

28 July 2004

STRICTLY PRIVATE & CONFIDENTIAL  
WITHOUT PREJUDICE

8 days after  
facilitated meeting

The Very Rev Mgr Brian Rayner  
Vicar General, Chancellor &  
Moderator of the Curia  
Catholic Archdiocese of Sydney  
Polding Centre  
133 Liverpool Street  
SYDNEY NSW 2000

Dear Monsignor Rayner

**JOHN ELLIS AND REV AIDAN DUGGAN**

We are instructed on behalf of Mr. John Ellis, in relation to a series of incidents of sexual assaults which took place from 1975 until 1987. You will be aware that the perpetrator of these acts of sexual assaults was Fr Duggan. This letter represents an attempt by our client to open discussions towards a negotiated settlement with the Church in relation to the financial aspects of the effects of that abuse, without the need for court proceedings. However, in light of some imminent Limitation Act issues, we need to ascertain your general attitude towards this approach as soon as possible.

**Allegations of sexual assault**

Our client alleges that from 1975 to 1978, whilst working as an assistant priest for the Sydney Archdiocese at the Christ the King Catholic Church, Bass Hill, Fr Duggan frequently and on a regular basis sexually assaulted him. The sexual assaults began when Mr Ellis was a minor (age of 14), and was engaged by the Church as an altar boy, and continued until he left the parish to join the Marist Fathers novitiate at Toongabbie. The sexual assaults occurred mainly at the Presbytery at Bass Hill, but also at a cottage at Lawson, NSW, operated by the Sisters of St Joseph as clergy accommodation, and at a holiday home at Umina, NSW. The sexual conduct by Fr Duggan towards Mr Ellis included:

1. Hugging and touching Mr Ellis.
2. Kissing Mr Ellis on the mouth.
3. Touching Mr Ellis' genitals.
4. Placing Mr Ellis' hand on Fr Duggan's genitals and having him masturbate Fr Duggan.
5. Undressing Mr Ellis.
6. Undressing and masturbating in Mr Ellis presence.
7. Performing oral sex on Mr Ellis and having Mr Ellis perform oral sex on him.
8. Penetrating Mr Ellis' anus with his penis.

#### 9. Ejaculating in Mr Ellis' anus.

Our client also alleges that from 1979 until approximately 1987 Fr Duggan continued to initiate sexual contact with our client, who was at the time aged between 18 and 27 years. We are instructed these were more sporadic sexual episodes than occurred whilst Mr Ellis was a parishioner at Christ the King parish and were unwelcomed and resisted by Mr Ellis. This conduct occurred at the presbytery at St Catherine Laboure's parish, Gymea, NSW, the presbytery at St Mary's Cathedral, Sydney, NSW and the presbytery at St Joseph's parish Camperdown.

#### **Brief Overview of Mr Ellis**

Mr Ellis worked as a nurse from 1981-1990 at Marsden Hospital, combining this with a combined economics/law degree at the University of Sydney. After graduating with 1<sup>st</sup> class honours in 1992, Mr Ellis was employed by Baker & McKenzie, solicitors, in late 1992. He was seconded to the Department of Public Works in 1994, acting for some time as Manager of the Legal Branch of the Department, before returning to Baker & McKenzie in 1996. He was promoted to Senior Associate in 1987 and to salaried partner in 1999. He was requested by the Management Committee of the firm to resign from the partnership in May 2004.

#### **Prospective Psychiatric Impact**

Mr Ellis suffers or has suffered from the following conditions and disabilities:

- He has difficulty trusting others, forming friendships and relationships;
- He has communications difficulties;
- He suffers from rage, which often manifest themselves in outbursts towards his family;
- Significant self-harming behaviour, e.g. hitting his head and face with objects such as a book;
- Anxiety;
- Social phobia and withdrawal;
- Self loathing and low self esteem;
- Poor appetite;
- Sleep difficulties;
- Chronic fatigue;
- Symptoms consistent with depression;
- Questions of sexual identity.

