Year in review – major developments in abuse law

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A founding member of LEGALIGN GLOBAL

Contents

Year in review – reflections

Close to 10 years after the *Royal Commission* handed down its final report, civil claims for damages arising from child abuse remains a contested, difficult, but important area of law. As more claims are advanced that push against the margins, obtaining clear guidance from the Courts is critical to practitioners on both sides. We have assembled here a collection of case notes of interest that we think are of potential significance in the years ahead.

Some of these cases conclusively settle questions that have been open for years, including what is 'sexual abuse' for the purposes of the extension of the limitation period (*Anderson*) and what is a claim 'founded on or arising from sexual abuse' for the purposes of the law requiring non-incorporated organisations to nominate a proper defendant (*RWQ*).

Some of these cases raise more questions than they answer:

- The long-awaited decision in *GLJ* has unsettled established understandings of the law with respect to permanent stays and caused a level of disquiet at least in one intermediate appellate Court (see our summary of *CM*). It remains to be seen how deep-rooted that decision is (noting that a bench of five was divided in *GLJ*, and that one member of the majority has now left the Court). Practitioners now keenly await the next High Court decision in this area in the appeals from *Willmot* and *RC*, which will be heard together.
- On another front, the question of vicarious liability for non-employees has not been decisively resolved. A religious institution was found vicariously liable for the actions of a priest in *DP*, but the High Court's decision in *Schokman* suggests at least some members of that Court might want to dispense with 'true' vicarious liability in this area of law altogether, and deal with it by way of non-delegable duties. Whether this notion will find favour will be determined in the upcoming appeal in *DP*.
- The very high jury verdicts coming out of Victoria in *Kneale* and *TJ* upset established understandings of what these cases are worth, and are out of step with comparable awards in other jurisdictions. An appeal is coming, however practitioners are left with less certainty (and clashing expectations between both sides) in the meantime.
- The *RWQ* decision also raises the spectre of a potential wave of new claims advanced by secondary victims. It is now clear that those claims are not barred by the 'proper defendant' statutes, but it remains to be seen how the Courts will impose control mechanisms to draw a line against indeterminate liability. Further cases in this area are all but certain.

We expect (or hope) that 2024 will be a year of clarifying some of these matters.

While these reported decisions (and others) are of critical importance, we should also not lose sight of the fact that practitioners on both sides spent most of 2023 helping their clients to make reasonable compromises, and settling cases without litigation or trial. That continues to be the most appropriate, victim-focused, cheapest and conflict-free method of dealing with such cases. The greatest benefit of the reported decisions is to clarify the law and allow practitioners to continue to achieve such outcomes in the vast majority of claims.

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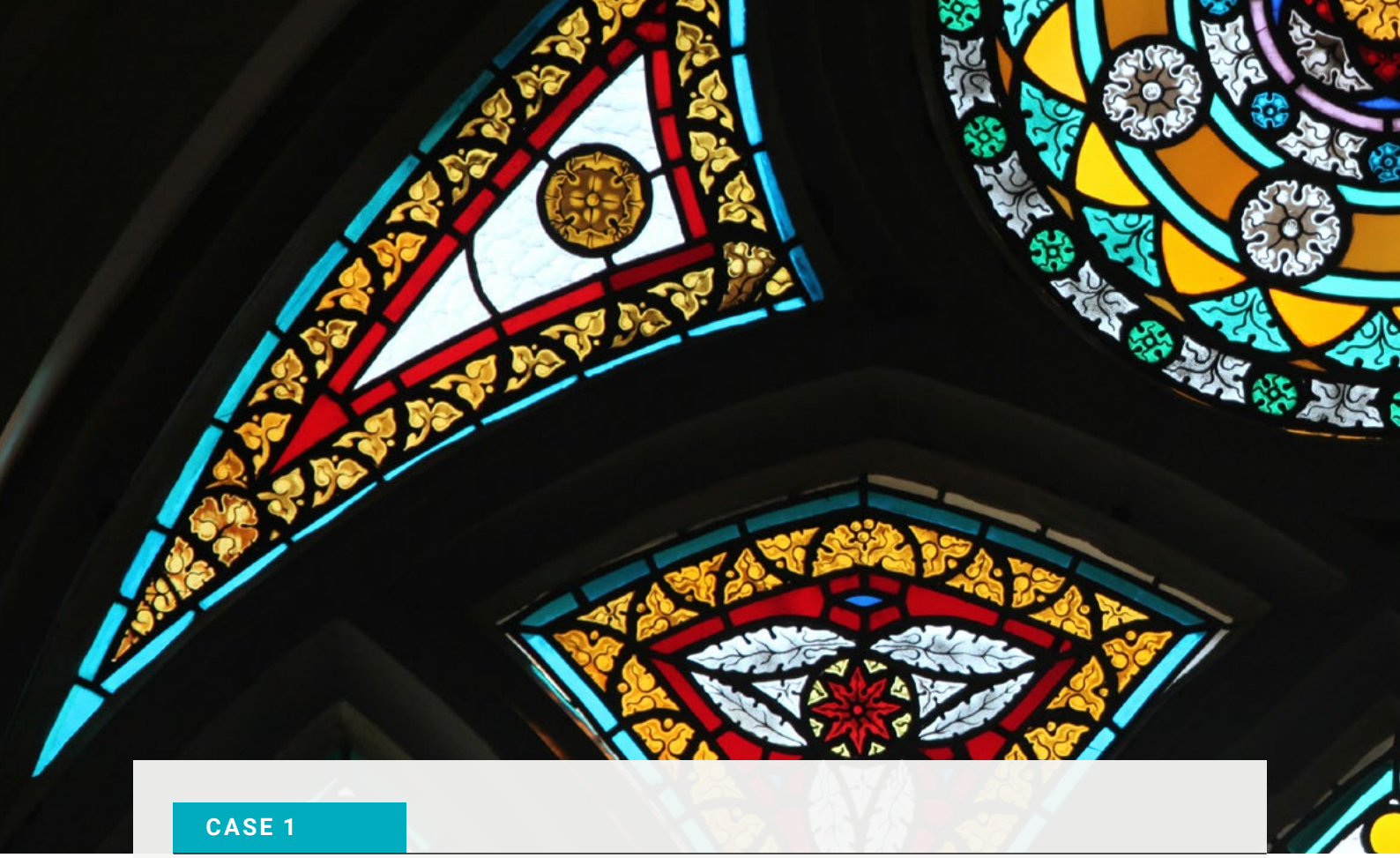


CASE 1

GLJ v The Trustees of the Roman Catholic Church for the Diocese of Lismore [2023] HCA 32

THE FACTS

The appellant, referred to by the pseudonym 'GLJ', alleged that she was sexually abused by a priest within the Diocese of Lismore (Diocese) in 1968 when she was 14 years old. GLJ sued the Diocese in the Supreme Court alleging that she was abused after her father was injured in a motorcycle accident. The alleged perpetrator was allocated as support priest for her family. He visited the family regularly and gained the trust of GLJ's parents. GLJ said the alleged perpetrator assaulted her on a single occasion when he attended her family home unannounced one day, while her parents were not home.

On 17 November 2020, the Diocese filed a notice of motion seeking a permanent stay of the proceedings pursuant to s 67 of the *Civil Procedure Act 2005* (NSW), on the basis that a fair trial could no longer be held due to the paucity of evidence and because the alleged perpetrator and other material witnesses had died. In September 2021, Campbell J dismissed the notice of motion and the Diocese appealed on the grounds that the primary judge erred in principle and misapplied his discretion in failing to permanently stay the proceedings.

In June 2022, Mitchelmore, Brereton and Macfarlan JJA allowed the appeal and granted a permanent stay of the proceedings in favour of the Diocese. In November 2022, the High Court of Australia granted special leave for the appellant to appeal the decision in *The Trustees of the Roman Catholic Church for the Diocese of Lismore v GLJ* [2022] NSWCA 78, in which the NSW Court of Appeal permanently stayed historical abuse proceedings. The appeal was heard in June 2023 by Kiefel CJ, Gageler, Steward, Gleeson and Jagot JJ.

