



Vicarious liability and childhood abuse claims

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Please note: This blog references a decision of the Victorian Supreme Court of Appeal's decision in [Bird v DP \[2023\] VSCA 66](#), which was handed down on 3 April 2023. This decision was overruled by the High Court of Australia in late 2024.

On 20 October 2023, leave was granted to appeal the decision of the Victorian Supreme Court of Appeal to the High Court. The High Court decision was handed down on 13 November 2024.

The High Court ruled in favour of the Diocese, determining that the principle of vicarious liability should **not** extend to relationships "akin to employment". As such, the Court held Coffey was not an agent of the Diocese and therefore, vicarious liability for his actions could not be attributed to the Diocese. This overruled the Victorian Supreme Court of Appeal decision detailed below.

Please use this blog as a reference only to the previous Court of Appeal decision, as it is not representative of the current case law. For information about the current High Court decision in this matter, read our blog "[High Court finds Catholic Church not vicariously liable for historical sexual abuse](#)".

Original Supreme Court of Appeals decision from April 2023 – case review

The recent Supreme Court of Victoria – Court of Appeal decision in [Bird v DP \[2023\] VSCA 66](#) (3 April 2023) is an important case for [survivors of childhood abuse](#). Ultimately, the Court of Appeal found the Catholic Church liable for the sexual abuse by a paedophile priest. This decision upholds the original ruling, which found the church vicariously liable for the abuse.

What is vicarious liability?

Vicarious liability is when one party, typically an employer or an institution, is held responsible for the actions of another party.

In this case, the Court has addressed whether or not the Catholic Church was vicariously liable for the actions of an assistant Catholic Priest for childhood sexual assaults which took place in the victim's home at social events during the early 1970's. At this time, assistant priests were not considered employees of the Church.

The Court of Appeal confirmed that vicarious liability does not rest on establishing an employment relationship and found that the Catholic Church is vicariously liable for the actions of its assistant priests.

The circumstances of the abuse

Coffey was ordained in 1960 and was appointed to St Patrick's Port Fairy in 1966 as an assistant priest to Father Patrick O'Dowd. At the relevant time, Bishop Mulkerns was the appointed Bishop in charge of the Diocese.

Along with undertaking pastoral duties, Coffey taught at St Patrick's Primary School, where DP attend from 1971. DP gave evidence in the case that he was assaulted by Coffey on two occasions in 1971 when Coffey attended the family home.

It is important to note that DP was raised in a strict family home. Coffey provided pastoral care to DP's family and was trusted by the local Catholic community.

The original claim for compensation due to childhood abuse

In 2020, the respondent in the recent appeal, known by way of pseudonym "DP", commenced legal proceedings in the Supreme Court of Victoria in which he claimed that he had suffered psychological injuries arising from sexual assaults committed by a Catholic priest, Father Bryan Coffey ("Coffey"), at his parents' home in Port Fairy in 1971.

The proceedings were brought against the Diocese of Ballarat ("the Diocese") through the current Bishop, Paul Bird, who was the nominated defendant for the purpose of the original proceeding.

After a trial lasting fourteen days, the Judge concluded that Coffey had committed the assaults alleged by DP. Whilst the Judge held that the Diocese was "vicariously liable" for the assaults, it was found that DP had not established that the Diocese was directly liable to him in negligence.

This is because there was insufficient evidence upon which to find a conclusion that the Diocese or the Bishop should have known of the potential misconduct of Coffey. The Court found that there was insufficient evidence to demonstrate that there was a foreseeable risk in 1971 that Coffey might assault young boys such as DP.

Appeal by Diocese of Ballarat

The Diocese subsequently sought leave to appeal the findings of the Court on the following grounds:

- In circumstances where Coffey was found **not** to be an employee of the Diocese, the learned trial judge erred in finding that the applicant (the Diocese) was vicariously liable for his conduct.
- Alternatively, and assuming that the relationship between the Diocese and Coffey gave rise to a relationship of vicarious liability (which was denied by the Diocese), the learned trial judge erred in concluding that the relationship was such as to found a conclusion that the Diocese was so liable.