This is not an exhaustive list, but merely a snapshot of the nature of difficulties that Mr. Ellis has had to face in the last 25 years. As a real example of how they have directly impacted on his life, we note that Mr Ellis first marriage, entered into while the sexual abuse was still continuing, ended in divorce in 1992. He re-married in 2000 but is presently separated from his wife, and estranged from his children and step-children directly as a result of the impact on the family of dealing with the effects of the abuse

since he began to become aware of the significance of the abuse during the latter part of 2001.

Those behaviours and difficulties had become more severe and begun to impact on his life in a significant way in the 12 months prior to reaching that awareness. The connection between the abuse and the above-mentioned psychological difficulties has subsequently been identified diagnosed by health professionals. Following the disclosure by Mr Ellis of the abuse and the commencement of therapeutic intervention regarding its effects, the symptoms were exacerbated, culminating in the establishment of a separate household for his wife and step-children in December 2001 and the onset of difficulties in his professional activities in the latter part of 2001. Those matters have affected his career progression at Baker & McKenzie and in late April 2004, he was requested to resign from Baker & McKenzie on the basis of his complete inability to empathise, delegate and develop working relationships with his subordinates.

These conditions and effects are directly linked to the sexual abuse occasioned on our client, and the process he has been forced to undertake many years after the events constituting the abuse, in order to address the latent effects of the conduct of Fr Duggan.

#### **Prospective claim for Damages**

Having reviewed the assessment report prepared as part of the Church's Towards Healing protocol and other relevant material provided by our client, we have formed the view that our client has (prospectively) a considerable claim for common law damages which may be pursued against both Fr. Duggan and the Sydney Archdiocese, represented by His Eminence Cardinal Pell and the Trustees of the Archdiocese.

Given the circumstance that Fr Duggan (as a religious monk) was subject to a vow of poverty and is understood to be suffering from dementia, it is not intended by Mr Ellis to pursue a civil claim against him. As indicated, we consider that there is a proper basis for a claim to be made against the Archdiocese, being the particular juridical body of the Catholic Church of which Fr Duggan formed a part at the time of the relevant abuse.

This claim would be made up of the following components:

1. **General Damages.** The impact that the sexual assault has had on Mr Ellis' life has been, to some degree, catalogued in this letter. It is not an exhaustive list. Some of the emotional trauma will be with him for the rest of his life. We are presently seeking to arrange for a further expert assessment of the particular psychological condition(s) which our client suffers from, and once reports are to hand they will be forwarded to you.
2. **Economic Loss.** Mr Ellis' partner's salary (as a salaried partner) in his last full year at Baker & McKenzie was approximately \$300,000 per annum. He has not been able to work since the end of May 2004, when he was forced to resign from the partnership and the indications are that it may be 12 to 18 months (or possibly longer) before he is able to work again in his chosen profession at a level

commensurate with his previous demonstrated ability. He will then need to build back to his previous income level.

The period between late 2001 when he began to deal with the effects of the abuse and May 2004 has had a significant impact upon Mr Ellis' professional confidence and abilities, his reputation within his profession and his physical and emotional health. We believe that there is a direct nexus (both in fact and at law) between the termination of his employment, and the effects of sexual assaults occasioned on him. Furthermore, had these matters not impacted him during this period, Mr Ellis could reasonably have expected to have been considered for equity partnership with Baker & McKenzie in 2004 or 2005, consistently with his progression at the firm in the years prior to 2001. This would have resulted in a significant increase in his personal income over the next 5-10 years. In other words, the impact of the sexual abuse has come at a critical time in Mr Ellis' professional career.

3. Past Costs. Over the last 3-1/2 years, Mr Ellis has incurred significant costs of therapy for both himself and other members of his family directly associated with the effects and impacts of the sexual abuse.
4. Future therapeutic assistance. Our client still suffers from significant psychological impacts and a considerable period of ongoing regular therapy is indicated to address these impacts and allow, to the extent possible, a normal level of functioning in both the professional and social domains.
5. Costs. We believe that our client is entitled to have his legal costs to date paid by the Church.

We do not put the above list forward as a comprehensive list of our client's prospective damages claim, rather an indicative list of the major heads of damage that may be available to him.

