to any future loss of earning capacity, this is essentially a *Malec* claim. Recently in *Talacko v Talacko*,[286] the High Court said of this type of claim:

> In the second category, the existence of a loss is sufficiently shown by proving that the tort caused a permanent impairment of the value of the plaintiff's existing right. It is enough that the right is "something of value" and that its value is diminished or lost.[287]

439 This is consistent with what was said by the High Court in *Malec*: that the assessment of future or hypothetical events requires a plaintiff to demonstrate that the loss is more than "speculative".[288]

440 I accept the Diocese's submission that there is no cogent evidence to support an award for future loss of earning capacity. As with the case for past loss of earnings, there is no proper evidentiary basis to find that DP has been deprived of the loss of "something of value" — let alone one that can then be measured in any meaningful way. Consistent with my conclusion as to the claim for loss of earnings since 2019, DP has not demonstrated that he either had any earning capacity or that the Coffey assaults have in a material way diminished that earning capacity to an extent that would permit an assessment of damages pursuant to the *Malec* principle.

441 To put it bluntly, and somewhat repetitively, the die was cast well prior to 2019 in

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283 Exhibits P12 and D20.
284 (1990) 169 CLR 638 ('*Malec*').
285 See *New South Wales v Moss* (2000) 54 NSWLR 536.
286 (2021) 95 ALJR 417.
287 Ibid [43].
288 *Malec* (1990) 169 CLR 638, [7].

relation to DP's participation in the workforce, from which he had effectively retired when he went bankrupt. That decision and his past employment history was unrelated to the Coffey assaults. No relevant loss of opportunity has been demonstrated and no allowance should be made under this head of damage.

442 It follows that the claim for past and future loss of superannuation of over $200,000 must also fail.

Medical expenses — past and future

443 In the particulars of special damage filed shortly prior to trial, DP claimed "a global amount of $10,000 for past medical expenses".[289]

444 DP asserted, at least impliedly, that this related to treatment from Dr Watson and Dr Pagano. Neither doctor was called, and no evidence was led, to justify this amount. The Diocese correctly contended that, in the absence of any evidence as to actual payments made for past medical expenses (as opposed to a guess by an expert witness) there was no scope for such an award. I agree and no allowance ought to be made for past medical expenses.

445 The claim for future medical expenses was based upon Associate Professor Quadrio's assessment that DP would need ongoing future treatment which would require:

(a) monthly sessions with a clinical psychologist;

(b) medication; and

(c) GP annual review.

The total claim for future treatment costs was just short of $110,000.

446 For reasons set out previously, I do not accept Associate Professor Quadrio's opinion in relation to the cause of DP's psychological symptoms or as to his current condition – particularly that of PTSD. I find it difficult to relate this hypothetical estimate to the

289 Particulars of Special Damages dated 27 May 2021 [8].

reality that there is no evidence of any past expense incurred for the treatment of his symptoms of depression and anxiety.

447 As best I can determine, DP will need some ongoing psychological treatment which is causally related to the Coffey abuse. He may also need medication, such as antidepressants and medication for anxiety.

448 This may well persist indefinitely. But, on the other hand, he may well have needed this form of treatment for his psychological condition irrespective of the Coffey assaults.

449 Doing the best I can, I think an appropriate allowance is $10,000 for future medical expenses.

Should there be an award of aggravated damages?

