



New South Wales  
Supreme Court

**CITATION:** Ellis v Pell [2006] NSWSC 109

**HEARING DATE(S):** 25,26,27,28 July 2005  
12,16,25, August 2005  
10,11,12 October 2005

**JUDGMENT DATE:** 3 February 2006

**JUDGMENT OF:** Patten AJ at 1

**DECISION:** See page 56

**LEGISLATION CITED:** Limitation Act 1969  
Roman Catholic Church Trust Property Act 1936

**CASES CITED:** Archbishop of Perth v A A & Ors (1995) 18  
ACSR 333  
John Doe v Bennett (2004) 236 DLR (4th) 577  
Lepore v State of NSW (2003) 77 ALJR 558  
Nobrega v Trustees of the Roman Catholic  
Church of the Archdiocese of Sydney (1999)  
NSWCA 75.  
Brisbane South Regional Health Authority v  
Taylor  
(1996) 186 CLR 541  
Campbell v Paddington Corp (1911) 1KB 869  
Trustees of the Roman Catholic Church for the  
Diocese of Sydney & Anor v Hogan (2001) 53  
NSWLR 343  
Ditchburn v Selstram Ltd (1989) 17 NSWLR 697  
at 702

**PARTIES:** John Andrew Ellis - Plaintiff  
His Eminence Cardinal George Pell Archbishop of Sydney for  
and on behalf of the Roman Catholic Church in the  
Archdiocese of Sydney - First Defendant  
The Trustees of the Roman Catholic Church for the

Archdiocese of Sydney - Second Defendant  
Reverend Aidan Duggan OSB - Third Defendant

**FILE NUMBER(S):** SC 20308 of 2004

**COUNSEL:** Dr A Morrison SC with R Royle - Plaintiff  
J. Rushton SC with R G McHugh - First, Second Defendant.

**SOLICITORS:** David Begg & Associates - Plaintiff  
Corrs Chambers Westgarth - Defendants

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**IN THE SUPREME COURT  
OF NEW SOUTH WALES  
COMMON LAW DIVISION**

**Patten AJ**

**3 March 2006**

**No 20308 of 2004**

**John Andrew Ellis - Plaintiff**

**v**

**His Eminence Cardinal George Pell Archbishop of Sydney  
for and on behalf of The Roman Catholic Church in the  
Archdiocese of Sydney – First Defendant**

**The Trustees of the Roman Catholic Church for the  
Archdiocese of Sydney – Second Defendant**

**Reverend Aidan Duggan OSB – Third Defendant**

**JUDGMENT**

**Introduction:**

- 1 By his Amended Motion filed in court on 25 July 2005, the Plaintiff seeks relief under s58 of the Limitation Act (the Act) or, alternatively, under s60G.

- 2 The Plaintiff was born on 14 March 1961. His Statement of Claim filed 30 August 2004 alleges that from 1974 when he was 13 years of age, until 1979 when he was 18, he was engaged as an altar server in the Roman Catholic parish known as Christ the King at Bass Hill. While so engaged, so the Plaintiff claims, he was subjected to frequent sexual assaults by a priest, Aidan Duggan (Father Duggan), joined in these proceedings as Third Defendant. The Plaintiff attained the age of 18 on 14 March 1979.
  
- 3 Accordingly, s14 of the Act, in combination with s52, would have the effect of barring the Plaintiff on 14 March 1985 from commencing an action founded on a tort committed prior to 14 March 1979. This action was commenced more than 19 years after 14 March 1985, a very considerable period.
  
- 4 It should be recorded at this stage that the Statement of Claim in amended form filed, by leave, on 25 August 2005, in addition to pleading causes of action in tort at common law, sought equitable damages for breach of fiduciary duty. Section 14 of the Act has no application to the Plaintiff's claim for equitable relief except as it may be applied by analogy (s23). This factor founded an argument by the Plaintiff to which I will need to return. Apart from that argument, the motion not only raised questions as to the applicability of sections 58 and 60G of the Act to the Plaintiff's circumstances but also as to whether there is evidence to establish a cause or causes of action in tort, given that the Plaintiff no longer seeks to pursue the action against the Third Defendant who died on 5 October 2004.

#### THE PARTIES:

- 5 As to the first two defendants, (hereafter "the Defendants") Cardinal Pell was not appointed to the position he presently holds until many years after the events about which the Plaintiff claims. There is no suggestion that he had any personal involvement or even that he served in the Sydney Diocese of the Roman Catholic Church at any relevant time. With regard to Cardinal Pell, the Statement of Claim alleges:

"1. The First Defendant is the person for the time being occupying the office of Archbishop of Sydney for the Roman Catholic church (the Church), being a juridical person having perpetual succession established under the Code of Canon Law of the Church to govern the Archdiocese of Sydney (the Archdiocese) as the particular Church entrusted to him, and in all juridical transactions of the Archdiocese acts in the person of the Archdiocese and is a proper defendant for claims against the Church in the Archdiocese.

1A The First Defendant is a member and the present head of the unincorporated association known as the Catholic Archdiocese of Sydney and the Plaintiff seeks an order that the First Defendant represents that unincorporated association for the purpose of these proceedings.

6 In relation to the Second Defendant, the Trustees of the Roman Catholic Church for the Archdiocese of Sydney, (the Trustees) the Statement of Claim pleads:

2. The Second Defendant is a body corporate having perpetual succession established under the Roman Catholic Church Trust Property Act 1936 (NSW) as trustees of the Church property for the Archdiocese and is capable of being sued in its corporate name, and of doing and suffering all such acts and things as a body corporate or a natural person may by law do or suffer.

7 As I have indicated the alleged perpetrator of sexual abuse upon the Plaintiff, Father Duggan, is deceased. For practical reasons he having, so it was said, taken a vow of poverty, the Plaintiff does not seek to continue the action against his estate. In the result, nothing probably turns on the fact that he was a member of a Benedictine order of monks located at Port Augustus, Inverness, Scotland, seconded to the Sydney Archdiocese during the relevant period.

8 In 1974, Cardinal James Freeman was the Roman Catholic Archbishop of Sydney and evidence establishes that he personally approved of Father Duggan working in the Sydney Diocese "ad experimentum" for a year. This initial period was extended and Father Duggan was incardinated into the Sydney Archdiocese in December 1990.

- 9 Cardinal Freeman, according to the evidence, was also personally involved in the appointment of Father Duggan during 1974 to the parish of Bass Hill where the alleged sexual abuse occurred and where, as it seems, Father Duggan remained until 1979 when Cardinal Freeman appointed him to the parish of Gymea. Cardinal Freeman was succeeded by Cardinal Clancy in 1983.
- 10 In so far as it pleads causes of action in tort, the Statement of Claim alleges that the Defendants are vicariously liable for the illegal conduct of Father Duggan and are also directly liable for what occurred as resulting from breaches of their duty of care towards the Plaintiff whilst in the service of the church as an altar boy.

**EVIDENCE OF THE PLAINTIFF:**

- 11 Dr A S Morrison SC, who appeared with Mr R Royle for the Plaintiff, read his affidavits sworn respectively 10 November 2004 and 4 February 2005, the latter being in reply to affidavits filed on behalf of the Defendant.
- 12 In his affidavit of 10 November 2004 the Plaintiff deposed to his abuse by Father Duggan in these terms:

"During the period from approximately 1973 to 1978, when I was aged 12 to 17 years old, I served as an altar boy at the Christ the King Parish of the Catholic Church, at Bass hill, New South Wales. The parish is part of the Sydney Archdiocese.

Father Aidan Duggan came to the parish in late 1975. At that time, I was a senior altar boy, with responsibilities for rosters and training of the younger altar boys.

Soon after his arrival in the Parish, Father Duggan took a special interest in me. He often invited me back to the presbytery where we would sit in his room, Father Duggan would tell me stories of his time in Scotland and offered to teach me Latin. We would share coffee and biscuits. Sometimes we had a meal together in the presbytery dining room, served by the housekeeper.

During most of his time at the parish, Father Duggan had two rooms in the presbytery, comprising a sitting room/study and a bedroom, separated by a bathroom.

Initially, all of our meetings were in the sitting room. Father Duggan would close the door when I was in there. One day, he began touching me on the legs and arms, and he hugged me closely, I cannot remember precisely when this began, but it was within a few months after he first came to the parish.

One evening, Father Duggan invited me to visit him to commence Latin lessons. When I arrived, he hugged me closely, and I experienced an erection. Father Duggan began kissing me and touched my genitals through my clothes. He then put his hand inside my tracksuit pants and began rubbing my penis. He then closed the blinds in that room and locked the door. He then lay down with me in that room on either a sofa or daybed and undressed both me and himself. He masturbated me and put my hand on his penis and made me masturbate him. During this time he was kissing me. When I ejaculated, he mopped up my semen with a tissue. After we had both ejaculated, he took me into the bathroom to clean up.