In light of this, it is our view that the ex-gratia payment offered to our client at the conclusion of the Towards Healing process was not an appropriate reflection of the loss and damage which our client has suffered to date, and will no doubt continue to suffer in the future. We are instructed that the offer was conditional upon Mr Ellis executing a deed of release in relation to his legal rights against the Archdiocese, which he was not prepared to do in the circumstances. It is for this reason that we are instructed to pursue this alternative course to seek redress for that loss and damage.

#### **Other legal issues**

There are two matters germane to Mr Ellis' prospective claim which we believe are appropriate to raise in this letter, to assist towards the facilitation of our foreshadowed discussions:

## 1. Limitation Act application

As you would be aware, to enable our client's claim to come to court, we would have to demonstrate that the claim falls within one of the relevant exceptions to the normal application of the Limitation Act, 1969. We have closely scrutinised the provisions of the Act, and in so doing, we have advised our client that he has reasonable prospects of being able to satisfy any relevant requirements of the Act in relation to the proposed claim. In particular, we believe that given that a proper appreciation of the reality of Fr. Duggan's conduct manifested itself only recently in our client (at the earliest August 2001), Mr Ellis would be successful in any application under the Limitation Act to extend the time within which his claim may be made. This would enable Mr Ellis to proceed with a substantive claim against the Archdiocese, subject to what we say below.

## 2. Liability issues

It is clear that the law in relation to non-delegable duties and vicarious liability, has evolved, and continues to evolve, and had its most recent judicial consideration in this country in *Lepore v State of New South Wales* (2003) 212 CLR 511. You may be aware that in those proceedings the High Court (by majority) reaffirmed that vicarious liability for intentional harm should not be extended beyond the two kinds of cases identified in *Deatons Pty Limited v Flew* (1949) 79 CLR 370, namely: firstly, where the conduct of which complaint is made was done in the intended pursuit of the employer's interest or the intended performance of the contract of employment; or secondly, where the conduct of which complaint made was done in the ostensible pursuit of the business or the apparent execution of the authority which the employer held out the employee as having done.

In the particular circumstances of that case, the majority of the Court also considered that there was not a non-delegable duty of the relevant school authority to prevent the harm complained of, in the absence of any allegation that the school authority had itself been negligent in the selection or supervision of the teacher who had been found to have assaulted a pupil.

We understand from discussions with representatives of the Catholic Church in other matters that there may be a view held by some sections of the Church that this decision may form some sort of bar to a claim such as that of Mr Ellis. Accordingly, in advising Mr Ellis, we have carefully examined the decision in *Lepore*, and believe that there is nothing in that decision which would limit or exclude Mr Ellis' potential claim against the Archdiocese. There were six separate judgments in the case, each with a slightly different reasoning process. However, only one of the seven justices was prepared to exclude altogether vicarious liability for intentional, criminal acts by an employee (a proposition for which the case is sometimes stated to stand, because of the outcome on its particular facts).

In an attempt to reach an early resolution of this matter, we put forward the following reasons in support of our view that the current status of the law in this area supports the claim foreshadowed by Mr Ellis. You will appreciate, of course, that our time to consider these issues has been limited, as we were not consulted by Mr Ellis in relation to the potential claim until the issue of a release by Mr Ellis was raised by the Archdiocese in the course of the Towards Healing process. Accordingly, the following reasoning is provided without prejudice and is not intended to limit any arguments or allegations which may be made on behalf of Mr Ellis if it becomes necessary to commence proceedings. Finally, we note that there are no reported decisions in any Australian jurisdiction of which we are presently aware in which the liability of a church authority for sexual abuse in the circumstances alleged by Mr Ellis has been considered. We have therefore approached the matter from basic principles informed by notions of justice, reasonableness and fairness.