The decision

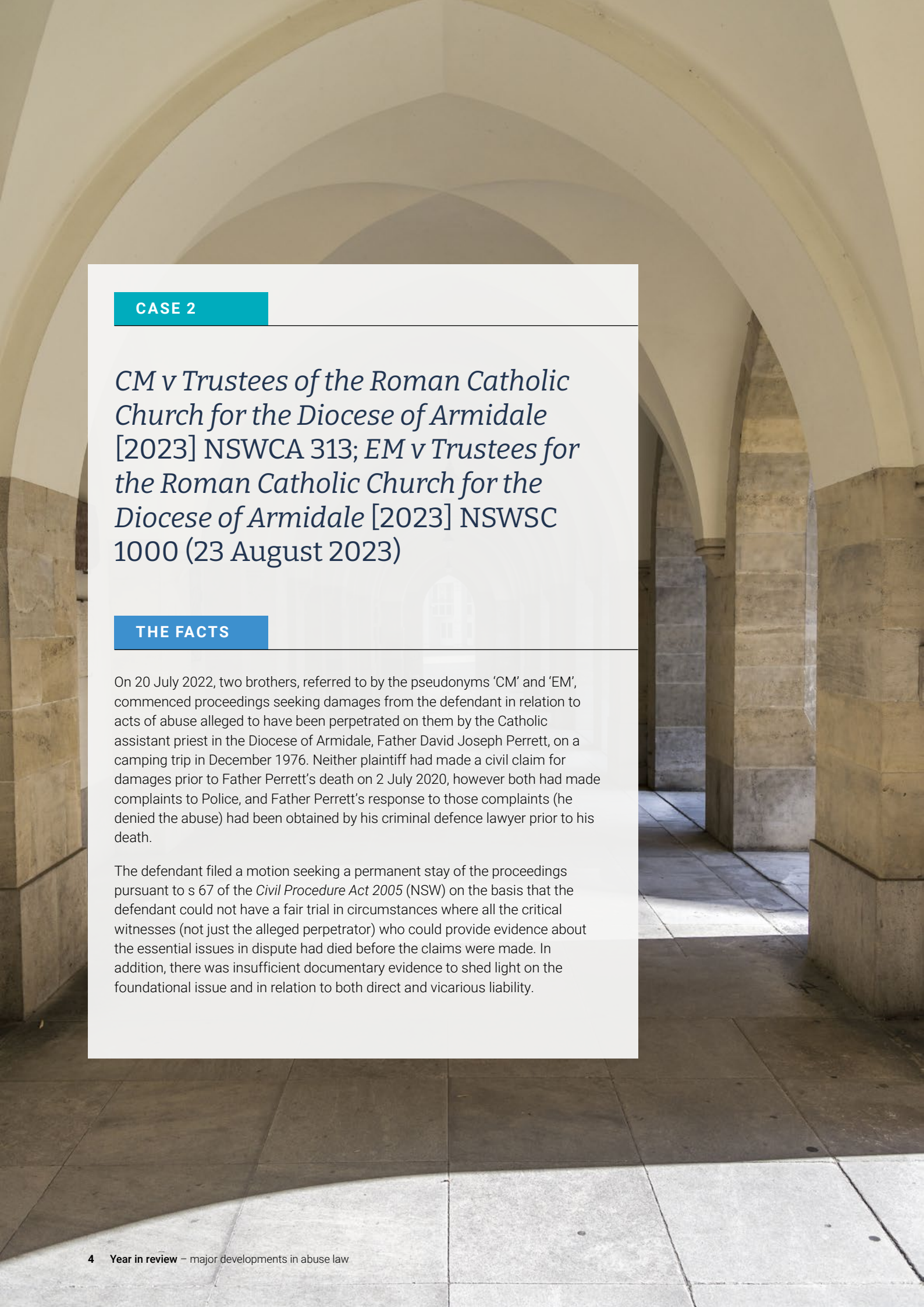
The High Court was asked to (1) determine the applicable standard for appellate review of an order of a court permanently staying proceedings and (2) determine whether GLJ's case involved an abuse of process justifying a permanent stay of proceedings. The majority held that the NSW Court of Appeal erred in allowing the Diocese's application for a permanent stay in all the circumstances and considered that GLJ's case is one that ought to be heard and determined.

The High Court held that only "exceptional cases" will justify the exercise of the power of a court to permanently stay proceedings. "The common and expected effects of the effluxion of time" will not, of themselves, reach the level of "exceptional circumstance" justifying the extreme remedy of a permanent stay being granted. Rather, that decision must be one of last resort on the basis that no other option is available. The majority found that all the Diocese had lost by reason of the death of Father Anderson was the opportunity to ask him if he sexually assaulted GLJ and the possibility of calling him as a witness. However, the loss of these opportunities did not amount to an unfair trial. Having regard to the unique facts in GLJ's case, the majority considered that there were not "exceptional circumstances" warranting a stay and dismissed the application.

Implications

The decision of the High Court provides guidance on the application of the law in this area which has been constantly evolving in all jurisdictions across the country. However, questions remain. The dispositive reasoning of the majority judgment turned on factual matters unique to GLJ's case, including that Father Anderson had a documented sexual interest in (male) children. Many other cases can be distinguished, including where the alleged perpetrators had no prior history. There is an open question as to how factually different cases must now be considered having regard to the "new normative structure". What is considered an "exceptional case" warranting a stay, in a post-*GLJ* world, will now need to be explored again by first instance and appellate courts. Until this becomes clear, all applications face a greater degree of uncertainty and risk.

The majority decision notes that claimants must prove their case to a *Briginshaw* standard, and that this is a high threshold that some claimants may fail on, even if their evidence is uncontradicted. While the decision rightly restores focus on the important *Briginshaw* test, in practice, it is difficult to confidently predict outcomes when an institution simply puts a claimant to proof on allegations, especially when their evidence is uncontradicted. We expect that, notwithstanding the importance of *Briginshaw*, many first instance courts will be slow to find allegations of abuse did not occur in such circumstances.



CASE 2

CM v Trustees of the Roman Catholic Church for the Diocese of Armidale [2023] NSWCA 313; *EM v Trustees for the Roman Catholic Church for the Diocese of Armidale* [2023] NSWSC 1000 (23 August 2023)

THE FACTS

On 20 July 2022, two brothers, referred to by the pseudonyms 'CM' and 'EM', commenced proceedings seeking damages from the defendant in relation to acts of abuse alleged to have been perpetrated on them by the Catholic assistant priest in the Diocese of Armidale, Father David Joseph Perrett, on a camping trip in December 1976. Neither plaintiff had made a civil claim for damages prior to Father Perrett's death on 2 July 2020, however both had made complaints to Police, and Father Perrett's response to those complaints (he denied the abuse) had been obtained by his criminal defence lawyer prior to his death.

The defendant filed a motion seeking a permanent stay of the proceedings pursuant to s 67 of the *Civil Procedure Act 2005* (NSW) on the basis that the defendant could not have a fair trial in circumstances where all the critical witnesses (not just the alleged perpetrator) who could provide evidence about the essential issues in dispute had died before the claims were made. In addition, there was insufficient documentary evidence to shed light on the foundational issue and in relation to both direct and vicarious liability.

The decision

In coming to his decision, Cavanagh J observed that (1) these types of applications are essentially fact-driven or dependant; (2) the defendant must satisfy the Court that exceptional circumstances exist; (3) extensive delay without more would not justify a stay; and (4) the death of a witness does not, of itself, justify a stay. Cavanagh J was satisfied that the defendant was unable to have a fair trial and was unable to meaningfully participate in a trial in respect of all causes of action. On this basis, Cavanagh J granted the application and ordered that the proceeding be permanently stayed pursuant to s 67 of the *Civil Procedure Act 2005* (NSW).