450 Aggravated damages are compensatory in nature and may be awarded to a plaintiff "when the harm done to him by a wrongful act was aggravated by the manner in which the act was done".[290]

451 In *Cassell v Broome*[291] Lord Devlin adopted what he had said in *Rookes v Barnard*,[292]:

> Additional compensation for the injured feelings of the plaintiff where his sense of injury resulting from the wrongful physical act is justifiably heightened by the manner in which or the motive for which the defendant did it.[293]

452 It is also established that aggravation may come not only from conduct directly associated with the alleged tortious conduct but subsequent conduct which may have the same effect. So the manner in which a defendant may conduct a proceeding brought against it may lead to an award of aggravated damages.[294]

453 DP asserted that aggravated damages were available in this case on two separate

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290 *Uren v John Fairfax & Sons Pty Ltd* (1966) 117 CLR 118, 149 ('*Uren*'), quoted in *Gray v Motor Accident Commission* (1998) 196 CLR 1, [6] ('*Gray*').
291 [1972] AC 1027, [1124] ('*Cassell*').
292 [1964] AC 1129.
293 *Cassell* [1972] AC 1027, [1124]. See also *Spautz v Butterworth* (1996) 41 NSWLR 1, [15].
294 See *Houda v New South Wales* [2005] NSWSC 1053.

bases:

(a) The conduct of Coffey and the circumstances of the abuse, that is, cloaked in secrecy so as to avoid any detection by DP's parents; and

(b) The conduct of the Diocese in the defence of the case and particularly in respect of senior counsel's cross-examination of DP.

454 In relation to the first basis — the surreptitious nature of Coffey's conduct — I think that there is force in this contention. Whilst I have not accepted that there was any immediate consequence to DP's psyche as a result of the two assaults, that does not mean that the circumstances in which they occurred can be treated as irrelevant – particularly as they have now become a focus of DP and productive of ongoing anxiety and depression.

455 I am conscious that the award of compensatory damages takes into account the damage to DP's mental condition as a result of the Coffey assaults. Nevertheless, the circumstances in which the assaults occurred provide a proper basis upon which to award an additional amount in the form of aggravated damages; this was a breach of trust by Coffey perpetrated on both occasions in a clandestine fashion on a young boy who could not be protected by his parents.

456 There should be an award of damages on this basis. I can see no reason why the Diocese should not be vicariously liable for such an award given that it relates directly to Coffey's conduct and is compensatory in nature.

457 On the second basis, in closing submissions, counsel for DP focused on the conduct of senior counsel for the Diocese in her cross-examination of DP.

458 Whilst it is not uncommon (particularly in defamation cases) for an award of aggravated damages to be made based on the conduct of a case, this case does not fall into that category.

459 True it is that counsel's cross-examination was lengthy and unsympathetic to DP.

Counsel implied in her cross-examination that DP was, at the least, exaggerating the circumstances surrounding the assaults. But in a case where the allegations against Coffey first surfaced nearly 50 years after the events, and where on DP's own account there were no witnesses, none of this was surprising or inappropriate — particularly so given the variety of other potential causes for DP's alleged psychological injury.

460 The end result is that whilst I have some sympathy for DP's position in relation to the nature of the cross-examination, I do not regard it as providing grounds for an award of aggravated damages.

461 In my view, an appropriate award is $20,000.

Should there be an award of exemplary damages?

462 DP contended that exemplary damages were available by reason of the following:

(a) the Diocese's actual or constructive knowledge about the risk of paedophilia amongst priests in the Diocese;

(b) the risk posed by Coffey;

(c) the prolific nature of Coffey's offending between 1960 to 1975;

(d) the failure of the Diocese to reprimand or remove Coffey from office and its failure after his conviction to laicise Coffey; and

(e) the conduct of counsel for the Diocese in suggesting that the Coffey abuse did not occur when the Diocese had pleaded that it did not know and could not admit.

463 For the following reasons, I do not accept that any of these matters give rise to an award of exemplary damages.

464 In Australia, it has been accepted by the High Court that exemplary damages will be awarded in cases of "conscious wrongdoing in contumelious disregard of another's

rights".[295]

465 In *Gray*,[296] the majority said as follows:

> [E]xemplary damages could not properly be awarded in a case of alleged negligence in which there was no *conscious wrongdoing by the defendant*.[297]

466 In *Lamb*,[298] the High Court held that it was not necessary to establish actual malice on the part of the wrongdoer:

> Whilst there can be no malice without intent, the intent or recklessness necessary to justify an award of exemplary damages may be found in contumelious behaviour which falls short of being malicious or is not aptly described by the use of that word.[299]

467 On its face, therefore, it must be dubious whether, in a case involving vicarious liability, an innocent party should be held liable for an award of exemplary damages based on the conduct of the person for whom vicarious liability was imposed.