- It is clear that there can be liability for negligence on ordinary principles if there is established default by the Archdiocese or its representatives. As with the relationship between school authority and pupil, the relationship between “Church” and parishioner is one of the exceptional relationships which give rise to a duty in one party to take reasonable care to protect the other from the wrongful behaviour of third parties even if such behaviour is criminal [See the judgment of Gleeson CJ in *Lepore*, citing *Modbury Triangle Shopping Centre Pty Ltd v Anzil* (2000) 205 CLR 254 at 265]
- *A fortiori* in the case of Mr Ellis, a child parishioner and altar boy performing functions in the service of the ministry of the Church.
- The underlying assumption in *Lepore* was that there had been no want of care on the part of the school authority, either in appointing or supervising the teacher, or in any other relevant aspect of the arrangements made for the care of pupils. On the facts, this is distinguishable from the present circumstance, where Mr Ellis alleges and is likely to be able to establish:
  - No evidence of screening of the priest before his acceptance into the role of assistant priest at Bass Hill parish, in contravention of the Church’s own policies and guidelines;
  - Evidence of unsatisfactory conduct at Fort Augustus, at least in relation to physical violence;
  - No supervision or inadequate supervision of Fr Duggan’s conduct in the course of his ministry despite it being known to the Parish Priest that he was alone behind closed doors within the presbytery with an adolescent boy for extended periods of time;
  - Failure by the Archdiocese to follow the Church’s own policies and guidelines;
  - Lack of adequate procedures; and

- Actual or assumed knowledge of the risks.
- *Lepore* involved “*isolated acts of abuse*”, and there was a lack of evidence as to the nature of the abuse and any default by the school authority. On the facts, this is distinguishable from the present circumstance, where Mr Ellis alleges and is likely to be able to establish:
- Abuse occurring over a period of some 11 years involving anal and oral intercourse on many occasions;
  - Evidence of such abuse from a credible and reliable witness (Mr Ellis) who was aged between 14 and 25 at the time of the abuse;
  - Evidence of other priests being present in the presbytery at the time of many of the instances of abuse.
- Gleeson CJ in *Lepore* thought there may have been an arguable case that the Department in that case would be liable on ordinary principles of vicarious liability. In Mr Ellis’ case, part of the particular role of Fr Duggan as a priest was to instruct and educate altar boys towards Christian maturity and to provide advice and guidance in the issues of life, which included the development of sexuality and human relations [See the Church’s decree *Presbyterorum Ordinis*, 7 December 1965, §6]. The abuse occurred in precisely this context and would fall within the ordinary principles of vicarious liability for acts of an employee (whether negligent or intentional) which have a sufficient connection to the relevant employee’s employment.
- At paragraphs 43ff of *Lepore*, Gleeson CJ recognised that employers may be vicariously liable for intentional and criminal wrongdoing by its employees, even in cases where the wrongdoing constitutes a flagrant breach of the employment obligations [see also Kirby J at paragraphs 313-314 and the joint judgment of Gummow and Hayne JJ]. In *Lloyd v Grace, Smith & Co*, the employer was held liable for fraud by its employee which was held to constitute: “*a tortious act committed by the clerk in conducting business which he had a right to conduct honestly, and was instructed to conduct, on behalf of his principal*”. It was stated that: “*the employer, having put the employee in the place of the employer to do a certain class of acts, must be answerable for the manner in which that agent has conducted himself in doing the business of the employer*”.
- In *Deatons Pty Ltd v Flew*, Dixon J explained that decision as concerning “*one of those wrongful acts done for the servant's own benefit for which the master is liable when they are acts to which the ostensible performance of his master's work gives occasion or which are committed under cover of the authority the servant is held out as possessing or of the position in which he is placed as a representative of his master*”. The present circumstances are precisely analogous for the reasons set out in the previous paragraph.
- At paragraph 52 of *Lepore*, Gleeson CJ stated: “*When the specific responsibilities of an employer relate in some way to the protection of person or property, and an*

*intentional wrongful act causes harm to person or property, then the specific responsibilities of a particular employee may require close examination*". This is consistent with the approach of Kirby J and of Gummow and Hayne JJ. See also the decision of the NSW Court of Appeal in *Peakhurst v Fox & Ors; Newton v Fox & Ors* [2004] NSWCA 74 (8 April 2004), in which it was recognized that on appropriate facts there can be vicarious liability for intentional acts, following the decision in *Lepore*.