Cavanagh J's decision has been appealed to the Court of Appeal and a decision of that Court is presently awaited, the appeal having been heard in December 2023. The *GLJ* decision, which was handed down after Cavanagh's judgment, is a major focus of the appeal. In December 2023, the Court of Appeal delivered an 'interim' judgment, granting leave to appeal and directing the appellants to file and serve further evidence.

While the December 2023 decision does not dispose of the appeal, the comments of Leeming JA (with whom Payne JA and Harrison CJ agreed) are still of interest. Leeming JA held that *GLJ* was not just an application of orthodox principles, arriving at a different result from the Courts below. Instead, *GLJ*: *"must be taken to have changed the law*". The effect of *GLJ* is that forms of impoverishment of evidence in such cases *"are not to be regarded as exceptional"* from here on. Leeming JA went on to comment that *GLJ* is difficult to reconcile with the statute with respect to the removal of limitation periods. He went on to raise other difficulties with *GLJ*, including that it sits orthogonally to established principles and might have unintended and unprincipled consequences. However, Leeming JA ultimately noted that given the judicial hierarchy, he was bound to apply it.

Implications

The Court of Appeal's ultimate decision is hotly anticipated, as it will be a useful indicator of how appellate Courts interpret and apply the High Court's decision in *GLJ*. It remains to be seen whether the Court will distinguish the facts, which are notably different from *GLJ*, in that there is no evidence that the Diocese in this case was aware of any propensity to offend on the part of Perrett prior to the alleged abuse (whereas in *GLJ*, the perpetrator had a documented sexual interest in (male) children). How the Court of Appeal will grapple with the 'new world' scope of *GLJ* also remains to be seen.

Even beyond the Court of Appeal case itself, Leeming JA's veiled critique of *GLJ* may have further implications. The High Court will no doubt consider carefully the points raised by Leeming JA when returning to the issue in the *Willmot* and *RC* appeals.

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CASE 3

Willmot v State of Queensland [2023] QCA 102

THE FACTS

The Appellant is an Indigenous woman who commenced proceedings against the State of Queensland on 11 June 2020 seeking damages for serious physical and sexual abuse she claimed to have suffered whilst she was a State Child pursuant to the *State Children Act 1911* (Qld).

Specifically, the Appellant alleged three separate periods of abuse:

- from 1957 to 1959 while in the care of Jack and Tottie Demlin (foster carers), during which period she alleged Mr Demlin physically and sexually abused her
- in or around about 1959 while living at the Girl's Dormitory in Cherbourg, where she alleged being subjected to serious physical abuse by Maude Phillips, a dormitory supervisor, and
- between 1960 and 1967 while visiting her grandmother, two instances of abuse are alleged to have taken place. The first instance was alleged to have occurred in 1960 and to have been perpetrated by a relative referred to as 'NW'. The second instance is alleged to have occurred in or around 1967 perpetrated by a relative referred to as 'Pickering'.

On 14 December 2021, the defendant filed an application seeking to permanently stay the plaintiff's proceedings, and on 22 July 2022, the Court made an order permanently staying the plaintiff's proceeding.

The decision

The plaintiff filed a notice of appeal on 19 September 2022 and submitted six grounds in support of her application, which included that:

- the learned primary judge erred in treating the absence of "foundational witnesses" as being determinative
- it was against the evidence for the learned primary judge to find that it would be "insurmountably difficult" to extricate the impact of the alleged assault by NW from the impacts of the alleged mistreatment by other persons, and
- the learned primary judge failed to acknowledge that the evidence which the Appellant's former foster sibling would give forms a basis for the Respondent to investigate and substantiate the foundational allegations.

Her Honour emphasised at [78] "*… the consequences of the passage of some 60 years since those events are said to have occurred, and the fact that the State now does not have any opportunity to confront the alleged perpetrators to obtain instructions for the purpose of defending the claim, let alone calling those persons as witnesses, are such that any trial would be fundamentally unfair, and there is nothing that a trial judge could do to overcome that unfairness*". Her Honour was not convinced the evidence raised by the plaintiff overcame this unfairness.

The Court of Appeal dismissed the plaintiff's appeal. The plaintiff's special leave application was heard by the High Court on 9 November 2023, and special leave was granted.

Implications

The High Court's decision is anxiously awaited by those working in the historical abuse space, and it is hoped that the Court takes the opportunity to further elucidate the *GLJ* decision.

CASE 4

Kneale v Footscray Football Club Ltd [2023] VSC 679

THE FACTS

On 17 October 2023, the plaintiff, Adam Kneale, commenced proceedings seeking damages for injuries he claimed to have suffered as a result of being groomed, sexually abused and trafficked for abuse to others by Graeme Hobbs (Hobbs), a volunteer of Footscray Football Club, between 1984 and 1989. The plaintiff's family moved to West Footscray in 1984 when he was 11 years old. From that time, he went regularly to the nearby Western Oval as a spectator, both on game days and to watch training during the week. The plaintiff met Hobbs at the Western Oval. Much of the abuse took place on game days at the Western Oval, and in the Club's administration offices in the EJ Whitten Stand.

The decision

The jury found that there was negligence on the part of the defendant that was a cause of the plaintiff's injuries and assessed damages as follows: $3,250,000 for pain and suffering and loss of enjoyment of life; $2,605,578 for past loss of earnings and loss of earning capacity; and $87,573 for future medical and related expenses. Richard J held that there was no evidence on which the jury could reasonably award aggravated or exemplary damages, as the only ground on which the defendant could be held liable was in negligence, for failing to notice or act on 'red flags' raised about Hobbs as early as 1981, and failing to exclude him from the Club before 1992. Richard J also held that there was nothing to support a finding that the Defendant's negligence had been deliberate, or intentional, or involved reckless disregard of the plaintiff's welfare.

Richard J concluded that there was no evidence on which the jury could reasonably have found that the relationship between the defendant and Hobbs was one in which vicarious liability could arise. His reasons were that Hobbs' role with the defendant was informal, undocumented and uncertain, that the work performed by him was to sell membership and raffle tickets to the public, and there was no evidence that the defendant exercised control over Hobbs in relation to any other aspect of his work nor clothed him with any authority to represent it in anything other than selling tickets and raising funds. Further, Richard J found no evidence that Hobbs wore a uniform, or any garment associated with the defendant.