As part of the grounds of appeal, the Diocese challenged the Court's finding that:

1. the Diocese was "all powerful in the management of clergy within the Diocese" and that activities of an assistant priest were under the "direct control" of the priest, who reported to the Bishop; and
2. the visits to DP's home were part of Coffey's pastoral role.

It was the Diocese's submission that these findings of the Court formed part of the erroneous conclusion that the Diocese was vicariously liable.

The Diocese's arguments at appeal

During the appeal, the Diocese argued that the existence of a relationship of employer and employee is a necessary foundation for a conclusion that the Diocese was vicariously liable for the wrongs of Coffey. They submitted that in Australia, vicarious liability requires an employment relationship between the tortfeasor (in this case, DP) and the defendant (in this case, the Diocese).

The Diocese argued that it was not "all powerful" and that Coffey's priestly duties did not provide the opportunity for the wrongful act. Further, they submitted that the fact that Coffey was at a parishioner's home did not itself establish the requisite connection between his role as an assistant priest and the opportunity and occasion that he took to abuse DP.

DP's arguments at appeal

DP's arguments referenced the High Court decisions of *Sweeny* and *Hollis*. These cases do not preclude a finding of vicarious liability in a case to which the employment/independent contractor dichotomy is inapplicable. They also submitted that the decision in *Colonial Mutual Life* is particularly relevant as it supports the application of vicarious liability to a person who stands in the place of, or represents a defendant and that is neither an independent contractor nor an employee.

DP also argued that the evidence provided a substantial basis for the finding that the Bishop was "all powerful" in the management of the clergy within the Diocese. Further, the role of an assistant priest under canon law (law related to the church) had the same duties as a parish priest, including

visiting homes and becoming acquainted with parishioners as an integral part of the pastoral care role of the assistant priest.

The Court noted that it was common ground that, at the relevant time, Coffey was neither an employee of the Diocese nor was he an independent contractor engaged by it.

The findings of the Supreme Court of Victoria – Court of Appeal

The Court of Appeal found that the decision of the High Court in *Colonial Mutual Life* makes it clear that, in an appropriate case, a relationship may give rise to vicarious liability on the part of the principal (in this case, the Diocese), notwithstanding the tortfeasor (in this case, Coffey) was not an employee of the principal.

In such a case, vicarious liability is imposed on the principal for the actions of the tortfeasor on the basis that the work performed by the tortfeasor and the business of the principal were so interconnected that the tortfeasor represented the business of or the principal or represented the principal directly and, by doing so, conducted the business of the principal.

Further, the Court found that 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. In discharging his duties in that role, Coffey was not acting independently of the diocese but as a representative of it.

The Court concluded that the relationship between Coffey, as 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.

The Court then found that Coffey's position as the appointed assistant priest invested in him "authority, power, trust, control and the ability to achieve intimacy" with his parishioners, and in particular with DP's family and DP. As such, his appointment and function as an assistant priest in the parish not only gave him the opportunity to abuse DP, but was the "occasion" for those wrongful acts.

What does this mean for survivors of childhood abuse?

The case of *Bird v DP* [2023] VSCA is an important case for survivors of childhood abuse, particularly those who have experienced abuse by a representative of a Church, institution or other organisation.

The case supports that representatives of the Church can be found to be vicariously liable, even where an employment relationship doesn't strictly exist. Importantly, this opens the gateway for survivors to pursue claims against representatives of organisations.

Get help from a lawyer experienced in abuse law

As the circumstances of each case of abuse are different, careful instructions must be taken. At Guardian Injury Law, we take a trauma informed approach and take the time to listen to our clients.

Abuse compensation claims are, by their nature, painful and difficult for survivors. If you have experienced childhood abuse and made the decision to tell your story, we will ensure that you receive the respect and empathetic approach to any compensation you wish to pursue that you deserve.

Contacting Guardian Injury Law

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