



Victorian Supreme Court of Appeal confirms Catholic Diocese vicariously liable for historical abuse committed by a priest - Bird v DP (a pseudonym) [2023] VSCA 66 (3 April 2023)

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Bird v DP (a pseudonym) [2023] VSCA 66 (3 April 2023)

Judges: Beach, Niall and Kaye JJA

Date of Hearing: 17 March 2023

Date of Judgement: 3 April 2023

This is a Supreme Court of Victoria, Court of Appeal, decision in respect of the original decision of His Honour Justice Forrest on 22 December 2021, *DP (a pseudonym) v Bird* [2021] VSC 850 (22 December 2021).

There was a cross claim of the Respondent also heard in the appeal, relating to damages, which was also dismissed. This aspect of the appeal is not dealt with in this case note.

Original decision

In 2020, the Respondent commenced proceedings in the Supreme Court of Victoria in which he claimed damages for psychological injuries. The Respondent alleged he sustained the injuries as a result of assaults committed by Catholic Priest, Father Bryan Coffey, at the home of his parents in Port Fairy in 1971.

The claim was made on two bases, namely the Diocese was:

1. **vicariously liable** for the assaults committed by Coffey; and
2. **directly liable** in negligence as a result of the failure by the (then) Bishop of the Diocese to exercise reasonable care in his authority, supervision and control of the conduct of Coffey.

The trial Judge, Forrest J, found that Coffey had committed the assaults which DP alleged. His Honour held that the Diocese was **vicariously liable** for those assaults, but that the Respondent had not established that the Diocese was directly liable to him in negligence. Forrest J assessed the Respondent's damages in the sum of \$230,000.

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Appeal

The Applicant, Bird, sought leave to appeal the decision on three grounds which related to vicarious liability:

1. in circumstances where Coffey was found not to be an employee of the Diocese, the learned trial Judge erred in finding that the Applicant was vicariously liable for his conduct;
2. further or in the alternative, the learned trial Judge erred in holding that the Diocese could be vicariously liable for the conduct of another

(this was not relied on by the Applicant at hearing); and

3. further or in the alternative, assuming the relationship between the Diocese and Coffey gave rise to a relationship of vicarious liability (which is denied), the learned trial Judge erred in concluding that the relationship was such as to found a conclusion that the Diocese was so liable.

Findings

First ground of appeal

The Court of Appeal found that it was not made out and held that Forrest J was correct to conclude that the relationship between Coffey as an assistant priest, and the Diocese was one which, in an appropriate case, would render the Diocese vicariously liable for any tort committed by Coffey in his role as an assistant priest within the Diocese.¹

In reaching this position, the Court of Appeal relevantly stated:

- *“it has been recognised in the authorities that, in certain circumstances, vicarious liability may apply in respect of a relationship which is not that of employment. Secondly, the cases reveal, in large measure, a commonality of the factors that are central to the issue whether, in an appropriate case, the relationship is one to which the principle of vicarious liability may apply.”*²
- *“A number of those factors, of course, are not applicable to the relationship between Coffey and the Diocese. It is for that reason that Coffey could not be considered to be an employee of the Diocese. However, the decision in Hollis is important, because it demonstrates the relevance and significance, as a criterion of vicarious liability, of the circumstance that the particular tortfeasor’s role was so closely tied with the enterprise of the employer that he or she was presented to the public as carrying out the work of, and representing, the employer.”*³
- *“In his work as assistant priest, Coffey was very much a representative, and conducted the work, of the Diocese. His role, and the work he performed in undertaking that role, was necessarily and integrally interconnected with the fundamental work and function of the Diocese.”*⁴

Third ground of appeal

The Court of Appeal found it was not made out and held that Forrest J was correct to conclude that Coffey perpetrated the indecent assaults on the Respondent in such circumstances as to render the Diocese vicariously liable to the Respondent.

In reaching this position, the Court of Appeal relevantly stated:

- *“It has long been accepted that a principal may be vicariously liable for a tort that is committed by an employee or agent, notwithstanding that the tort is constituted by criminal acts committed by that employee.”*⁵
- *“On the other hand as would be expected an employer is not*

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On the other hand, as would be expected, an employer is not liable for a wrong, criminal or civil, committed by an employee, where it is based on acts performed by the employee for which the employment could not be properly regarded as the occasion.”⁶

- “Applying those principles to the evidence in the present case, we consider that the judge was well justified in concluding that 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.”⁷

- “It is quite clear that the role of Coffey, presenting as a priest to the local parishioners, invested him with a substantial degree of power, authority and respect. As such, that role, in itself, engendered a significant degree of respect and trust in him by his parishioners, enabling him to achieve real intimacy with the respondent’s family, and with the respondent in particular.”⁸

Implications of decision

Courts will continue to look at the evidence regarding the nature of the specific relationship between the tortfeasor and a defendant organisation when determining whether vicarious liability is established. The Court of Appeal re-confirmed that vicarious liability is not confined solely to relationships of an employer and employee.

This Court of Appeal decision shows that there are a number of factors that will be considered when determining if an entity is vicariously liable for the conduct of the tortfeasor, including:

- the nature of the role of the tortfeasor and whether their work was necessarily and integrally interconnected with the fundamental work and function of the entity;
- whether the tortfeasor wore a uniform and publicly represented the entity;
- the control that the entity exercised over aspects of the work of the tortfeasor (even if day-to-day supervision is of another person);
- the tortfeasor’s role within the community to which they were assigned;
- the tortfeasor’s relationship with the victim and their family;
- the level of power, authority and respect held by the tortfeasor as a result of representing the entity; and
- the circumstances and location in which the tort was committed.

For further information

Please get in contact with [Ben Lloyd](#), Principal, [Sharon Van Dyk](#), Special Counsel or [Erin Rooney](#), Senior Associate.

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Endnotes

1. *Bird v DP (a pseudonym)* [2023] VSCA 66, paragraph 130 and 131.
2. *Ibid*, paragraph 82.
3. *Ibid*, paragraph 94.
4. *Ibid*, paragraph 128.
5. *Ibid*, paragraph 133.
6. *Ibid*, paragraph 136.

7. Ibid, paragraph 148.
8. Ibid, paragraph 149.

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