After this first time, the sexual contact continued on a regular and frequent basis. I attended daily mass at that time, and so saw Father Duggan on a daily basis.

There were different forms of sexual contact as time went on. This included oral sex and penetration by Father Duggan of my anus. Many times, Father Duggan ejaculated in my anus. After the first time, the sexual contact was always in Father Duggan's bedroom.

On more than one occasion, the Parish Priest knocked on Father Duggan's door asking to see him while we were partially undressed and engaged in sexual interaction. The Parish Priest was initially Father John Farrer. Later, there was another Parish Priest. When the parish Priest knocked on the door, we quickly dressed and Father Duggan answered the door.

On many occasions, Father Duggan gave me Scotch whisky to drink. It was either, "The Black Douglas" or Grants" brand. He gave it to me in a small glass with some ice. I liked it, and it made me feel light-headed and more relaxed about

him touching me. One evening, I became very intoxicated drinking "Grants" scotch and felt nauseous and dizzy. I vomited, and Father Duggan later drove me home to my parents' house. He said to my parents "John is not feeling well".

The sexual abuse also occurred at a cottage attached to a convent of the Sisters of St Josephs church in Lawson NSW, and at a holiday home at Umina NSW rented by Father Duggan, which he had taken me to.

Father Duggan gave me a book entitled "Special Friendships" which he asked me to read. The book dealt with homosexual relationships between boys at a French boarding school. I remember him saying to me something to the effect of, "it is ok and normal to feel the way we do. But some people don't understand. I understand you".

On many occasions, Father Duggan said to me words to the effect of; "I love you. You are special to me".

In the period between 1979 and 1987, Father Duggan continued to initiate and pursue a sexual relationship with me, although I then saw him less frequently. This conduct was unwelcome by me at all times during this period, but I found it difficult to stop him from touching me. I had considered that Father Duggan had been kind and generous to me, and I did not want to hurt his feelings by rejecting his advances. The only way I felt I could control the situation was to minimise the times I saw him.

The sexual contact occurred inside the presbytery building of St Catherine Laboures parish in Gymea, the presbytery building at St Mary's Cathedral Sydney and the presbytery building at St Joseph's parish at Camperdown. To the best of my recollection, each time I saw Father Duggan, he initiated sexual contact with me.

I did not tell anyone about the occurrence of the sexual interactions with Father Duggan until some 9 or 10 years after they had stopped, because I was ashamed of having had sexual relations with a man. I thought I was homosexual, and that people would not understand or appreciate at the time that there was any inherent wrongfulness in Father Duggan's conduct, and I believed that he genuinely loved and cared for me and that if I loved him, I had to submit to his sexual advances.

I am not aware of anyone else being present at, or having witnessed, the sexual assaults as they occurred in private. However, on the occasion of most of the assaults at Bass Hill parish and at St Mary's Cathedral, there were other priests in the presbytery at the time of the assaults."

- 13 After leaving school, the Plaintiff studied nursing and qualified as a nurse. For several years he worked as a nurse educator, but while still working in that capacity in 1985 commenced a law course, graduating in 1992 with first class honours.
- 14 He took employment with Baker & McKenzie, solicitors, where in 1999 he became a salaried partner, practising principally in building and engineering matters
- 15 The Plaintiff married in 1983 but there were severe conflicts in the marriage and there was a separation in 1992 followed by divorce.
- 16 The Plaintiff married his present wife, Nicola in July 2000. But that marriage too has experienced difficulties deposed to by the Plaintiff as follows:

"Despite undertaking pre-marriage counselling, we experienced relationship difficulties within the first few months of marriage, characterised by severe conflicts and periods of anxiety, depression and self-abusive behaviour on my part. I also experienced significant and severe anger. The feelings I was experiencing at that time were a surprise and shock to me, and I did not understand why I was feeling that way.

By December 2000, I had commenced counselling with Ms Fleur Bishop. This continued on a regular basis until early 2002 when Ms Bishop was overseas. During that time, I attended Mr John Murray for counselling. Mr Murray was formerly a priest. Nicola and I also attended Ms Anna Lee (a psychiatrist) together at around that time.

In approximately August 2001, I became aware of the incidence of the sexual abuse by Father Aidan Duggan while I was a teenager as a matter which may have been affecting my sexual relationship with my wife Nicola. I did not discuss this matter with Nicola at that time, but did write to Ms Bishop (who was at that time overseas), indicating that it was a matter I wished to explore with her upon her return from overseas.

In approximately September 2001, during the course of the counselling sessions with Mr John Murray, an awareness of the significance and profound nature of the effects of the earlier sexual abuse emerged. I disclosed the details of the abuse to Nicola during September 2001. Nicola was the first person to whom I had spoken regarding any details of the sexual abuse. I later discussed the details with Ms Bishop, with other therapists and with other persons.

After initial disclosure, I experienced a severe decline in my feeling of emotional wellness and found it difficult to cope with the demands of day to day working and family life. I was alternatively crying or feeling strong anger most of the time."

- 17 In June 2002, the Plaintiff made a "Formal Statement of Complaint" to the Catholic Church regarding Father Duggan in accordance with its "Towards Healing" protocol. This ultimately led to the appointment of a Mr Michael Eccelston as an assessor and to various meetings involving the Plaintiff. At one point he was told that before any financial reparation could be made, he would be required to sign a deed of release in the draft form provided to him. He claims that it is not without significance that the releasees named in the draft were the Defendants.
- 18 As a result of receiving the draft release, the Plaintiff consulted solicitors who advised that he had a significant potential claim for damages. These proceedings were commenced shortly afterwards.
- 19 Although his career at Baker & McKenzie seemed promising at first, it commenced to deteriorate as he related:

"However, towards the end of 2001, coinciding with the disclosure of the sexual abuse and my beginning to deal with the effects of the abuse, I began to receive notice of complaints from members of my staff and colleagues about my leadership skills and my methods of communication and feedback.

As a result of these complaints, at the feedback session in relation to my annual review in 2002, which was conducted in March 2003, I was informed that unless there was significant improvement in these areas, my position as a salaried partner would need to be reviewed.

In approximately May 2003, Baker & McKenzie engaged an external consultant, Ms Reyna Matthes of the "Stephenson Partnership" to conduct a "360 degree" survey of my performance and to provide a report and coaching to deal with the identified issues.

I worked with Reyna Matthes over a period of some 4-6 months during 2003/4, during which time she took feedback from all levels of my peers, colleagues and professional and support staff.

The feedback from the "Stephenson Partnership Executive Survey report (the Stephenson Report) was quite severe. Amongst other things it included the following statements made by people reporting to me:

"John's interpersonal skills are the worst I have ever come across in a person... I do not believe he understands the impact his behaviour has on others ...John displays no 'emotional intelligence' ... John is deceitful, malicious, controlling, manipulative, prosecutorial and focused on causing humiliation on his dealings with people he considers are 'below him in the pecking order' and over whom he consider he has control ... persons who are obliged to work with John on a more irregular basis all experience extreme frustration, loss of confidence, loss of motivation, and are often reduced to tears or have suffered incidents of being physically ill. Person who are obliged to work with John on a more regular basis show signs of extreme stress which is manifested in depression, withdrawal from the group, sleeplessness, general decline in health, weight loss, deterioration in the care they take with their personal appearance, inability to look people in the eye due to feelings of humiliation

and even verbalising thoughts of suicide ... His conduct seems to be controlled and deliberate..." (extract from Stephenson Report section entitled "Observations-Emotional Intelligence – Report")

Over the period when the survey was being conducted and after I received the feedback, I experienced considerable stress and increasing difficulty in continuing to work. At this time, I commenced seeing Dr Geoffrey Streimer (a psychiatrist and psycho-therapist) in a professional capacity. The stress that I was experiencing impacted upon my physical well-being and between December 2003 and May 2004, I was able to work only part time. I attended the office between 1 and 3 days per week and suffered from depression and lethargy which made it impossible for me to return to full time work."