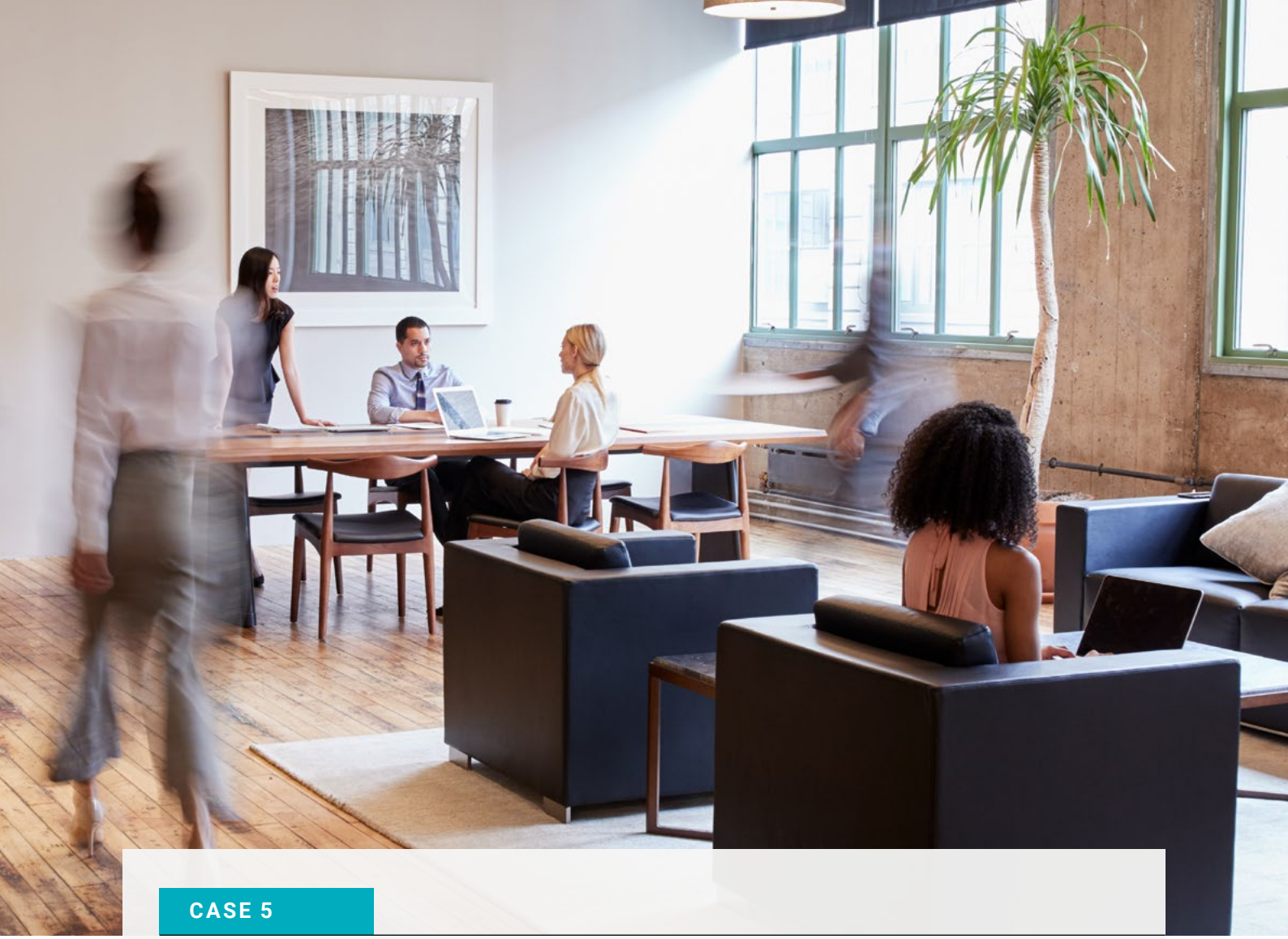
This case is currently under appeal.

Key points

- There was no evidence on which the jury could have reasonably found that the relationship between the volunteer and the sporting club was one in which vicarious liability could arise.
- There was no evidence on which the jury could reasonably have awarded aggravated or exemplary damages.

Implications

The award of $3,250,000 for pain and suffering is particularly significant in circumstances where there was no award of aggravated or exemplary damages, and we expect this will see plaintiff's having higher expectations in respect of this head of damage, particularly in Victoria.



CASE 5

CCIG Investments Pty Ltd v Schokman [2023] HCA 21

Should institutional liability for child abuse (other than direct negligence) be dealt with by way of non-delegable duties, as opposed to vicarious liability?

THE FACTS

Mr Schokman was working at a Daydream Island resort in 2016. He lived in shared accommodation the resort provided with another worker. One evening, he awoke to find his flatmate and coworker, Mr Hewett – who was heavily intoxicated – urinating onto his face. He suffered a cataleptic attack and a lasting personal injury which caused economic loss.

Mr Schokman sued his employer, alleging that (among other allegations) the employer was vicariously liable for the urinator. He lost at first instance; the trial judge did not accept that the urinator's actions were committed in the course of his employment with the employer. He then appealed and won in the Queensland Court of Appeal. The Court of Appeal found that the urination event was sufficiently connected to the urinator's employment, because it was a term of employment that Mr Schokman and the urinator live in the shared accommodation.

The employer appealed to the High Court.

The decision

Kiefel CJ, Gageler, Gordon and Jagot JJ

Kiefel CJ, Gageler, Gordon and Jagot JJ started from the bedrock principle that, for an employer to be held liable for the tort of an employee, the tortious act must be committed "in the course or scope" of the employment.

The key question is whether a wrongful or unsanctioned act was sufficiently connected to the employment. There is some nuance to this. Employers are not vicariously liable for all unauthorised acts of employees just because of a connection between the employment and the tort. The tortious act must be sufficiently connected to what the employee was assigned to do, putting focus on the employment role.

Another way to look at the 'sufficient connection' test is that it requires more than the employment to have provided the opportunity for the tortious act. If the employment also provides the 'occasion' for the tortious act – where the tortious act was made possible because the employer placed the employee in a 'special position' – the connection is stronger.

The critical authority is *Prince Alfred College v ADC*. In *PAC*, the High Court singled out specific features of the employment role, including authority, power, trust and control. Each of these features, if present and used to carry out the abuse (creating the occasion for it), increases the connection between the employment role and the tort. This combination makes a finding of vicarious liability more likely.

In *Schokman*, however, while the employment role had created the opportunity for his negligent act by placing the two men together in shared accommodation, it had not created the occasion for the tort as no part of Mr Hewett's employment role had led to his drunken act. Therefore, the connection to the employment role was insufficient. Mr Schokman's case against the employer failed.

Gleeson J wrote a separate judgment along similar lines.

Edelman and Steward JJ

Edelman and Steward JJ took a different approach from the judgment of the plurality, starting their analysis by stepping back and asking what vicarious liability involves. In their view, the notion of vicarious liability entails several discreet legal principles that need to be disentangled from one another because the entwining of these principles has led to great confusion. There are three discreet areas of law currently being described under the umbrella term
'vicarious liability':

- **Vicarious liability describing attributed acts** – where the acts, as opposed to the liability, of an agent is attributed back to the principal, on the basis of the agency relationship.
- **Vicarious liability describing attributed liability** – where the liability of an employee is sheeted home to the employer. The test in these cases involves identifying the powers and duties of employment, and then considering the sufficiency or closeness of the connection between the wrongful act and the powers and duties. Mr Schokman's case fell into this category, and it failed because of the lack of connection between the urination and the urinator's powers and duties.
- **Vicarious liability describing a non-delegable duty** – where the nature of the relationship between the parties gives rise to a special duty to ensure that reasonable care is taken. Mr Schokman's case did not fall into this category. Interestingly, though, their Honours suggested many other abuse cases might.

Implications

On its face, the *Schokman* decision seems to be an orthodox restatement of the law with respect to vicarious liability, in a case with nothing to do with child abuse. There are, however, some important takeaways. The plurality judgment of Kiefel CJ, Gageler, Gordon and Jagot JJ puts focus back on the primacy of the scope of employment, and whether it is sufficiently connected to the tortious act. The 'relevant approach' in *PAC* is described as one way to analyse that test, but it is not a separate test.

More significantly, Edelman and Steward JJ suggest the possibility of a significant shift in the way liability for child abuse is ascribed to institutions. Their Honours suggest liability should flow in such cases not because of 'true' vicarious liability, but because of the doctrine of non-delegable duties – where institutions must ensure care is taken. Their Honours acknowledge the decision of the High Court in *Lepore v State of NSW* is an impediment to their proposed conceptualisation of the law, but leave the question of grappling with that case for another day.

Whether or not Edelman and Steward JJ's proposed taxonomy of the law of vicarious liability finds favour with the Court in future decisions, and becomes the law of Australia, remains to be seen. Notably, though, when the High Court granted special leave to appeal from the decision of *DP v Bird*, the parties were invited to engage on the concept. It may be that the High Court will entertain the notion in that judgment, which is expected this year.

CASE 6

Bishop Bird v DP (A Pseudonym) [2023] VSCA66

Can vicarious liability only flow in an employment context, or does it go further?

THE FACTS

DP asserted that, in 1971 at the age of 5, he was sexually assaulted within the family home by a Catholic priest, Fr Coffey (as he then was), in Port Fairy. Coffey was ordained in 1960. At the time of the assaults, he was an assistant priest within the local parish and taught at a school. Years later, Coffey was convicted of indecently assaulting children. He died in 2013.

DP sued the Diocese of Ballarat (by way of Bishop Bird) in 2020, arguing that the Diocese was vicariously liable for the actions of Coffey and his resultant personal injury and loss. He won at first instance in the Victorian Supreme Court. The Diocese appealed.