In the present circumstance, there was (arguably) a specific responsibility of the Church authority to protect Mr Ellis as an altar boy in its service [See Canon 383 §1, Canon 392 §2 and Canon 473 §1 of the Code of Canon Law which describe the obligations of a bishop, which are akin to a "fiduciary" as Gleeson CJ described the defendants in *Lloyd v Grace, Smith & Co*. There is also arguably a duty to provide a safe place of work for Mr Ellis as a person acting in the service or employment of the Church. This may conceivably open up other possible legal responsibilities and obligations for the Church].

There was a corresponding specific responsibility of the priest to instruct and educate altar boys towards Christian maturity and to provide advice and guidance in the issues of life, including the development of sexuality and human relations. [See the Church's decree *Presbyterorum Ordinis*, 7 December 1965, §6], where it is stated:

*"Although priests owe service to everybody, the poor and the weaker ones have been committed to their care in a special way.... Priests will look after young people with a special diligence"*

Fr Duggan was therefore the person entrusted with the care and instruction of Mr Ellis, and he performed that role "in the name of the bishop" [*Presbyterorum Ordinis*, 7 December 1965, §6].

This ought to be considered, therefore, as one of the circumstances identified by Gleeson CJ at paragraph 67 of *Lepore* where "*persons associated with school children, have responsibilities of a kind that involve an undertaking of personal protection, and a relationship of such power and intimacy, that sexual abuse may properly be regarded as sufficiently connected with their duties to give rise to vicarious liability in their employers.*" [see *Lister v Hesley Hall Ltd*]

- By analogy to *Lister v Hesley Hall Ltd*, Fr Duggan did not merely take advantage of the opportunity which engagement as a priest in contact with young boys gave him. He abused the special position in which the diocese (through the Archbishop) had placed him to enable it to discharge its own responsibilities, with the result that the assaults were committed by the very person to whom the diocese had entrusted the care of Mr Ellis. The fact that this was serious misconduct does not absolve the Archdiocese or the Archbishop from vicarious liability [see *Lepore* at paragraphs 72 and 74 per Gleeson CJ].



- Applying the test cited by Gleeson CJ in *Lepore* at paragraph 74, the relationship between Fr Duggan and Mr Ellis involved a sufficient degree of power and intimacy to result in vicarious liability of the diocese for Fr Duggan's misconduct:
- Mr Ellis was 14 years old and entering puberty when the abuse began;
  - He was particularly vulnerable by reason of being a shy, withdrawn young person with few friends of his own age and a relatively distant relationship with his own father, particularly in matters of emotional, moral and spiritual content;
  - This was known to the Parish Priest. Mr Ellis' father was, to the knowledge of the Parish Priest, not a catholic and was not involved in the school or church activities. Mr Ellis had formed close relationships with previous assistant priests in the parish and with the Parish Priest (now deceased);
  - The functions delegated to Fr Duggan included the instruction and education of altar boys towards Christian maturity and the provision of advice and guidance in the issues of life, including the development of sexuality and human relations;
  - Mr Ellis was often in the sole care of Fr Duggan both within the presbytery and on outings and holidays;
  - The sexual misconduct was of a serious nature and occurred within the presbytery while other priests were present in those premises;
  - The sexual abuse was "*inextricably interwoven*" with the carrying out of Fr Duggan's duties in the sense referred to in *Lister v Hesley Hall Ltd* [see *Lepore* at paragraph 206 per Gummow and Hayne JJ and at paragraphs 315-333 per Kirby J];
  - Fr Duggan was placed by the Archdiocese in a position of trust and fiduciary obligation. Mr Ellis was exposed to the abuse of this trust precisely because Fr Duggan was undertaking duties imposed by the nature of the Church's "undertaking", as indeed was Mr Ellis.
- This approach is supported by the later decision of the New Zealand Court of Appeal in *S v The Attorney-General* [2003] NZCA 149 (15 July 2003), where the relevant government Department was held to be vicariously liable for the effects of sexual abuse perpetrated by foster parents appointed by the Department on the basis that such abuse was sufficiently connected with the purpose of parenting for which the foster placements were made, even though it was absolutely contrary to the intentions of the Department.
- Following the dicta in *Lepore* (particularly the judgment of Gaudron J at paragraphs 108 and 130-131 and the joint judgment of Gummow and Hayne JJ at paragraphs 231-239), liability of the Archdiocese also exists on the basis of ostensible authority, a species of estoppel by which a principal is precluded from denying his or her agent's authority. The circumstances supporting such an estoppel include:

- By ordaining Fr Duggan as a priest, the Church (through the Archbishop) held him out as one of a class of persons "*marked with an indelible character and are thus constituted sacred ministers; thereby they are consecrated and deputed so that, each according to his own grade, they fulfill, in the person of Christ the Head, the offices of teaching, sanctifying and ruling, and so they nourish the people of God.*" [Canon 1008, Code of Canon Law];
- By accepting Fr Duggan into the service of the Archdiocese in 1974, the Archbishop represented to the parishioners of Bass Hill parish that proper enquiries had been made as to his character, in accordance with the Church's procedures for incardination, including appropriate testimonials concerning his life, behavior and studies [see Canon 1008, Code of Canon Law] and that Fr Duggan was suitable by virtue of his office as assistant priest for the performance of all aspects of the parochial ministry [see Canon 548, Code of Canon Law];
- By continuing Fr Duggan's appointment, there was an on-going representation that Fr Duggan was suitable for the performance of the parochial ministry [see Canon 552, Code of Canon Law] and that Fr Duggan would look after young people entrusted to his care with a "special diligence" [*Presbyterorum Ordinis*, 7 December 1965, §6];
- In accordance with the decrees of the Church: "*All priests, whether diocesan or religious, share and exercise with the bishop the one priesthood of Christ ... their unity of purpose will make their pastoral activity more effective*" [*Christus Dominus*, 28 October 1965, §28. Similar sentiments are expressed in §30 and paragraphs 7 and 8 of *Presbyterorum Ordinis*, 7 December 1965] This places Fr Duggan in a quite different position in relation to the Archdiocese than that of an employee of, for example, a State Education Department;
- By giving Fr Duggan duties in the education and moral and spiritual development towards maturity of altar boys in Bass Hill parish [*Presbyterorum Ordinis*, 7 December 1965, §6], in the name of the bishop, the Church (through the Archbishop) is estopped from denying Fr Duggan's ostensible authority to undertake that duty in the way in which he did, or its responsibility for the adverse effects of that;
- Mr Ellis was not in a position (due to his vulnerability and level of maturity) at the time of the sexual abuse to appreciate that the conduct of Fr Duggan was unauthorized and contrary to the proper exercise of Fr Duggan's duties and obligations as a priest. Fr Duggan was himself an ordained representative of the Church apparently "clothed in holiness" and in that capacity encouraged the assumption of authority, as did other representatives of the Archdiocese by failing to intervene or take any measures to seek to prevent the conduct. Mr Ellis was entitled and encouraged to assume (and did in fact reasonably assume) that what Fr Duggan did within the confines of the presbytery was sanctioned by the Church.

- The Archbishop has obligations under Canon Law to ensure that abuses do not occur (Canon 392 §2), to ensure that everything concerning the administration of the whole diocese is properly coordinated and is directed in the way that will best achieve the good of that portion of the people of God entrusted to his care (Canon 473 §1), and to ensure that all priests in the Archdiocese fulfill the obligations proper to their state (Canon 384).
- Gaudron J stated at paragraph 125 in *Lepore* that: “*A residential institution or authority that does not take reasonable steps to institute a system such that its employees do not come into personal contact with a child or other vulnerable person unless supervised or accompanied by another adult should be held directly liable in negligence if abuse occurs in a situation in which there is neither supervision nor an accompanying adult.*”.

There is no reason in principle why this should be limited to *residential* institutions. In the present circumstances, Fr Duggan was permitted to have Mr Ellis in his private living quarters within the presbytery behind closed doors and without the supervision or presence of another adult. This was with the express knowledge and ostensible authority of the Parish Priest, who was the representative of the bishop and “*the proper pastor of the parish entrusted to him*”, who “*exercises the pastoral care of the community entrusted to him under the authority of the diocesan Bishop, whose ministry of Christ he is called to share*” [Canon 519, Code of Canon Law]. Fr Duggan was also permitted to take Mr Ellis away on holidays, without the supervision of another adult.