- 20 Subsequently, effective 31 May 2004, the Plaintiff was required to resign from Baker & McKenzie. He attributes his loss of career opportunities to Father Duggan's sexual abuse.
- 21 The Plaintiff claims that he continues to suffer from depression and associated physical symptoms and has been unable to resume work within the legal profession. He also attributes this to the misconduct of Father Duggan.
- 22 The affidavit of 4 February 2005, inter alia, referred to the efforts by the Plaintiff, in the period following his first complaint about Father Duggan's misconduct in June 2002, to persuade various authorities in the church to interview him. Despite these efforts, it was not until June 2003 that he was informed that a report had been obtained from a psychiatrist to the effect that Father Duggan was not capable of participating in an interview.
- 23 The Plaintiff's affidavit of 4 February 2005 concluded with the following paragraphs:
- "Since becoming aware that the first and second defendants maintain that they dispute the fact of the abuse, I have not had an opportunity to consider what other witnesses may be available to provide additional circumstantial and

corroborative evidence as to the relationship between Fr Duggan and myself. However, as I spent considerable time in the company of Fr Duggan, it is likely that other parishioners of Bass Hill Parish could provide relevant evidence. This would include particularly the other altar servers and acolytes at the relevant time.

I recall discussing with Michael Eccelston, (the assessor appointed by the first and second defendant) on 2 July 2003, the availability of such people to give information relevant to my claim, and how they may be identified and contacted. As far as I am aware, Mr Eccelston did not contact or interview any such persons.

Annexed hereto and marked "K" is a true copy of a bundle of email correspondence from former students of Fort Augustus Abbey where Fr Duggan was placed prior to his return to Australia. Contact details for Fort Augustus old boys are publicly available via the internet."

- 24 In cross-examination by Mr S Rushton SC who appeared with Mr M McHugh for the Defendants, the Plaintiff said that as at June 2003 he was concerned about self harming behaviour, anxiety, the state of his marriage and low self esteem which, since September 2001, in the course of therapy by Mr John Murray, he had related to the conduct of Father Duggan.
- 25 The Plaintiff also told Mr Rushton that in December 2003 he was diagnosed by Dr Streimer as suffering from depression. Although Dr Streimer diagnosed that he had been suffering from this for some time, the Plaintiff said that he had not been aware of it.
- 26 Cross-examined further as to his awareness of the nature of the conduct of Father Duggan and of his rights flowing from such conduct, there was this exchange:

"Q. Did you ever have an awareness before filing your statement of claim that you had been sexually assaulted by this priest?

A. Yes I did.

Q. When do you say you first had an awareness?

A. In 1996 or 1997.

Q. And being a well qualified lawyer, you would have recognised would you not that the sexual assault of a minor would give rise to or could give rise to a substantial claim for damages?

A. Could give rise to, yes, yes. Yes, so far.

Q. It must follow must it not that at least in 1996 you had an appreciation that you had a potentially significant claim against Father Duggan?

A. No I am sorry I don't, I don't agree with that.

Q. And why don't you agree with that Mr Ellis?

A. Because at that time I didn't appreciate that there had been any damage, anything that would sound in significant damages, so I was aware of the sexual conduct as being abusive. I didn't appreciate that that - that I would have a claim arising out of that at that time, at all.

Q. And you didn't appreciate at that time that you had suffered damage?

A. No I didn't.

Q. I beg your pardon?

A. No I did not.

Q. But at that time is the position in beginning of 1996 and 1997, is the position this, that you appreciated that you had been sexually assaulted but as far as you could ascertain, or as far as you turned your mind to the problem at that point in time, it had had no adverse impact upon you?

A. I wouldn't say no adverse impact.

Q. Well if it had any adverse impact I want to give you the opportunity to tell us what in your own words was the adverse impact that you recognised you had at that point?

A. I think when I appreciated it as abuse, I appreciated that that had had an adverse impact, in the sense that you know that was quite an upsetting realisation. A very upsetting realisation, and that's certainly adverse.

Q. Well did it make you sad?

A. Yes it did.

Q. Did it make you angry?

A. No.

Q. Did you feel betrayed?

A. No, not at that time.

Q. Did you feel as though your trust had been abused?

A. Yes.

Q. See I want to suggest to you Mr Ellis that at the very latest, at the very very latest, in early August 2001, you well understood the impact that this sexual abuse had upon you and your state of well-being?

A. You wish me to respond to that?

Q. Yes?

A. No I don't think that that's a correct statement."

27 Later in the cross-examination, Mr Rushton put to the Plaintiff that by 5 August 2001 he had conveyed to his therapist, Ms Fleur Bishop, his belief that the sexual abuse suffered at the hands of Father Duggan had had a major impact on his life. He replied:

"A. I think that's overstating the case. I disclosed to Fleur that the abuse had occurred and I had seen that as relevant to sexual issues that I was having with my wife at that time.

Q. It is the case then, is it not, it must be the case that when you said to his Honour yesterday and today that you made no connection between the abuse and the problems you were suffering until September 2001, that evidence was false, was it not?

A. No, I can't accept that.

Q. How do we reconcile them? If indeed you told Miss Bishop that there was a connection you believed between the sexual abuse you had suffered and some of the problems you were experiencing at that time in August 2001, how does that reconcile with your evidence that you made no connection between the abuse and any of the problems you were suffering until September 2001 when you saw Mr Murray?

A. The matter that I identified to Fleur was a very specific matter.

Q. I don't think that's an answer to my question, because yesterday and today you said you made no connection, didn't you, until September?

A. I answered your questions, Mr Rushton, as to particular issues that I had been suffering and when I made a

connection of those issues to the sexual abuse, and some of those connections were made in September when I worked with John Murray, some of those connections were made at a later time in later therapy.

Q. Don't worry about the later time, what about in August? Are you now saying you made a connection between some of the problems you were suffering and the sexual abuse which you say you suffered?

A. I made it - in early August I made a connection between issues that had arisen in my sexual relationship with my wife and the sexual abuse, that there was a possible connection that I wanted to explore with Fleur.

Q. Well, it must follow from that, don't you agree, that what you told us a little earlier just can't be true, that you made no such connection?

A. No. All the answers I gave you yesterday were true.

Q. I want to remind you of what you said at page 68 of the transcript yesterday. At line 7 I was referring to Miss Bishop, and I said, "She went overseas for a period of time, did she not, in September/October 2001; is that right?" And you answered, "From approximately June to September of that year." And I asked you this question: "And are you saying that you did not make any of these connections between Father Duggan's conduct and the severe problems you were suffering until she returned?" And you said, "No. In fact it was while she was away." And I said, "Okay, and was that in the context of your counselling with Mr Murray? And you said, "That's correct." "Q. It was during that counselling with Mr Murray which I think took place in late August, early September 2001 that you say you first made this connection? A. That's correct."

A. Yes.

Q. And then at line 49: "Q. But you did not really make any connection between the problems you were experiencing then and Father Duggan until you engaged in therapy with the replacement therapist, Mr Murray? A. That's correct."

A. Yes.

Q. Do you want to change that evidence at all?

A. No, not at all.

Q. Because it was a fact, I suggest to you, Mr Ellis, that by 5 August 2001 at the very latest you were well aware or believed that there was a connection between Father Duggan's conduct and the severe emotional problems that you were suffering at that time?

A. No, I didn't have that awareness at that time at all. I know when it came it came very dramatically, I recall."

28 Later in the cross-examination, the Plaintiff conceded to Mr Rushton that by August 5 2001 he had made a connection between Father Duggan's conduct and one, at least, of the symptoms he was experiencing, namely, as I understand his evidence, sexual problems with his wife which he described as "my ability to have a healthy sexual relationship

29 In my assessment, the Plaintiff was an honest witness who did his best to assist the court. In general terms, I accept his evidence as reliable. That acceptance must, I think, be tempered by taking into account, as a matter of common sense the difficulties which the Plaintiff faced as an honest witness testifying in 2005 as to his state of mind and emotional feelings upon complex and sensitive subjects at various periods and even on particular dates in the lengthy period between 1974 and the end of 2003.

#### **EVIDENCE OF S R SMITH**

30 The hearing of the motion commenced on 25 July 2005. On the fourth day of the hearing I gave Dr Morrison leave to read the affidavit of Stephen Robert Smith sworn 27 July 2005. The affidavit, as it seemed to me dealt in a significant way with the issue of prejudice suffered by the Defendants and on that basis I permitted Dr Morrison to rely upon it. On Mr Rushton's application I granted an adjournment in order that the Defendants could investigate the matters raised by Mr Smith, and, in the result the substantial hearing of the motion did not recommence until 10 October.

31 Dr Morrison then read a further affidavit of Mr Smith sworn 9 August 2005. He was not required for cross-examination.

32 The substance of Mr Smith's testimony was that he met Father Duggan in January 1980 at a time when he was about to commence year 10 at the Christian Brothers High School, St Mary's Cathedral. He was an altar server and served at both weekday and Sunday masses.