The decision

There are two related issues dealt with by the Victorian Court of Appeal (Beach, Niall and Kaye JJA) worth focusing on.

The **first** is whether the Diocese could be vicariously liable for the actions of a priest at all. A priest is not an employee; he enters no contract of employment, but rather takes a vow. One orthodox understanding of vicarious liability (the Diocese argued) is that it is confined only to employment relationships.

However, the Victorian Court of Appeal held that even if vicarious liability did not flow between Diocese and priest by way of an employment relationship, that was not the end of the question. Vicarious liability could still be imposed on the basis of the agency relationship. This is because in some cases: *"the work performed by the tortfeasor and the business of the principal were so interconnected that the tortfeasor represented the business of and/or the principal, and, by doing so, conducted the business of the principal"*.

Applying those principles, the question became whether, on the facts of this particular case, the relationship between the Diocese and Coffey (then an assistant priest) was sufficient to attract vicarious liability. This was a highly fact-specific question. Their Honours noted that the Diocese had the right to exercise control over aspects of the work conducted by Coffey, and his work was *"necessarily and integrally connected with the fundamental work and function of the Diocese"*. It followed that vicarious liability *could* flow between Coffey and the Diocese.

The **second** question was whether vicarious liability actually *did* flow in relation to Coffey's abuse of DP. Their Honours held that it did. They applied the test espoused in *PAC v ADC* (the first intermediate appellate court application of that test). Their Honours noted the importance of looking for power, trust and an ability to achieve intimacy by way of the employment relationship. They noted the evidence that Coffey had an "aura of charisma and authority" with the parishioners, and that his role invested him with power, authority and respect. That enabled him to achieve intimacy with DP's family and DP himself. It followed that, applying the *PAC* test, *"the position of power and intimacy, invested in Coffey as an assistant priest of the parish, provided him not only with the opportunity to sexually abuse the respondent, but also the occasion for the commission of those wrongful acts."*

The Diocese was accordingly held vicariously liable for the assaults and their sequelae. The damages awarded in the primary judgment ($230,000 plus costs) stood.

The Diocese has since sought and been granted special leave to appeal to the High Court. The matter is currently in the list of business for sittings commencing 5 March 2024.

Implications

This decision answers, albeit not with finality, the question of whether a religious institution can ever be vicariously liable for the actions of a priest. The answer reached is 'yes', depending on the circumstances. However, since special leave has been granted, the High Court now has an opportunity to deliver the conclusive answer to this question. The Diocese has filed written submissions in that Court arguing that vicarious liability should be confined to an employment context, and that expanding the ambit of vicarious liability for policy reasons should be left for the legislature.

The outcome of the appeal on this point will have implications not just for religious institutions, but also for other institutions in relationships with persons – including volunteers and specifically foster parents – that could be described as "akin to employment".

The decision is also an application of the oft-cited but rarely applied *PAC v ADC* test. That test is expressed at such a level of generality that its application, particularly in a borderline case such as *DP*, is difficult. The Diocese now argues before the High Court that its application by the Victorian Court of Appeal was erroneous. The argument advanced is that while Coffey might have been in a position of "authority" with respect to parishioners generally, *PAC* calls for an analysis of the "special role" in which the employer placed the tortfeasor "vis-à-vis the victim". The Diocese argues this was not done by the Court of Appeal, whose analysis glossed over the fact that the Diocese did not place Coffey in any role, special or otherwise, with respect to *DP* personally.

Whether the High Court accepts those arguments or not, *DP* will present the High Court an opportunity to offer practitioners from both sides (and their clients) further guidance on how *PAC* actually applies. As already noted, it may also offer an opportunity to consider whether the concept of non-delegable duties has further work to do in this space. The judgment in *DP* may be one of the most significant decisions this year.

CASE 7

Anderson v State of NSW; Perri v State of NSW [2023] NSWCA 160

What is 'sexual abuse' for the purposes of evading the limitation periods? Does a strip search constitute sexual abuse, without any suggestion of sexual gratification among those who carried it out?

THE FACTS

On 7 April 2011, the plaintiffs, two boys aged 13 and 14, were arrested by police officers on suspicion of having stolen a mobile phone. They were transported to a police station where they were strip searched. They were required to take off all of their clothes in the presence of male police officers, and squat while naked. They were asked to lift their genitalia while in view. They were ultimately released without charge.

Ten years after the incident, the plaintiffs sued, arguing the strip search constituted a tortious assault. The State pleaded that the claim was statute barred. The plaintiffs' case on this issue was that the strip search was an act of 'sexual abuse' as defined under the *Limitations Act 1969* (NSW), and that as such the limitation period did not apply. The State disputed that this was a child abuse case. At first instance, Weber DCJ upheld the State's defence under the limitation period, finding: *"No doubt watching a child undress, or forcing him or her to do so, in certain circumstances may amount to a violation of the child's privacy, involving sexual abuse. However, in my view, not every case in which such behaviour occurred would necessarily do so. In my view, a sexual connotation must be present before behaviour of this nature could constitute child sexual abuse … here the strip searches, although clearly regrettable, had no such sexual connotation".*

It followed that the claim was *prima facie* statute barred and, after determining (against them) the plaintiff's alternative position that they should be entitled to an extension of time under the *Limitation Act*, Weber DCJ entered judgment for the State.

The decision

The plaintiffs' application for leave to appeal was refused by the NSW Court of Appeal, comprised of Gleeson JA, White JA and Griffiths AJA (who wrote the primary judgment).

Griffiths AJA upheld the primary judge's conclusion that "sexual abuse" for the purposes of the *Limitations Act* meant conduct with a sexual connotation. This was supported by the extrinsic materials, including the Royal Commission's Final Report. The Commission had itself defined "sexual abuse" in this way: *"Any act which exposes a child to, or involves a child in, sexual processes beyond his or her understanding or contrary to accepted community standards."*

Whether conduct had a sexual connotation so as to constitute "sexual abuse" was a question of fact that must be determined objectively by the Court. The subjective intention of the perpetrator was a relevant consideration, but ultimately it was a question of fact for the Court itself.

The plaintiffs accepted all of the above principles. Their contention was that the trial judge had erred in his fact-finding exercise, and ought to have found that, objectively viewed, the conduct constituted sexual abuse. However, Griffiths AJA found that no arguable error of law or fact was demonstrated in the trial judge's reasons.

After dealing with another appeal ground as to the extension of the limitation period, the summons seeking leave to appeal was dismissed.

Implications

This decision is the first intermediate appellate Court treatment as to how "sexual abuse" should be construed for the purposes of the child abuse exclusion from the limitation period. The 'test' is now that sexual abuse will be comprised of acts with a sexual connotation. Whether conduct has such a connotation is a question of fact to be determined by the trial judge. How the conduct was perceived by perpetrator and victim might be relevant, but it is ultimately a question for the Court.

These principles will provide guidance to practitioners grappling with other conduct on the margins of what is understood to constitute sexual abuse.