468 Counsel for DP were not able to identify any case in which an employer (or in this case, a quasi-employer) had been held vicariously liable for exemplary damages.

469 However, there are a couple of instances where exemplary damages have been awarded against an employer which has been held vicariously liable for the actions of its employee. In *New South Wales v Ibbett*,[300] the High Court considered the question of the State's responsibility for such an award of damages where a police officer assaulted the plaintiff. Subsequently in *Zorom Enterprises Pty Ltd v Zabow*,[301] the New South Wales Court of Appeal upheld an award of exemplary damages against an employer where a bouncer unlawfully assaulted a patron of a nightclub.

470 Although both cases resulted in the award being upheld, neither offers any definitive guidance. In *Ibbett*, the liability of the State arose as a result of misconduct by police

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295 *Whitfeld v De Lauret & Co Ltd* (1920) 29 CLR 71, 77. See also *Uren* (1966) 117 CLR 118, 138, 147, 154, 160; *XL Petroleum (NSW) Pty Ltd v Caltex Oil (Australia) Pty Ltd* (1985) 155 CLR 448, 470; *Lamb v Cotogno* (1987) 164 CLR 1, 13 ('*Lamb*'); *Gray* (1998) 196 CLR 1, [14] ('*Gray*').

296 (1998) 196 CLR 1.

297 *Gray* [22] (emphasis added).

298 (1987) 164 CLR 1.

299 *Lamb* [13] (citations omitted).

300 (2006) 229 CLR 638 ('*Ibbett*').

301 (2007) 71 NSWLR 354 ('*Zorom Enterprises*').

and liability turned on the application of a particular statutory provision. Indeed, the High Court's remarks appear to, at least, leave open the question of the rationale behind an award where vicarious liability has been imposed upon an innocent party:

> Such authorities in this Court assume that awards of exemplary damages may properly be made against a principal or employer who is vicariously liable for the tortious acts or omissions of an agent or employee; they do not canvass any rationale for the making of such awards.
>
> The nature of vicarious liability most recently was treated by this Court in *Sweeney v Boylan Nominees Pty Ltd* and need not be further considered here. But why, it has been asked, should shareholders of a corporation bear the burden of the punishment by the medium of an award of exemplary damages for corporate conduct in which they took no part? That question itself recapitulates arguments presented in the nineteenth century in related fields, before the development of modern ideas of corporate identity and responsibility.[302]

471 In *Zorom Enterprises*, the Court of Appeal held that such a claim was tenable and dismissed the appeal against the award. However, in doing so, it relied upon an earlier decision of *New South Wales v Bryant,*[303] in which the Court, as with *Ibbett,* awarded exemplary damages arising out the conduct of police officers. As in *Ibbett,* this required consideration of the terms of the *Law Reform (Vicarious Liability) Act 1983* (NSW) in the context of police misconduct.

472 Whilst the decisions in *Ibbett, Zorom Enterprises* and *Bryant* might tend to the conclusion that exemplary damages may be available in a vicarious liability situation, *Ibbett* and *Bryant* (in which there is a fulsome discussion of the concept) turned directly upon principles of statutory construction and police misconduct.

473 For my part, I would share the implied doubt of the High Court as to the availability of such an award of damages in a case such as the present one.