33 Over the course of 1980 and into 1981, according to his testimony, Mr Smith was sexually assaulted by Father Duggan on numerous occasions. In mid to late 1983, Mr Smith said that he handed to a Father McGloin, who he believed was the Dean of the Cathedral, a Statutory Declaration detailing sexual assaults upon him by Father Duggan. Thereafter, according to Mr Smith's affidavit sworn 9 August 2005:

"Within approximately one week, Father McGloin contacted me. I agreed to meet with him. The meeting took place on a weekend in the evening. Father McGloin was smoking a pipe. He said words to the effect of: "I have read your stat dec. Can you speak to me about it?"

We then had a detailed conversation during which I said thing about what I had experienced with Father Duggan. I said to Father McGloin words to the effect of: "I think that Dom Aidan should be removed. He should return to his Abbey in Scotland where he belongs".

Father McGloin said words to the effect of: "Perhaps it is an issue best dealt with by the two of you."

One evening during the following week, I had a further meeting with Father McGloin. This was the meeting referred to in paragraph 7 of my first affidavit, in which Father Duggan was then brought into the room and Father McGloin then left the room. The meeting with Father Duggan was so humiliating for me that I did not want to make any further complaint for fear that it would lead to a similar experience. During and after that meeting, I felt devastated and I felt that my complaint had not been taken seriously."

#### **Psychiatric and Psychological evidence:**

34 The Plaintiff relied on testimony from Ms Fleur Bishop, psychologist; Mr John Murray, counsellor and psychotherapist; and Dr Jeffrey Streimer, psychiatrist and psychotherapist. In an affidavit sworn 7 June 2005, Ms Bishop after detailing her quite extensive qualifications deposed:

"John Andrew Ellis first came to me for therapy in December 2000, as a result of a sudden onset of severe emotional and psychological distress from an unknown source.

The presenting symptoms included: severe conflict within his marriage of approximately six months; anxiety; angry and violent outbursts; and significant self-harming behaviours which had resulted in physical injuries including facial lacerations and bruising.

Quite early in the therapy, I concluded that Mr Ellis was suffering with symptoms consistent with Post Traumatic Stress Disorder, and I discussed this opinion with Mr Ellis. While this was consistent with all of his symptoms, at that time, no particular trauma had been identified.

My therapy at that time was focussed on the symptoms Mr Ellis was suffering, particularly the self-abusive behaviours.

In June 2001, I went overseas for approximately 3 months. Before my departure, I had given Mr Ellis the names of several therapists he could consult during my absence. I also gave him an e-mail address at which I could be contacted.

On 5 August 2001, Mr Ellis sent me an email. In that email he disclosed to me for the first time that he had been sexually abused as a teenager. A true copy of Mr Ellis' email is annexed and marked "B".

- 35 In the email referred to in Ms Bishop's affidavit, the Plaintiff made only a fleeting reference to "being sexually abused as a teenager" in the context of recounting sexual difficulties with his wife. He provided no detail.
- 36 Ms Bishop concluded her affidavit by recording that in October 2003 she furnished a report to Mr Eccelston and that in May 2004 the Plaintiff recommenced therapy with her. At that time he told her that his employment had been terminated as a result of deterioration in his work performance and relationships.
- 37 In her report to Mr Eccelston, Ms Bishop provided the following history and opinion:

"I was seeing Mr Ellis for counselling several times a month between December 2000 and April 2002. During that time he disclosed that from approximately age 14 years (1975) he had been sexually abused by Fr Duggan, who at that time was the assistant priest at Christ the King Parish at Bass Hill. The sexual abuse took place over a number of years in his rooms at the presbytery and also at other locations for example, while on holidays.

It is my understanding that the abuse continued on a regular basis until Mr Ellis turned 17, when he left the parish. The sexual abuse then resumed on an intermittent basis when Fr Duggan was located at different parishes, including the St Mary's Cathedral presbyter, St Josephs at Camperdown and the presbytery at Gympie.

#### Disclosure of the Sexual Abuse

It was many months into therapy that Mr Ellis disclosed his history of child sexual abuse. He expressed great shame and confusion about his feelings towards the priest, as he felt someone he had thought was his friend had betrayed him.

#### Impact of the Sexual Assaults

The following information was gathered from self-reports by Mr Ellis and from conversations with his wife, Mrs Nicola Ellis. Mr Ellis has been affected by the sexual abuse in the following ways:

- He has difficulty trusting others and forming friendships and relationships;
- Communication difficulties;
- Rage filled angry outbursts particularly towards himself, his wife and children;
- Sometimes violent interactions with his wife, the violence being exchanged by both parties;
- Significant self-harming behaviours, eg, hitting his head and face with his hands or objects such as a book. Self-harming behaviour would occur when Mr Ellis was dealing with elevated levels of distress.

- Anxiety;
- Social phobia and withdrawal;
- Occasional agoraphobia;
- Self-loathing;
- Low self-esteem
- Poor appetite;
- Sleep difficulties;
- Fear of crowded places;
- Symptoms consistent with depression;
- Questions of sexual identity.

Mr Ellis is still experiencing difficulties in his second marriage which has been in a state of separation since 2001.

It is my opinion that many of the feelings and behaviours reported by Mr Ellis are consistent with adult survival of child sexual assault. It is my hope that Mr Ellis is able to resolve his inner conflict and heal from the damage resulting from being sexually abused by Fr Duggan.”

38 Mr Murray, a psychotherapist with extensive experience said that the Plaintiff came to him for six counselling sessions in August and September 2001 while Ms Bishop was away. In the course of a report to Mr Eccelston, Mr Murray said:

“In my 4<sup>th</sup> session with John, something turned-up that was a complete surprise. After being able to talk quite freely about himself and what had happened to him up until then, he was unable to talk about something that the very thought of brought about the most significant physical change in John.

- Anxiety;
- Social phobia and withdrawal;
- Occasional agoraphobia;
- Self-loathing;
- Low self-esteem
- Poor appetite;
- Sleep difficulties;
- Fear of crowded places;
- Symptoms consistent with depression;
- Questions of sexual identity.

Mr Ellis is still experiencing difficulties in his second marriage which has been in a state of separation since 2001.

It is my opinion that many of the feelings and behaviours reported by Mr Ellis are consistent with adult survival of child sexual assault. It is my hope that Mr Ellis is able to resolve his inner conflict and heal from the damage resulting from being sexually abused by Fr Duggan.”

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He was able to speak of the fact of sexual abuse by a priest when he was a teenager, but unable to talk about or speak the priest's name.

When I asked him to tell me what happened, he started to stutter and choke. He said it felt as if there was a restriction or barrier in his neck, "keeping down everything down below". He said, "It is not safe to talk about that. It is too painful". I don't want to go there". Then he burst out with the words, "That bastard – why am I protecting Him".

Even with two further sessions of counselling, I do not remember John going ahead and talking specifically about what happened. However, he used symbols and images to express what he was feeling and seemed to have a significant break-through. He continued to express his rage and pain, and testify to the barrier he felt between himself and what happened.

I have no further written notes on the last two sessions, nor can I remember any specific details of how the abuse was carried out. This fact supports my recollection that John was not ready to fully explore his memories of the incident, through fear, I concentrated mainly on the impact his emotional state was having on his relationship with Nicola."

39 In the final paragraph of his affidavit, sworn 10 June 2005, paragraph 7, Mr Murray said:

"In my opinion, it was around 5 September 2001 that Mr Ellis would have first been in a position to appreciate the link between the sexual abuse he had suffered and the symptoms he had been experiencing, particularly in the 12 months before that date."

40 Mr Murray gave short oral evidence before being cross-examined by Mr Rushton. He told Dr Morrison that in the six sessions he had with the Plaintiff, difficulties in his career or at work did not arise.

41 Questioned by Mr Rushton on the opinion expressed in paragraph 7 of his affidavit, there was this exchange:

"Q. Now you don't set out in your affidavit the basis upon which you formed that opinion, do you?"

A. That is not stated there.

Q. Yes. Would you mind telling us then as best you can, how you have come to that opinion?

A. I came to that opinion because it was in this fourth session that I had with Mr Ellis, after following three sessions of considerable emotional upset and turmoil over his destructive behaviour towards himself and his immediate family and that his whole focus of attention in those first three sessions was on these behavioural difficulties and their very bad effect on those he loved.

In the fourth session on 5 September, I asked John about the sexual abuse that he had mentioned in passing without any real charge or emotional agenda, and as I worked with him in this fourth session, he, at the question, "what happened", he displayed extraordinary physical signs of - he started to stutter, he choked, he couldn't speak about it, and when I asked him what was stopping him, he said "there's like a barrier there holding - an invisible barrier in my mind holding it down and I don't want to go there, it is too painful", and I deduced from that that at last he was getting in touch at a feeling level, and a realistic awareness level, of the source of his destructive behaviour towards himself and others and his attitude of the course to himself and others.