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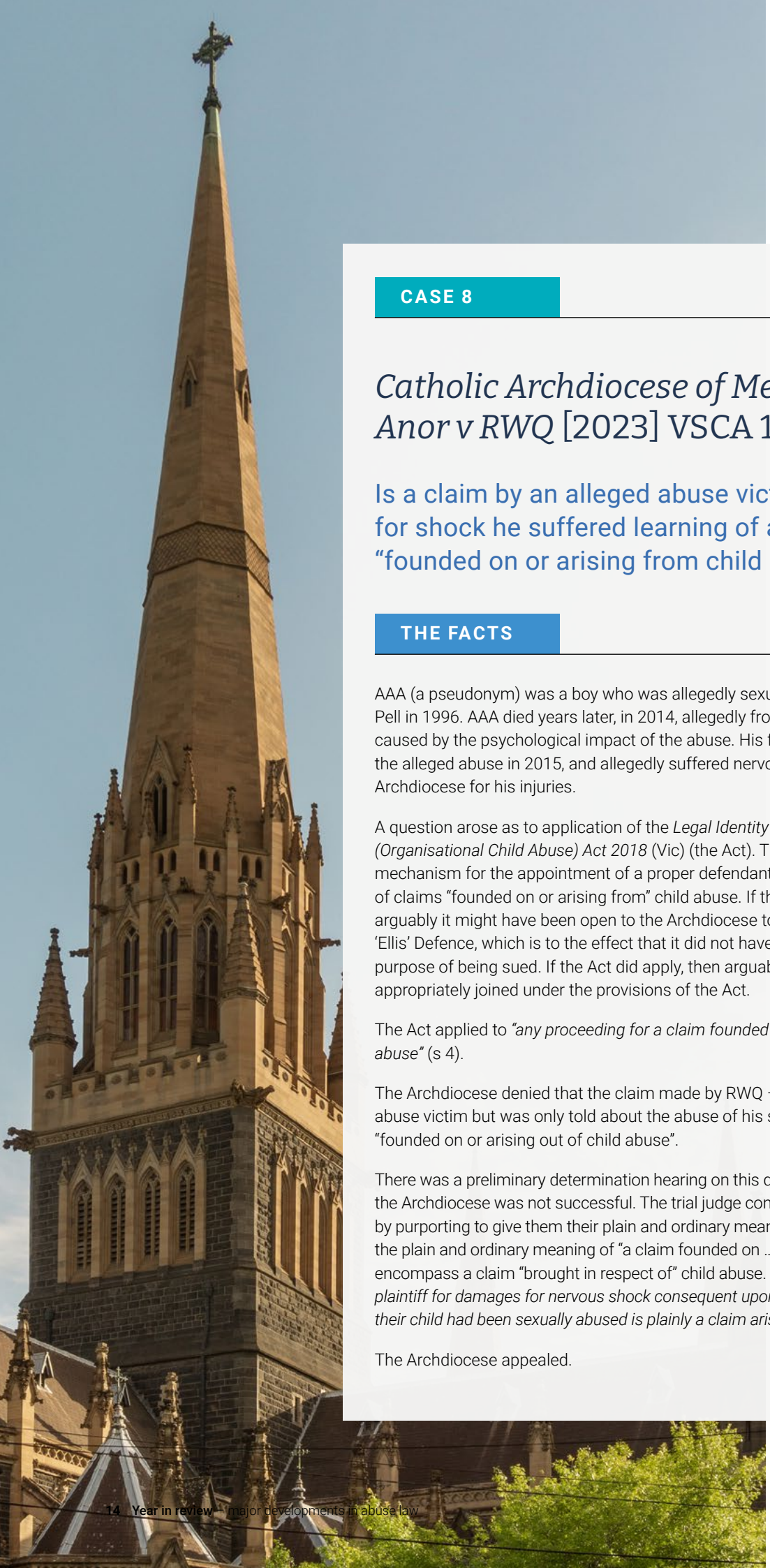

CASE 8

Catholic Archdiocese of Melbourne & Anor v RWQ [2023] VSCA 197

Is a claim by an alleged abuse victim's father for shock he suffered learning of abuse a claim "founded on or arising from child abuse"?

THE FACTS

AAA (a pseudonym) was a boy who was allegedly sexually abused by George Pell in 1996. AAA died years later, in 2014, allegedly from a heroin overdose caused by the psychological impact of the abuse. His father, RWQ, was told about the alleged abuse in 2015, and allegedly suffered nervous shock. He sued the Archdiocese for his injuries.

A question arose as to application of the *Legal Identity of Defendants (Organisational Child Abuse) Act 2018* (Vic) (the Act). The Act provides a mechanism for the appointment of a proper defendant to incur liability in respect of claims "founded on or arising from" child abuse. If the Act did not apply, then arguably it might have been open to the Archdiocese to raise the so-called 'Ellis' Defence, which is to the effect that it did not have legal personality for the purpose of being sued. If the Act did apply, then arguably the Archdiocese was appropriately joined under the provisions of the Act.

The Act applied to *"any proceeding for a claim founded on or arising from child abuse"* (s 4).

The Archdiocese denied that the claim made by RWQ – who was not an alleged abuse victim but was only told about the abuse of his son – was a claim "founded on or arising out of child abuse".

There was a preliminary determination hearing on this question. At first instance, the Archdiocese was not successful. The trial judge construed the provisions by purporting to give them their plain and ordinary meaning. He considered that the plain and ordinary meaning of "a claim founded on … child abuse" would encompass a claim "brought in respect of" child abuse. Similarly: *"a claim by a plaintiff for damages for nervous shock consequent upon the plaintiff being told that their child had been sexually abused is plainly a claim arising from child abuse."*

The Archdiocese appealed.

The decision

The Archdiocese accepted that the way the trial judge construed the section was open on the face of the words. However, it was argued that the section had to be considered in conjunction with the entire Act, its history and the extrinsic materials. The principle of legality also had to be taken into account; namely that where legislation is said to interfere with pre-existing rights, the intention to do so must be manifest.

As to the entire Act, attention was drawn to s 3, where "child abuse" was defined exhaustively as *"an act or omission in relation to a person when the person is a minor that is physical abuse or sexual abuse"*. Attention was also drawn to s 1, which stated that the main purpose of the Act was to *"provide for child abuse plaintiffs to sue…"* Read together, it was suggested that RWQ was not a "child abuse plaintiff", because the claim did not relate to an act or omission in relation to *him* when he was a minor.

As to the extrinsic materials, the Archdiocese highlighted the *absence* of recommendations from relevant reports (including from the Royal Commission) that recommended broadening recovery avenues for civil claims to secondary victims.

The Victorian Court of Appeal (Beach JA, McLeish JA and Kennedy JA) agreed with the trial judge that the logical starting point was the construction of the critical section itself. They agreed with the trial judge that the natural meaning of the expansive phrase 'a claim founded on or arising from child abuse' includes an action for damages based on child abuse perpetrated on a plaintiff's child.

Their Honours were not persuaded either the balance of the Act or the extrinsic materials shifted the operative meaning. As to the extrinsic materials, while it might be accepted the main focus of the legislation was directed at primary victims, that did not mean that it was intended for secondary victims to be excluded. In any event, extrinsic materials cannot be relied on to displace the clear meaning of the text.

Last, their Honours held that the trial judge's constructions were consistent with the purpose of the Act, noting: *"There is no sound reason why Parliament would address this issue for one group of plaintiffs (those who had suffered abuse), but not others (those who suffered mental harm as a result of the abuse of their children)."*

The Archdiocese was refused leave to appeal. An application for special leave to appeal to the High Court was refused in early 2024.

Implications

'Nervous shock' claims advanced by secondary victims remain comparatively few in number but are a growing proportion of all claims advanced. The effect of this decision is that claimants can benefit from legislation that requires unincorporated organisations to nominate a proper defendant. The claims will be easier to advance in the wake of this decision, which could lead to a further uptick in such claims.

The fact that an entirely new category of claim is now open may be of concern to unincorporated organisations and raises the spectre of indeterminate liability. That said, it remains to be seen whether such claims will ever reach comparable numbers to primary victim claims. After all, it has always been open to advance such claims against institutional defendants that are not unincorporated organisations (such as the States across Australia) which have never had the benefit of legislation like the Act, yet secondary victim claims remain comparatively few in number. There remain other mechanisms to defend against such cases, including questions around whether duties of care are owed to secondary victims, and the possibility of permanent stay applications.