It is clear that no steps were taken by the Archdiocese or its proper representatives on behalf of the Church to institute a system such that its priests did not come into personal contact with vulnerable minors unless supervised or accompanied by another adult, or to counsel minors such as Mr Ellis as to the proper and acceptable standards of conduct expected of its clergy, and avenues for redress where those bounds were over-stepped. In so doing, it exposed Mr Ellis to the risk of foreseeable harm of the general nature of what occurred, and in fact permitted the abuse to continue over a period of years unchecked, exacerbating the harm caused. The Archdiocese is therefore liable in negligence for the abuse which occurred in the absence of such supervision and counsel. [see also *Southern Area Health Service v Brown* [2003] NSWCA 369 (18 December 2003)]

- There is clear authority of the High Court that as a matter of principle the law will identify a duty to take reasonable care when a person has undertaken the supervision or control of, or has assumed a particular responsibility for, the person or property of another in circumstances where the person affected might reasonably expect that due care would be exercised. This authority was not over-ruled by the decision in *Lepore*. In Mr Ellis’ case, the Church (through the Archdiocese) had undertaken responsibility for Mr Ellis as an altar boy and therefore had a duty to take reasonable care to ensure his safety and protection from sexual abuse while in the care of its ministers. It clearly failed to take such

steps as were reasonable in the circumstances, including by reason of the matters identified in the previous paragraph.

- It is fair and just that the Archdiocese be liable for the effects of the conduct of its priests within the scope of their ministry, given the unique relationship between the particular Church constituted by the Archdiocese and its clergy, as identified in the Decrees of the Church and the Code of Canon Law, the Church's own legislative documents. As indicated earlier in this letter, that relationship was such that Fr Duggan acted in effect as the *alter ego* of the Archdiocese "*in the name of the bishop*". He was, to Mr Ellis, the human face of the "moral person" that is the Catholic Church and the Apostolic See in ministry to the people of God entrusted to its care. Such may be derived from the Code of Canon Law, which itself is supported by and based upon the Church's juridical and legislative heritage of revelation and tradition, the teaching of the Second Vatican Council and the earlier decrees of the Church. In regard to Mr Ellis' reliance on the Code in this respect, we note the following statement made by Pope John Paul II in promulgating the most recent revision of the Code:

*"...in fact a Code of Canon Law is absolutely necessary for the Church. Since the Church is established in the form of a social and visible unit, it needs rules, so that its hierarchical and organic structure may be visible; that its exercise of the functions divinely entrusted to it, particularly the sacred power and of the administration of the sacraments, is properly ordered, that the mutual relationship of the Church's faithful are reconciled in justice based on charity, with the rights of each safeguarded and defined; and lastly that the common initiatives which are undertaken so that Christian life may be ever more perfectly carried out, are supported, strengthened and promoted by canonical laws".*

- It is not an answer to Mr Ellis claim to indicate, as has been expressed to Mr Ellis, that he may bring proceedings against Fr Duggan personally. As you are aware, Fr Duggan was a monk in the Order of St Benedict and subject to a vow of poverty. He would therefore, to the knowledge of the Archdiocese, be unable to make any adequate reparation for the harm caused in the course of his ministry. This was a circumstance encouraged and promoted by the Church as a means of supporting the carrying out of the Church's mission in the world [*Presbyterorum Ordinis*, 7 December 1965, §17]. It would be unfair and unjust for the Archdiocese, having benefited from this during Fr Duggan's ministry to now allow it to be a circumstance leaving Mr Ellis uncompensated for the significant effects of Fr Duggan's conduct in the course of that ministry.

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In light of the required time frame for any Limitation Act application that we may have to bring to the Court, we ask that you consider, on a without prejudice basis, a meeting with the writer and Mr Ellis to attempt to reach a complete settlement of the matter without the

need for litigation. Subject to a satisfactory settlement being reached which properly reflects the loss and damage he has suffered and the anticipated future costs he is likely to incur, our client will be prepared to sign a deed largely in the form of the one provided to him earlier.

We suggest any time in the afternoon of Tuesday 3 August 2004, at your office. We will contact you later in the week to ascertain whether this course is acceptable to you.

Yours faithfully

David Begg  
DAVID BEGG & ASSOCIATES