Q. And it must follow from what you've just said can I suggest, that implicit in the opinion you express in paragraph 7 of your affidavit, is the assumption he hadn't made the disclosure that he made to you in the fourth session to his psychotherapist who he was seeing before he saw you?

A. I have no knowledge of what - that's correct. I had no knowledge of what he said to his other psychotherapist.

Q. To come back to my question, implicit in your opinion in paragraph 7 is an unstated assumption is it not, that he had not made disclosure of this matter to his psychotherapist who was treating him before he saw you?

A. Certainly, if he had disclosed it as a fact then that may have been the case but the emotional charge and his inability to actually speak about it was a clear indication to me that my assumption is correct, that he just was becoming aware of its significance for the first time.

Q. Would your opinion change Mr Murray if you were to learn for example, that Mr Ellis had spoken publicly about at least the fact that he had been sexually abused by a priest to a group of people as part of a presentation?

A. He could indeed have spoken of the fact of being sexually abused because to have just a conceptual

informational statement about it, is of course very very different from actually accessing one's traumatic hidden feelings associated with that event.

Q. But surely if he went on during that presentation to describe the impact that had had on his life, your opinion would change?

A. I could only answer that if I was there to hear him and to evaluate the emotional content that would be conveyed in his description."

42 Dr Streimer provided a letter to the Plaintiff's solicitors dated 30 May 2005 which, omitting formal parts said:

Your correspondence indicates that there is a question as to whether Mr Ellis was aware of the extent of the injury he has suffered prior to August 2001 or whether the awareness of the severity and impact on him arose later on or after August/late September 2003.

There are several sources of information covered within my clinical file notes that are relevant in this regard.

Firstly, at my initial assessment of Mr Ellis on 9 September 2003 he presented with panic feelings and issues around two recent losses, his father's death three weeks before and his marital separation three months beforehand. My interview notes list the history of the present illness (HPI) which included information that he had seen Fleur Bishop (social worker/therapist) from December 2000 for eighteen months, that it did not work with Fleur but that nine months thereafter he became conscious of having been sexually abused as a teenager.

He "faced it" with the assistance of John Murray an ex-priest/therapist. My notes indicate him reporting his "Life torn apart during the recall. Occurred as a result, not in therapy". This indicates the impact of initial awareness began in 2002. Further, during that same interview he stated he "recalled (the abuse) after she was gone!" (that is after Fleur was gone) meaning that recollections surfaced after the therapy with Fleur Bishop ended.

My notes indicate that work with Jacqueline Segal a counsellor and in associated encounter courses he undertook in 2002 allowed angry, frightening feeling to erupt which were related to earlier abuse by the priest and violence from his father.

Subsequently, during a session on 24 November 2003, Mr Ellis reported that three years earlier and also five to six years earlier he had suffered from unexplained physical symptoms that had taken him to a naturopath for treatment. These symptoms included fatigue, irritable bowel syndrome, pain and headaches.

In talking about the low energy levels (fatigue) and physical symptoms he now relates these to sexual abuse, he reported that "because (I was) becoming aware of the sexual abuse I felt torn apart in that moment". He was indicating that the abuse was manifesting itself directly physically but was not then named or known consciously and only with talk and resultant awareness could the symptoms be understood and begin to move from physical sensations into consciousness. In that session he said that he had initially been "torn apart in the centre of the body". "Feeling and healing (occurred) to be able to talk about it" and he had only been able to "name(d) it for a couple of years".

The case notes therefore indicate that Mr Ellis was unaware of the extent of injury he had suffered as a consequence of the abuse until after 2001 and he probably only became initially aware in 2002.

Further the full extent of the severity and impact of the injury suffered in terms of his psychological, social, occupational and interpersonal functioning may not even have been fully perceived by Mr Ellis when he consulted me in 2003."

#### **The Report of Dr Jonathan Phillips:**

- 43 The Plaintiff's solicitors arranged for him to have a series of consultations with the well-known Consultant Psychologist, Dr Jonathan Phillips. The consultations commenced on 24 August 2005. I admitted into evidence, over the objections of counsel for the Defendants, Dr Phillips' report of 15 September 2005. In it he expressed this opinion:

"This is an unusual case. As a general rule sexualised contact, particularly if the male perpetrator is a paedophile, will be directed at a child (or children) during primary school

years. The situation in which Father Duggan involved Mr Ellis in a sexualised relationship began when the plaintiff was 14 years old and continued (at least intermittently) until the plaintiff was at least in his twenties.

It is important to recognise that on the balance of probabilities Mr Ellis had been an intelligent, sensitive and impressionable adolescent at/about the time when Father Duggan began to make sexual contact with him. The plaintiff was an altar boy in the local parish and Father Duggan was perceived as a rather exotic priest. There was a substantial difference in power between the parties, this setting the scene for the damaging actions of the priest.

Also of importance is the careful planning undertaken by Father Duggan, initially to establish after school contact with Mr Ellis and in the progressive steps to achieve substantive sexual contact including anal penetration. It is salient, additionally, to note that Father Duggan arranged for the plaintiff to take short holidays with him ostensibly with agreement by the plaintiff's mother.

Mr Ellis described himself as both becoming sexually aroused in the course of sexual contact perpetrated by Father Duggan and having joined the priest in partially consensual sexual activities. Both require explanation. Specifically:

- The early adolescent years are a period where sexual arousal occurs with comparatively little stimulation. It is often the case that a person in those years will be come aroused by a variety of sexual stimuli, either of a heterosexual or homosexual type. That Mr Ellis recalls becoming sexually aroused during contact with the priest should not be taken as evidence that he is homosexual by disposition.
- The issue of consensual activities or in the plaintiff's words "partial consensual" activities is complex, given the power differential between the plaintiff and the priest. It may have proved difficult in that situation for the plaintiff to do other than acquiesce. In my opinion the liaison between the two parties could not realistically be deemed as having been consensual or partially consensual.

It is generally agreed within my profession that inappropriate early sexualised contact involving a child or adolescent by a powerful older figure is always damaging to the psycho/sexual/social development of a younger person. Psychological damage can be immediate or delayed, and psychological damage can be obvious or rather more subtle. Psychological damage can take numerous forms, a matter I highlighted in my earlier report (7 October 2004). The more obvious sequelae of sexualised contact perpetrated by a male figure include various depression spectrum problems and various anxiety disorders including post traumatic stress disorder. These disorders can appear at the time of sexualised contact, or later. I stand by my earlier report in which I noted that the less obvious problem of chronic demoralisation is arguably of greater importance. Chronic demoralisation can take many forms including reduced self-esteem, uncertainty in various domains of life and a failure to perform the necessary tasks of adulthood including marital/family relationships, work relationships and performance in general.

Mr Ellis is an intelligent and capable person. In normal circumstances the plaintiff should have had few difficulties functioning satisfactorily in all area of his life, given that apart from the sexualised contact perpetrated by Father Duggan he had enjoyed a reasonable environment during his formative years.

The sexualised relationship perpetrated by Father Duggan has altered Mr Ellis' psycho/social/sexual development in a number of ways. The following matters are of particular importance:

- The plaintiff experienced confusion regarding his sexual orientation, particularly during his later adolescent and early adult years. He attempted to move in homosexual circles, albeit with some difficulty, and he came to the conclusion that his orientation was heterosexual. Almost certainly the plaintiff's sense of sexual orientation had been disturbed by the actions of the priest.
- He had experienced and continues to experience difficulties maintaining close and intimate relationships. It becomes obvious from the plaintiff's history and material discussed by others that he has failed to commit to his second marriage in the expected manner. In particular he tends to question

his part in the relationship and tends to push his wife away from him. Almost certainly his capacity to accept closeness or intimacy had been eroded by the actions of the pries.

- He took time to settle into a career, firstly finding that he was uncomfortable in the seminary, secondly moving away from a nursing career and thirdly establishing a satisfactory and continuing career in the law. It is of particular interest that the plaintiff failed to relate in a satisfactory manner with others in his law firm, this leading to the management committee asking him to resign. It is probable that in the absence of the sexualised relationship perpetrated by Father Duggan, he would have been able to achieve far better relationships in the various important areas of his life.

All of the above are reasonable indicators that Mr Ellis suffers a serious handicap across the important domains of his life. Broadly, these matters are consistent with what is described as a chronic demoralisation. A vicious cycle has been established where the plaintiff has little faith in his capabilities and where he fails in a number of major life areas, with this experience causing further loss of faith in himself and further demoralisation.

Mr Ellis identified, in his consultation with me, a number of ongoing problems and I note both Dr Streimer and Ms Bishop came to a similar conclusion.