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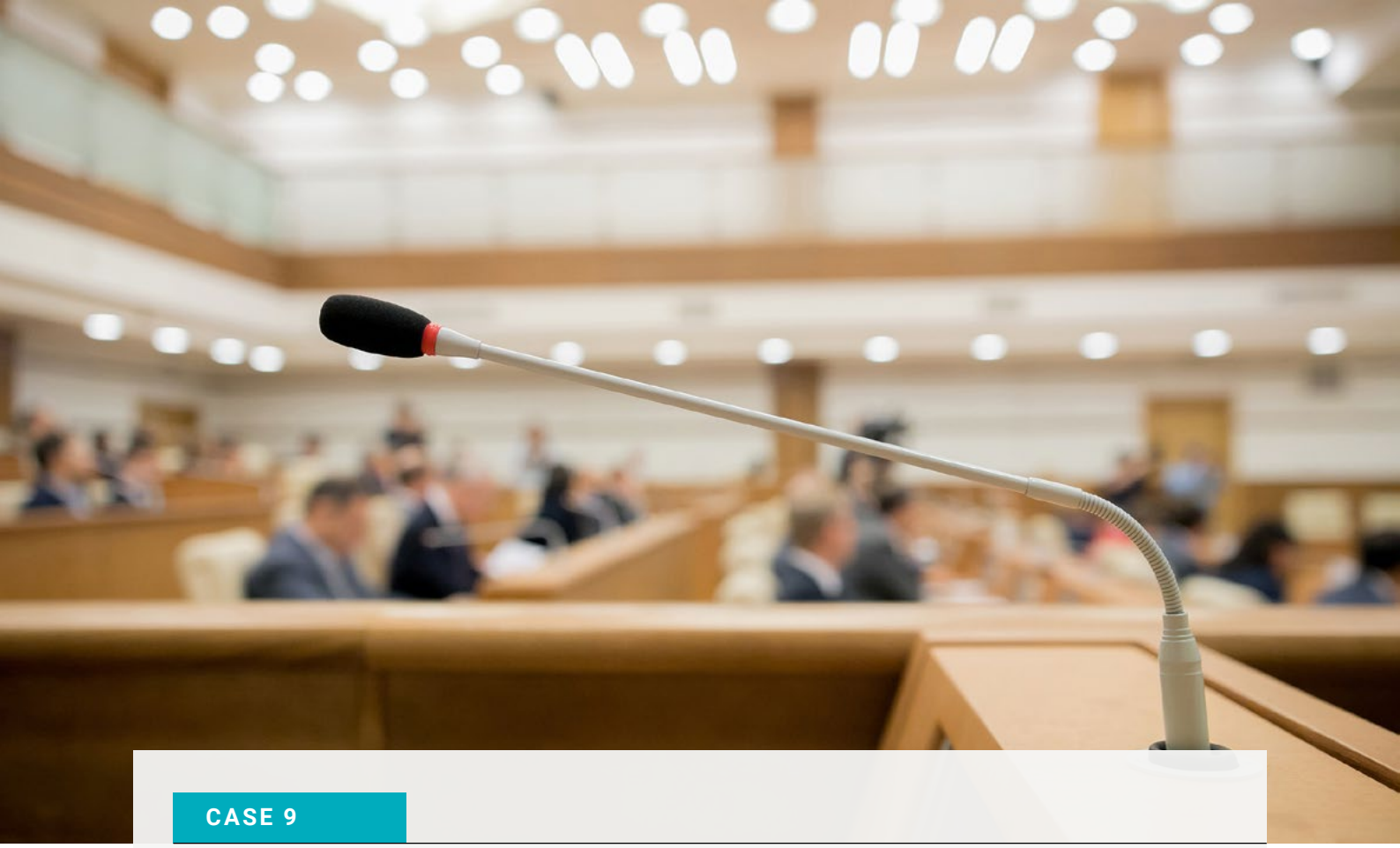


CASE 9

HXA v Surrey County Council; YXA v Wolverhampton City Council [2023] UKSC 52

A child welfare agency investigates neglect in a family home. Do they ever owe a duty of care to the children? If so, when, and in what circumstances?

THE FACTS

It should be noted at the outset that this case and the judgment come from the United Kingdom.

HXA alleged she ought to have been removed from her mother by a child welfare agency when she was a child in the 1990s, after reports of inappropriate physical chastisement, verbal abuse and neglect. There were also concerns about her mother's boyfriend acting inappropriately around her, which (in the litigation) she alleged were not properly followed up on, leading to her being sexually abused by him.

YXA alleged that a child welfare agency ought to have removed him from his parents at an earlier point in time. Reports were being made that his parents drank and took cannabis to excess, medicated him excessively and physically assaulted him. Ultimately (but at a time YXA says was too late), he was removed from their care.

Importantly, neither HXA nor YXA were formally in the care of the child welfare agencies pursuant to Court orders at the relevant time. Parental responsibility still resided with their parents.

In their adult years, HXA and YXA sued the child welfare agencies for negligence. The child welfare agencies sought and obtained summary dismissal, relying on a similar case from the UK Supreme Court, in which it had been found that a duty of care did not arise in such circumstances: *Poole Borough Council v GN* [2019] UKSC 25. HXA and YXA appealed, including successfully in the UK Court of Appeal. The Councils then appealed up to the UK Supreme Court.

The decision

The UK Supreme Court held that neither plaintiff had an arguable duty of care, and summarily dismissed both cases.

The Court acknowledged that the local authorities had powers and duties to act in certain ways with respect to children. But the fact that those powers existed was "neutral" as to the existence of a duty of care. The Court went on:

"One has to be very careful not to slide back to resting the duty of care, and breach, at common law on the mere fact that the public authority had statutory duties towards, and powers in respect of, the claimant … what is required (which the courts … have sometimes referred to … as the "something more" or "something else") is that there would have been a duty of care owed – because, for example, there is an assumption of responsibility."

The plaintiff's had to establish that there was an assumption of responsibility by the child welfare agencies. Without that, they were owed no duty, because in the absence of an assumption of responsibility, no person or institution is under a common law duty of care to confer a benefit to someone else (such as protecting them from harm by third parties). One might owe a duty not to *harm* others, but not to protect others.

To tell if the agency had assumed responsibility, it sharpens up the analysis always to ask, *"what is it alleged that the defendant had assumed responsibility to use reasonable care to do?"* The best answer HXA and YXA could offer was that there had been an assumption of responsibility to protect both children from abuse. However, the Supreme Court was not persuaded that anything the public authorities did amounted to an assumption of responsibility of that kind. The authorities carrying out an investigation did not entail assuming responsibility to protect the children from abuse.

The highpoint of YXA's claim that responsibility was assumed was evidence that the agency placed him into temporary respite care. While it was accepted that responsibility was assumed in relation to the respite care itself, that was still a far cry from the agency assuming responsibility to protect him from abuse:

"Providing respite accommodation for YXA did not constitute an assumption of responsibility to use reasonable care to protect YXA from the abuse. The local authority was temporarily taking YXA away, with the consent of his parents, on the basis that he would be returned. Indeed, the local authority had a duty to return YXA to his parents".

Implications

In the United Kingdom, this decision reaffirms *Poole* and clarifies the law to the extent that it would be surprising if any similar claims were advanced in future (unless they can be distinguished on the basis that there was a clear assumption of responsibility).

Whether Australian Courts would follow suit is difficult to say, but an 'assumption of responsibility' is one of the factors Australian Courts look for when deciding whether a novel duty of care exists. There are no Australian decisions entirely on all fours, but the decision appears consistent with Australian law as to novel duties of care generally. If *Poole* and *HXA* are ultimately followed, such claims will be difficult for claimants unless they can demonstrate an assumption of responsibility.

CASE 10

WQA (a pseudonym) v Archbishop Comensoli [2023] VSC 657

THE FACTS

The plaintiff (WQA) claimed damages for personal injury and economic loss arising from abuse that allegedly occurred in 1959 – 1961. During his adulthood (and in the period of his alleged economic loss), he received at various periods a significant Newstart allowance and a Disability Support Pension (**DSP**) under Commonwealth legislation. Those payments were significant; ~$250,000. In the case he later brought, he alleged that he only received those benefits because he was unable to work due to the abuse.

Sometimes statutory benefits received under the relevant legislation are repayable to the Commonwealth upon settlement (practitioners will be familiar with receiving 'Centrelink clearances' post settlement). It was common ground that where the Commonwealth will seek to recover benefits, those *repayable* benefits should not be taken into account for the purposes of economic loss. In this case, however, the DSP and Newstart paid to this plaintiff were *not* repayable. The Commonwealth had confirmed this.

