



HIGH COURT OF AUSTRALIA

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Details of Filing

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IN THE HIGH COURT OF AUSTRALIA
MELBOURNE REGISTRY

BETWEEN:

BISHOP PAUL BERNARD BIRD
Appellant

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and

DP (A PSEUDONYM)
Respondent

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APPELLANT'S OUTLINE OF ORAL SUBMISSIONS

Ground 1: Vicarious liability requires a relationship of employment or agency

1. The employment requirement, rooted in authority of this Court, should not be abandoned or extended, and leave to re-open the conclusions in *Hollis, Scott v Davis* and *Sweeney* – that a relationship of employment is a necessary precursor to a finding of vicarious liability (in the absence of “true agency” of an independent contractor) – should not be granted: AS, [29].
2. The test should not be abandoned or extended, because:
 - (a) it would produce uncertainty in the existing doctrine: AS, [31]-[33];
 - (b) a royal commission recommended that any expansion should operate prospectively: AS, [35];
 - 10 (c) any further reform is most appropriately undertaken by Parliament, not this Court: AS, [34], [38]; and
 - (d) vicarious liability’s central normative motivators of deterrence and enterprise risk do not support expanding no-fault liability retrospectively to non-profits: AS, [39]-[42].
3. Any expansion to “akin to employment” is contrary to authority, unstable and risks unintended consequences. There are no legal rights and obligations in the relations between the (fluctuating) association of parishioners and clergy comprising the Diocese (on the one hand) and an assistant priest (on the other). Any “control” is simply voluntary subjection: AS, [30]-[33].
4. Any expansion by reference to *Colonial Mutual Life Assurance* risks undermining the distinct
20 position of independent contractors: AS, [22].
5. The *Legal Identity of Defendants (Organisational Child Abuse) Act 2018* (Vic) – provides no so-called context in favour of changing the common law: Reply, [4]-[6].

Ground 2: The Courts below misapplied *Prince Alfred College*

6. The Courts below made findings at a high level, without (the necessary) appreciation of how the actual arrangements which the Diocese brought about created for a particular class of persons a heightened risk of the kind which in fact transpired: AS, [55]-[61].

7. The arrangements the Diocese had in place did not provide an occasion for the commission of the criminal act in respect of the class of victim: AS, [56]-[59]:
 - (a) The relationship which gave rise to the harm was one between the priest and parent.
 - (b) The relationship between priest (as teacher) and plaintiff did not give rise to the harm.

Notice of contention: Non-delegable duty does not apply

8. The Diocese is irremediably prejudiced by a non-delegable duty being advanced on appeal.
 - (a) At trial, the “nature and content of the particular duty and responsibility owed to the respondent” was never identified or pleaded in the form of a non-delegable duty: AS, [63].
- 10 (b) The Diocese had no opportunity at trial to lead evidence addressing the scope of the alleged protective role assumed: AS, [63].
9. The imposition of a non-delegable duty for intentional wrongs requires the re-opening and overruling of *Lepore*: AS, [64].
10. Non-delegable duties should not be imposed for intentional acts:
 - (a) The enlargement of the burden would be drastic.
 - (b) The intentional criminality involved in the wrong is not compatible with the duty’s protective rationale: such determined, deceptive conduct is all but impossible to prevent: AS, [42].
11. The facts would not, in any case, fall within the expanded notion of the supposed non-delegable duty.
 - (a) The Diocese had no actual custody or control: AS, [66].
 - (b) There was no obligation, or assumption of responsibility, such that the children were placed in any protective relationship: AS, [66].
 - (c) *Key dicta* in *Lepore* demonstrates why intentional wrongs will often be beyond the scope

of any protective role assumed.

- 12. A non-delegable duty for such intentional torts would substantially undermine the statutory balancing of interests the subject of the statutory regimes imposing an obligation to prevent child abuse: Rep [22]-[23].

Dated: 14 March 2024.



Bret Walker



Albert Dinelli



Alexander James-Martin

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