Suffice to say that Mr Ellis identified himself as suffering substantive fatigue (including both physical and psychological components), intermittent depressed mood (often with substantive loss of motivation) ongoing interpersonal difficulties (particularly in the relationship with his wife, and his inability to make and hold friendships), a tendency to withdraw from others and a flight into fantasy (particularly a past compulsive desire to seek out pornography). Taking these matters together it can reasonably be stated that the plaintiff has a chronic depression spectrum disorder probably taking the form of an adjustment disorder with depressed mood DSM4 TR309.0, or alternatively a dysthymic disorder DSMIVTR 300.4. It is my firm opinion that the causal pathway to the plaintiff's depression spectrum problems began with a sexualised contact perpetrated by Father Duggan.

Considerable diagnostic weight must be given to Dr Streimer's report, given that my colleague had met with Mr Ellis on at least eight occasions. My colleague found the plaintiff to have symptoms of both a generalised anxiety disorder and a depression spectrum disorder, and additionally to have avoidant personality traits and a tendency to somatize. In a broad sense Dr Streimer and I both noted the plaintiff to have chronic symptoms, but my colleague placed greater emphasis on the plaintiff's anxiety symptoms.

Similarly the report prepared by Ms Bishop should be given considerable diagnostic weight, particularly as she has had more therapeutic contact with Mr Ellis than any other person. Ms Bishop opined that the plaintiff's ongoing problems include difficulties with trust, self directed rage and self harming behaviour, anxiety, socially phobic behaviour and withdrawal, and occasional agoraphobia, self loathing, low self esteems, sleeping difficulties, depressive symptoms and problems with sexual identity. Ms Bishop has given a useful and wide-ranging appraisal of the plaintiff's state of chronic demoralisation.

Taking all material available to me currently, I state firmly that Mr Ellis is significantly handicapped as a consequence of psychological damage caused during the years when he was involved in a sexualised relationship perpetrated by Father Duggan. The plaintiff has problems in three overlapping domains. He has chronic symptoms across the domains of anxiety and depression of intensity sufficient to interfere with the smooth conduct of his life and sufficient to reduce significantly the quality of his life. He has avoidant features within his personality, this adding to his impaired communication with others. He lives in a state of chronic demoralisation, this auguring poorly for his future.

Mr Ellis has already undertaken a considerable amount of therapy, both as an individual and in group settings. The plaintiff's gains have been modest and he is failing in the most important areas of his life. Whilst I am pessimistic regarding the plaintiff's future, I believe he should continue in regular (fortnightly) therapy with Ms Bishop indefinitely. Emphasis should be placed on practical matters rather than exploration of his past. Therapy will need to include psycho education, esteem building and training in interpersonal skills. At best the plaintiff will make further slow progress.

There is one additional matter, which should be addressed. Mr Ellis advised that his eldest brother committed suicide in 1989. The plaintiff was 19 years old at the time. His brother had already moved out of the family home when the plaintiff was born. They did not share a close relationship as a consequence of this. I do not believe, in the circumstances, that the plaintiff has been affected adversely by the death of his brother.

Finally, it is more likely than not, if Mr Ellis had not become involved in a sexualised relationship perpetrated by Father Duggan, he would have undergone an essentially normal process of psycho/social/sexual development during his adolescent and early adult years and would have proved himself successful in the important domains of life including holding a satisfactory marriage and maintaining normal friendships and ensuring a normal professional life.”

#### **The Evidence of Mr Ralph Pliner:**

44 Mr Ralph Pliner, a solicitor, was until 31 December 2004 a senior partner at Baker & McKenzie. He swore an affidavit dated 22 July 2005 in which he deposed:

“I have known the Plaintiff since about 1995.

Since about 1998/1999 I was directly involved with the Plaintiff in assisting me with the discharge of work with clients of Baker & McKenzie for which I was generally responsible.

The Plaintiff's legal work was consistently of high standard and quality, and his ability to satisfy client demands and retain clients was well established.

I recall in late 2001/early 2002 the Plaintiff had an undiagnosed stomach ailment, and he was off work for some time. Furthermore, at this time, or shortly thereafter, his natural reticence became more pronounced, and this started to affect his ability to communicate and properly manage his relationships with clients. The issue was not raised directly with the Plaintiff until an internal review meeting in March 2003.

On 6 March 2003 I attended a professional review meeting with the Plaintiff, Tim Garood (International Partner) and Vicki Kelley (General Manager). At this meeting it was reported to the Plaintiff his management skills had deteriorated to such an extent that associates felt threatened, depressed and harassed. To the best of my knowledge and belief, this was the first time feedback of this nature was reported to the Plaintiff."

- 45 Thereafter the affidavit, after identifying some 22 internal evaluations of and reports concerning the Plaintiff, concluded:

"It became apparent, at least from 2003 onwards, that the Plaintiff's relationships with clients, peers and subordinate staff members was deteriorating significantly."

- 46 Annexed to Mr Pliner's affidavit were discussion notes dated 30 April 2004, obviously prepared in anticipation of a meeting with the Plaintiff, the notes read:

1. No bonus last year due to performance issues.
2. No salary review this year pending how you dealt with the performance issues.
3. We brought Stephenson Partnership in to give you the best chance at dealing with these performance issues back in May/June last year.
4. We have told you that these performance issues relating to your management of relationships with lawyers and support staff were in our eyes extremely serious back 12 months ago and that you had to resolve the issues in the following 12 months, which have now passed.
5. Despite all work of Stephenson Partnership lack of progress in eyes of Evaluation Committee and in eyes of Management Committee.
6. Accordingly, we have formed the view that we must part ways. We want to make this process as stress free as possible. We propose that you resign and work up until say 31 May or earlier if you prefer and we will pay you until 30/9.

(If we cant' reach agreement we will call a Partner's Meeting and obtain the 75% requisite vote.)

- 47 Cross-examined by Mr Rushton, Mr Pliner conceded that from as early as 1999 there were concerns in the firm about the Plaintiff's communication skills. However, he said that by about 2000/2001 there had been some improvement

**The Plaintiff seeks legal advice and commences proceedings:**

- 48 The Plaintiff's solicitor, Mr D J A Begg, in an affidavit sworn 22 July 2005, deposed to the fact that he was first consulted on or about 10 July 2004.

The affidavit proceeded:

"Prior to that time, I am informed and verily believe, that Mr Ellis had been attempting to resolve this matter with the Catholic Church via a process known as "Towards Healing". When it became apparent that a resolution pursuant to this process was not possible, I was instructed to consider, and, if necessary, institute proceedings against the Catholic Church.

At the time I was first instructed, Mr Ellis provided me with a copy of a Deed of Release which had been provided by the Catholic Church to him during the "Towards Healing". This Deed of Release annexed hereto and marked with the letter "A", indicates that a release was sought from Mr Ellis by both His Eminence Cardinal George Pell and the Trustees of the Roman Catholic Archdiocese of Sydney.

On 28 July 2004, an initial demand was sent by DBA to the Very Reverend Monsignor Brian Rayner of the Catholic Archdiocese of Sydney. Annexed hereto and marked with the letter "B" is a copy of this letter. On page 3 of this letter it is noted that a Common Law damages claim would be brought both against His Eminence Cardinal Pell and the Trustees of the Archdiocese.

No response having been received to this correspondence, proceedings were filed in this honourable court on 30 August 2004.

**The Mental Health of Father Duggan;**

- 49 The issue of the mental health of Father Duggan in the period leading up to his death was an issue in the case, at least as to prejudice suffered by the Defendants. As earlier appears, the Plaintiff was concerned that for about 12 months after his formal complaint, little or nothing was done to confront Father Duggan with his allegations.
- 50 Dr Morrison read an affidavit by the Plaintiff's mother to the effect that she saw Father Duggan in 2003, that he recognised her and was able to engage in some lucid conversation. She, at that time, was unaware of the Plaintiff's allegations of sexual abuse.
- 51 Father Duggan was born on 24 January 1920. It appears that he had a cerebral stroke about 1994 and I have the benefit of the report, part of exhibit 5, of neurologist, Dr Dudley O'Sullivan, dated 25 June 1999. The report included these paragraphs:
- "Father was in reasonably good health apart from hypertension I gather, up until 5 years ago when he had an acute event. He could not recall much of what happened. He collapsed and was taken to Concord Hospital, where he was found to have a left hemisphere infarct. His main difficulty was with speech and very little right sided weakness. His speech improved, but it has always been somewhat slow ever since. He feels the situation has steadily got worse, although it was difficult to precisely determine the severity of the deterioration. It is obvious he has impaired cognitive function and he could not tell me much about what has been happening to him for the last few years. It appears his balance and walking has deteriorated and he has had some falls".
- 52 I am satisfied that by June 2002 it was not reasonably possible for Father Duggan to give adequate instructions to solicitors in response to the Plaintiff's allegations nor to provide useful information to the Defendants. To that extent the Defendants would be prejudiced if the case were allowed to proceed but whether that prejudice is a decisive matter is a subject to which I will need to return.