The question was whether the social security benefits paid to this plaintiff should be taken into account in calculating damages for past economic loss, in circumstances where they were not repayable to the Commonwealth. This was determined by Gorton J in the Victorian Supreme Court.

The decision

Gorton J started by noting the fundamental principle that the purpose of compensatory damages was to put the injured party in the position they would have been in had the wrong not been done. His Honour acknowledged that at first glance, that might suggest social security payments should be taken into account when determining economic loss. Otherwise, the plaintiff would be 'double dipping' – compensated first by the Commonwealth in the form of benefits, and second by the defendant in the form of damages. The plaintiff would be left with a windfall, having been paid twice for the same economic loss. This was essentially the defendant's case.

But Gorton J held that this principle was "not absolute". If a plaintiff received some compensation from a third party to ameliorate the effects of the damage done to them (for example, where a benevolent organisation gives a gift to an injured plaintiff), it would be wrong to let the defendant escape the consequences of their wrongdoing by taking into account this payment. They would receive a windfall because of the generosity of others.

Whether a case fell into this exception depended on the intention of the party that paid the money. If the payor intended that the plaintiff keep the money in addition to damages, then it is not to be taken into account. This led Gorton J to consider the intention of the Commonwealth in paying Newstart and DSP benefits to the plaintiff, doing so by attempting to divine the intention of the Commonwealth from the text of the legislation in question.

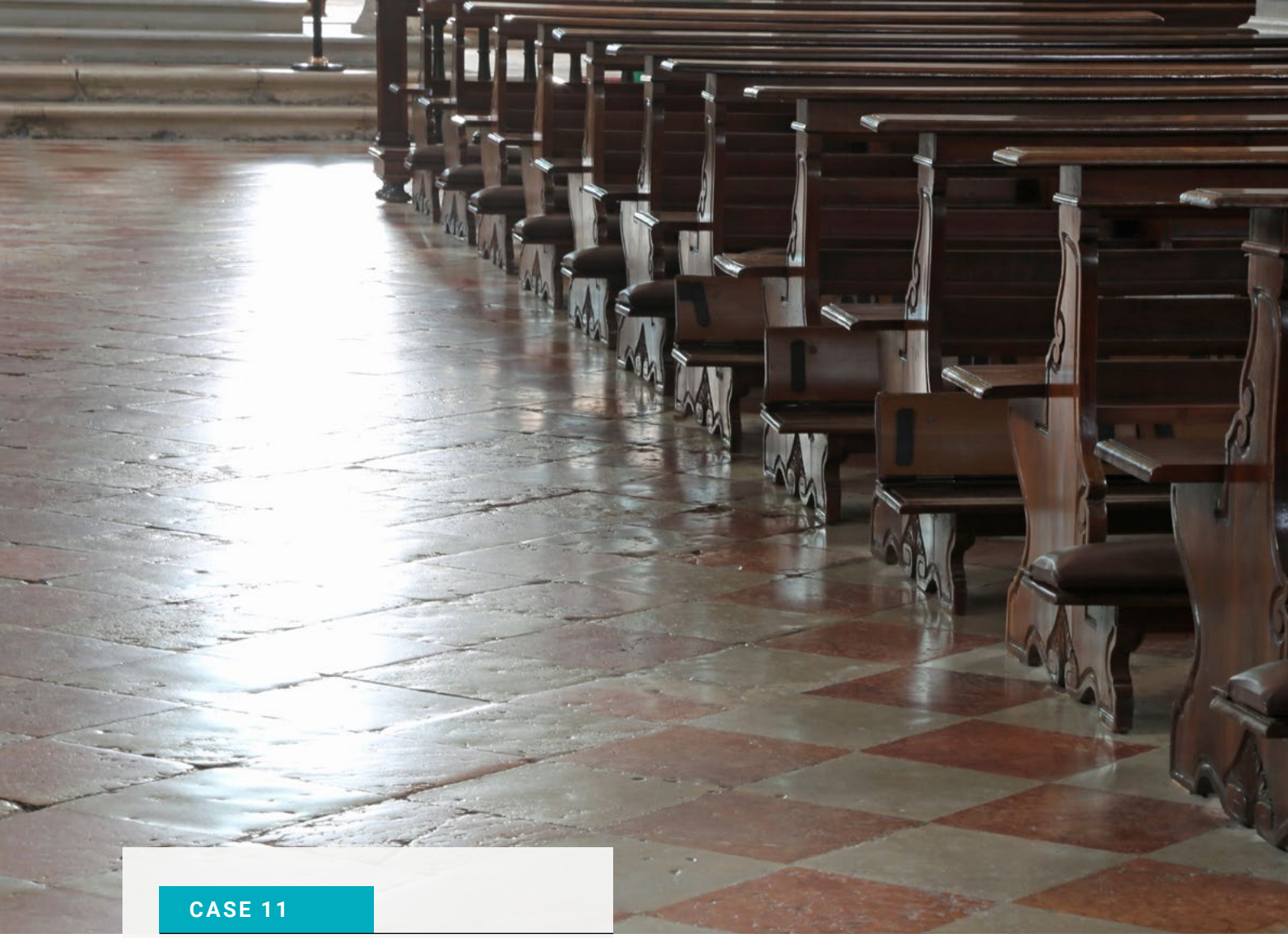
His Honour held that the legislature intended to create one arrangement that applied to *all* relevant social security payments, whether repayable to the Commonwealth or not. They are *always* to be ignored in the assessment of damages, even though they are only *sometimes* repayable to the Commonwealth by the plaintiff or wrongdoer. Even if social security payments fall outside the preclusion period and there will be no recovery mechanism open to the Commonwealth, they are still to be disregarded in terms of the assessment of damages. This stops the wrongdoer getting the benefit of paying less damages, just because the Commonwealth has taken upon itself to pay social security payments to an injured party.

The case is currently under appeal.

Implications

The law as to when benefits are to be deducted, and when the plaintiff may retain them *in addition to* damages, has long been plagued with uncertainty. The issue raises difficult policy questions, as whatever way the Court resolves the issue either the plaintiff or the defendant will be left with a 'windfall' from the third party. Parties might have thought the High Court clarified these matters thirty years ago in *Manser v Spry* (1994) 181 CLR 428, where it was held that damages paid to a plaintiff should be reduced to the extent she received worker's compensation under a State no-fault scheme. But here, Gorton J distinguished *Manser* and held that the question should be answered in favour of the plaintiffs when it comes to other social security payments.

Whether *WQA* will survive the test of time remains to be seen. For the moment, however, the immediate implication is that it will cost defendants more to settle certain types of cases. Even if a plaintiff has received Commonwealth social security benefits that they will never need to pay back, a Court must ignore them when assessing damages. That, or challenge the correctness of *WQA*.



CASE 11

TJ v Bishop of the Roman Catholic Diocese of Wagga Wagga [2023] VSC 704

THE FACTS

On 27 April 2022, the plaintiff commenced proceedings seeking damages as a consequence of alleged negligence and vicarious liability of the defendant in respect of grooming and sexual abuse by Father Vincent Kiss between 1972 and 1976. The trial proceeded before a jury in Victoria, but was subject to the provisions of the *Civil Liability Act 2002* (NSW).

The decision

It was common ground between the parties that the trial should proceed before a jury and in a manner reflected in *SR v Trustees of the De La Salle Brothers* [2023] NSWSC 66. The contentious question of exemplary damages for the plaintiff's claim was put to the jury. On 10 November 2022, the jury verdict was delivered and assessed damages as follows: $1,100,000 awarded for pain and suffering; $896,000 awarded for past economic loss; $69,000 awarded for future economic loss and $1,300,000 awarded for exemplary damages.

Following the verdict, the defendant applied for the exemplary damages award to be set aside. O'Meara J determined that, in circumstances where the defendant had ultimately admitted that it was vicariously liable for the conduct of Kiss, there was no basis to set aside the exemplary damages award.

Implications

The exemplary damages award is eye-wateringly large, and we anticipate plaintiff expectations to be raised in respect of this head of damage moving forward.

Contact us

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