474 The end result, I think, is that given the nature of an award of exemplary damages, it would seem at odds with the policy rationale of such an award if an innocent party was the subject of an award of damages designed to punish it for a contumelious act committed by a person unauthorised to carry out that activity. In the absence of any

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302 *Ibbett* (2006) 229 CLR 638, [44]–[45] (citations omitted).
303 (2005) 64 NSWLR 281 ('*Bryant*').

other evidence to connect the Diocese with the actions of Coffey there is, in my opinion, no basis to make an award of exemplary damages based on the vicarious liability of the Diocese.

475 In any event, and contrary to that conclusion, assuming exemplary damages are available, it is not appropriate to make such an award in this case.

476 As the High Court observed in *Gray*, such awards are "rarely" made.

477 Whilst the circumstances of this case constitute a breach of trust on the part of Coffey, these events occurred nearly 50 years ago and little or nothing could be achieved by punishment of the Diocese and its current Bishop. This is particularly so given the findings of the Royal Commission and the establishment of schemes to redress the injustices perpetrated by members of the clergy, and particularly those under the direction of the Diocese and the Bishop.

478 In this regard, I adopt the following parts of Keogh J's reasons relevant to exemplary damages in *Lonergan v Trustees of The Sisters of Saint Joseph*,[304] a case which also involved the unlawful actions of Coffey:

> I accept the defendants' submissions, and on that basis will not make an award of exemplary or aggravated damages. The Bishops' knowledge that serious allegations of sexual abuse of children had been made against two other priests was relevant to the foreseeability of the risk of harm to Catholic children if they were alone in the care or company of Diocesan priests, and to breach by the Diocese of a duty owed to the plaintiff. However, there is no evidence the Diocese was aware that Coffey had sexually abused children before he was appointed parish priest at Ouyen, or of grounds for suspicion that he had done so. The Sisters were aware that in his time at Ouyen Coffey was regularly alone with Catholic children, including in circumstances where they needed to change in and out of running clothes. Again, that is knowledge relevant to foreseeability and breach. However, viewed at the time Mr Lonergan was abused, the evidence does not establish that either the Diocese or the Sisters acted in deliberate or reckless and contumelious disregard of Mr Lonergan's rights, or that their conduct was so reprehensible that it involved flagrant conscious wrongdoing.
>
> …
>
> More generally both defendants had implemented schemes to respond to persons who were abused as children, and systems of protection to avoid

304 [2021] VSC 651.

> future abuse. That is not to say the steps taken by the defendants are above criticism. However, I accept the conduct of the defendants is not such as to justify an award of exemplary or aggravated damages.[305]

479 In this case, the only evidence of any actual knowledge on the part of the Diocese is the discussion between Ridsdale and Bishop Mulkearns in 1961. As I have already discussed, this leads nowhere in relation to the allegations against Coffey in the negligence case. I repeat that there is no evidence of any actual knowledge of Coffey's misconduct nor, as I have found, is there any evidence that would lead to an inference that the Diocese should have known of Coffey's proclivities. Even if there was constructive knowledge on the part of the Diocese, there is no authority that I am aware of that would permit an award of exemplary damages on the basis of such imputed knowledge. Exemplary damages require "conscious wrongdoing".

480 The allegations relating to the Diocese's treatment of Coffey subsequent to the assaults are also misconceived. The contumelious behaviour which gives rise to a claim for exemplary damages must have a connection with the tort itself, not just egregious conduct at large. In this case, DP has failed to prove negligence on the part of the Diocese and therefore any nexus between the subsequent alleged misconduct on the part of the Diocese is irrelevant. The facts in *Lamb* demonstrate this amply.

481 Of course, it would be a different matter if the negligence of the Diocese was established and there was subsequent conduct referable to that negligence — such as moving a priest from one parish to another when the Diocese became aware of his unlawful behaviour. But that is not the case here.

482 Similarly, an allegation about the conduct of the trial is misconceived as grounds for a claim of exemplary damages.

483 The claim for exemplary damages fails.

Conclusion

484 There will be judgment for DP in the sum of $230,000. The parties will be at liberty to

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305 Ibid [211]–[212].

make submissions as to costs.