**The Correct Defendants have been sued?**

- 53 Although the Plaintiff has plainly pleaded a good cause of action against Father Duggan in tort and there is evidence to support that action, it seems to me that I must consider whether there is evidence of a cause of action against the Defendants as the Plaintiff does not wish to proceed against Father Duggan's estate. The matter arises by virtue of the express provisions of s58 (2) (b) of the Act and the well established principle that the Court will not grant relief of the kind sought here, if to do so would be futile
- 54 The liability of the First Defendant is put on alternative bases. Either that he is a corporation sole or that he may properly be appointed to represent (presumably) the members of the Roman Catholic Church in the Archdiocese of Sydney. As to the first submission, it is to be noted that Cardinal Pell, on the face of it, is sued personally. Although it is true that the question of an ecclesiastical corporation sole was left open by the majority (Cole and Meagher JJA) in **Archbishop of Perth v AA & Ors (1995) 18 ACSR 333**, the question there was whether there exists at common law a corporation sole known as the "Archbishop of Perth". The Statement of Claim in this case, in my opinion, does not purport to sue the Roman Catholic Archbishop of Sydney as a corporation sole, but rather Cardinal George Pell personally. The addition of the words "Archbishop of Sydney" does no more than describe his present office.
- 55 Although the Amended Statement of Claim seeks that Cardinal Pell be ordered to represent the "unincorporated association known as the Catholic Archdiocese of Sydney", that would require an order under rule 7.4 of the Uniform Civil Procedure Rules. The rule, however, requires that there be an identified class of persons having the same interest in the proceedings. It could hardly, I think, be suggested that a person within the Sydney Archdiocese who adheres to the Roman Catholic faith even a regular church goer would have a liability to the Plaintiff for the acts of Father Duggan or for the breaches of duty alleged by the Plaintiff.

- 56 In my opinion, there is no basis upon which the cause of action can be maintained against Archbishop Pell, as he is described in the Amended Statement of Claim. In respect of him I would refuse the Plaintiff relief and dismiss the motion with costs.

**The Claim against the Trustees:**

- 57 A considerable body of evidence was tendered in relation to the claim against the Trustees who were incorporated under the **Roman Catholic Church Trust Property Act 1936** (the Trustee Act). For each Roman Catholic Diocese in NSW, a corporate body was established. In the case of Sydney it is called "The Trustees of the Roman Catholic Church for the Archdiocese of Sydney". The trustees so incorporated are the Archbishop and the Diocesan Consultants.

- 58 The Preamble to the Trustee Act originally provided:

"Whereas lands held on trust for or for the use or benefit or for purposes of the roman Catholic Church in NSW are vested in many different bodies of trustees, and owing to deaths and other causes, the necessity for the appointment of new trustees frequently arises: AND WHEREAS it is expedient that bodies corporate be created for the purpose of holding, managing and dealing with lands so held, that provision be made of the vesting in bodies corporate to be created by this Act of lands so held, that conveyancing transactions in respect of lands so held be facilitated and rendered less expensive."

- 59 Section 4(1) of the Trustee Act conferred upon each body corporate established by the statute perpetual succession the right to acquire, hold and dispose of property and the capacity to sue and be sued etc.

- 60 The statute then proceeded to vest all church property within each diocese in the body corporate for that diocese. Section 9 relevantly provided:

"Every body corporate created by this Act shall have power from time to time:

- (a) To purchase, take on lease, or acquire by gift, devise, bequest, exchange or otherwise any real or personal property,
- (b) in relation to any Church trust property at any time vested in it:
  - (i) to sell it, and to exchange it for other land, and to transfer or convey Church trust property so sold or exchanged to the purchaser or person taking in exchange, freed and discharged from all trusts affecting the same in the hands of the body corporate, and
  - (ii) to demise or let it for such term at such rent and with or without taking premium, fine or foregift and subject to such provisions as to the body corporate shall appear desirable, and
  - (iii) to accept surrender of leases, upon such terms and subject to such conditions as to the body corporate shall appear desirable, and
  - (iv) to raise money on the security of it on such terms and conditions as to the body corporate shall appear desirable, and
  - (v) to declare trusts of it or of any estate or interest in it created by the body corporate for any Order or Community of the Church or for any association of members of the Church or for the use or benefit of or for any purpose of any such Order, Community or association, and either to retain the property in relation to which trusts are so declared, or to vest it, or any estate or interest so created, in other trustees upon the trusts so declared, and
- (c) For any purpose mentioned in this section to execute all such instruments as to the body corporate shall appear proper."

61 In 1986, the statute was amended in a number of respects, which had the effect of greatly expanding the powers of the trustees. The Plaintiff

contends that the amendments did little more than recognise what had, in fact, been occurring, in that, so it was submitted the trustees had already engaged in activities well beyond the limited function apparently contemplated by the 1936 Act.

62 In support of his contentions regarding the pre-1986 activities of the Trustees, Dr Morrison referred to the Minister's second reading speech in the Legislative Assembly on 20 November 1986 to business records and documents suggesting that the Trustees may have carried on some activities pre 1986, at least of an educational nature, and minutes of meetings of Diocesan Consultors which, so it was submitted, indicated that the Trustees were involved for many years prior to 1986 in a range of activities within the Church, beyond mere property holding.

63 The actual amendments effected by the 1986 Act particularly relevant to this case were, first the addition of words to the preamble "and also that other activities which are, or may be, for the benefit of the Roman Catholic Church may be conducted by (the Trustees)".

64 There was also an amendment to s4 which added subsection(3) as follows:

"(3) The objects of a body corporate created by this Act include:

- (a) the operation and conduct of educational, welfare and health institutions, organisations or other bodies, and
- (b) the performance of all such acts, matters and things of any nature (which may include, without limiting the scope of this paragraph, borrowing money) as, in its opinion, are or may be for its benefit or for the benefit of the Church."

65 Dr Morrison also relied on the report of an expert in Ecclesiastical Law, so far as it relates to the Roman Catholic Church, Dr Rodger Austin, exhibit N. He said, relevantly to the issues in this case:

"The teaching of the Church is that the Universal Church is not one single monolithic structure but a communion of individual or particular Churches.

The word *Church* means, in the second instance, the various individual or particular Churches, also called dioceses, in and from which the Universal Church comes into being.

In this report the word *diocese* includes *archdiocese* and the word *bishop* includes *archbishop*.

The teaching of the Church is that a diocese is a section of the People of God entrusted to a bishop to be shepherded by him with the cooperation of the *presbyterium*, that is the priests.

Diocesan bishops are not the delegates of the Roman Pontiff but govern the individual or particular Churches assigned to them as the vicars and ambassadors of Christ.

In the diocese entrusted to his pastoral care the diocesan bishop, as of right, possesses all the ordinary, proper and immediate power required for the exercise of his pastoral office, without prejudice to the supreme authority of the Roman Pontiff.

The diocesan bishop's power is legislative, judicial and executive. [CIC (1917) canons 335 S1, 1519]

Every diocese is, in accordance with the law of the Church, established as a legal entity, called in canon law a moral person. [CIC (1917) canons 100 S1, 215 S1'. In the 1983 Code of Canon Law the term used is *juridic* person. [CIC (1983) canon 113 S2]

With the exception of those Nations with which the Holy See has executed a Concordat whereby dioceses are recognised as legal entities in the civil law, every diocese is obliged to establish a legal entity in accordance with the civil law.

In New South Wales each diocese has established such a legal entity pursuant to the provisions of the Roman Catholic Church Trust Property Act of 1936.

For the Archdiocese of Sydney its body corporate is: The Trustees of the Roman Catholic Church for the Archdiocese of Sydney.

The Trustees of the Roman Catholic Church for the Archdiocese of Sydney holds legal title to the real property owned by the Archdiocese of Sydney and by all the parishes within the Archdiocese of Sydney. This land is held for the Church or for the use or benefit or for any purpose of the Church, unless subject to a specific trust.

The Trustees of the Roman Catholic Church for the Archdiocese of Sydney is the legal entity used in all matters relating to contracts as required by the norms of canon law. [CIC (1917) canon 1529].”

- 66 In Canada, the question of the liability of a corporate trustee having similar, but by no means identical, responsibilities to those conferred by the Trustee Act on the Trustees at the relevant time arose in *John Doe v Bennett* (2004) 236 DLR (4<sup>th</sup>) 577. The judgment of the Court (McLaughlin CJ and Jacobucci, Major, Bastarache, Binnie, Arbour, LeBel, Deschamps and Fish JJ) was delivered by the Chief Justice who commenced his judgment in these terms:

“1. Introduction

1. Over a period of almost two decades, Father Kevin Bennett, a Roman Catholic priest in Newfoundland in the Diocese of St George's, sexually assaulted boys in his parishes. Two successive bishops failed to take steps to stop the abuse. Ultimately, in 1979, a victim revealed the abuse to the Archbishop of the neighbouring diocese, St John's, who was also Metropolitan of the broader ecclesiastical province. He referred the complaint to Bennett's Bishop but again nothing was done. The unnamed plaintiffs, 36 in number, suffered greatly as a consequence of the abuse. Now adults, they remain deeply wounded.

2. The plaintiff-respondents sued for the wrongs that had been done to them. They sued Father Bennett; the Roman Catholic Episcopal Corporation of St George's (St George's); the bishop of St George's at the time the lawsuit was commenced, Raymond Lahey, the archbishop of St John's at the time of the abuse, Alphonsus Penney, the archbishop of St John's at the time the lawsuit was commenced, James MacDonald; the Roman Catholic Episcopal Corporation of St John's (St John's) and the Roman Catholic Church. Father Bennett's liability is not at issue before this Court. The main issue is the liability of St George's.

3. The trial judge found Bennett directly liable; St George's and Bishop Lahey vicariously liable, and Archbishop Penney liable in negligence. He dismissed the claims against Archbishop MacDonald, St John's and the Roman Catholic Church (2000), 190 Nfd. & P.E.I.R.277).

4. The Court of Appeal set aside the findings of personal liability against Archbishop Penney and Bishop Lahey and upheld the dismissal of the action against Archbishop MacDonald, St John's and the Roman Catholic Church. The majority found St George's directly but not vicariously liable (2002) NFCA 47 (CanL11) (2002), 218 D.L. R. (4<sup>th</sup>) 276, 2002 NFCA 47)

5. St George's appealed the finding of direct negligence to this Court, and argued in addition that the Roman Catholic Church was liable. The plaintiff-respondents replied that St George's is not only directly, but also vicariously liable for Bennett's wrongs. The plaintiff-respondents also filed a cross-appeal asserting the liability of Lahey, MacDonald, Penney, St. John's and the Roman Catholic Church. However, they also asserted that the cross-appeal was conditional on the success of St. George's appeal from liability and need not be considered in the event St. George's appeal was dismissed.

## II. The Appeal

6. The main issue on the appeal is whether St George's is liable to the plaintiff-respondents and if so, on what basis. St George's contends it is neither directly nor vicariously liable; the plaintiff-respondents assert they are liable on both grounds. St George's also argues that the Roman Catholic Church is liable.

## A. Direct Liability

7. All of the abuse took place in the diocese of St George's. A Roman Catholic diocese is a territorial enterprise, composed of a number of parishes and administered by a bishop or archbishop. Dioceses are constituted by the Pope, who also appoints the bishop or archbishop. A number of dioceses may form an ecclesiastical province. It is common for legislation to incorporate bishops and archbishops as Episcopal corporations. I conclude that the Episcopal corporation is the secular arm of the bishop or archbishop for all purposes. The office of bishop/archbishop, the enterprise of the diocese and the Episcopal corporation are legally synonymous.

8. The argument for direct liability of St George's is as follows:

(1) The bishops of St George's in charge of Bennett (Bishop O'Reilly and McGrath successively) knew or ought to have known that Bennett was abusing the plaintiff-respondents and negligently did nothing to stop the assaults from continuing;

(2) The bishops (successively) constituted the corporation sole of St. George's under the relevant legislation and acted on its behalf.

(3) Therefore St George's is directly liable for these acts and omissions.

9. St George's concedes the first proposition (the negligence of Bishops O'Reilly and McGrath) and does not seriously dispute the second. Its only argument is that St George's is not liable for the Bishops' negligence, because the corporation sole's activities and powers are confined to holding property and do not extend to the placement, direction and discipline of priests.

10. The narrow issue is therefore whether the corporation sole's activities and liability are confined to matters pertaining to its property. The courts below rejected this proposition. So would I. I base this conclusion on the legislation creating the corporation sole and on its function or purpose.

11. The purpose for which ecclesiastical corporations sole like St George's are created is to serve as a point of legal interface between the Roman Catholic Church and the community at the diocesan level. The Church is at one and the same time a spiritual presence in the community and a secular actor in the community. The task of the corporation sole is to provide a bridge between the two spheres for the diocese. On a secular level, the Church interacts with members of the diocesan community in a host of ways. It carries on a variety of religious, educational and social activities. It makes contracts with employees. It transports parishioners. It sponsors charitable events. It purchases and sells good and property. To do these things, it requires a legal personality. That personality is the corporation sole. To restrict the purpose of the corporation sole to the acquisition, holding and administration of property is to capture only a portion of the purpose it is intended to serve and to artificially truncate its functions.

12. The role of the corporation sole as a legal interface between the Church and the community is set forth in the legislation creating it, An Act to Incorporate the Roman Catholic Bishop of St George's, S.N. 1913,c 12. The Act, quite simply, incorporates the office of bishop, in all its aspects. It does not confine itself to the holding of property belonging to the diocese.

13. Section 1 of the Act states that "the Roman Catholic Bishops from time to time of the Diocese of St George's. shall be a body corporate ... for the purpose of holding lands and property, personal or otherwise". However, the language of other sections makes it clear the Corporation's powers are not confined to property. Section 3 provides:

The corporation shall have perpetual succession and a corporate seal, with power to alter the same, and by the name of the Roman Catholic Episcopal Corporation of St George's shall be capable in law of suing and being sued, pleading and being impleaded in all Courts and places whatsoever, and shall have power to take and to hold lands, and all other property whatsoever for ecclesiastical, charitable and educational purposes and uses of the Roman Catholic Church, and to lease, sell convey and dispose of the same.

This section permits the Corporation to be sued on all matters, not just those relating to property.

14. Section 5 states the Corporation's property is held "for charitable, ecclesiastical and educational uses of the Roman Catholic Church", indicating legislative intent that the corporation sole should carry on and be responsible for the wide panoply of Church activities in the diocese. Similarly, s7 gives the Corporation the power "to borrow money for the purpose of the said Diocese" without restricting that purpose.

15. In sum, the bishop is a corporation capable of suing and being sued "in all Courts" with respect to all matters, and has the power to hold property and borrow money for all diocesan purposes. The corporation can fairly be described as the temporal or secular arm of the bishop. The argument that only the bishop's acts relating to property are acts of the corporation must be rejected. All temporal or secular actions of the bishop are those of the corporation. This includes the direction, control and discipline of priests, which are the responsibility of the bishop. If the bishop is negligent in the discharge of these duties, the corporation is directly liable. Furthermore, this liability remains with the corporation sole, as a continuing legal entity, even when the bishop initially responsible moves from the diocese or retires from his position.

16. I would confirm the conclusion below that the Roman Catholic Episcopal Corporation of St George's is directly liable for the wrongs to the plaintiff-respondents resulting from its bishops' failure to properly direct and discipline Father Bennett."

- 67 The Chief Justice went on to find that "St George's" was vicariously liable for the torts of Father Bennett but that conclusion, in my opinion, would not be open to this court, in light of the decision of the High Court in *Lepore v State of NSW* (2003) 77ALJR 558. There could, I think, be no suggestion that Father Duggan was wrongfully performing part of his ecclesiastical duties when he sexually assaulted the Plaintiff. The Supreme Court of Canada applied tests different to those established by the Hight Court in *Lepore*. However *Lepore* alone would not prevent the Trustees being directly and vicariously liable for a failure to institute and implement proper systems and controls.
- 68 The Defendants submitted that the Trustees could not be a proper defendant for a number of reasons. In the first place reliance was placed

upon observations by Powell JA in **Nobrega v Trustees of the Roman Catholic Church for the Archdiocese of Sydney** (1999) NSWCA 75. However, the particular matter at issue here was not argued in *Nobrega* which, in any event, concerned the liability of a school. Moreover, unlike the case here, the Trustees were sued in a representative capacity, a factor which seems to have been the point of His Honour's remarks.

69 It was also submitted that the question of the liability of the Second Defendant is resolved against the Plaintiff by the decision of the Court of Appeal in *Archbishop of Perth v A.H & J.C* (1995) 18 HCSR 333, a case to which I have already made reference in a different context. That case concerned Western Australian legislation in relation to the Roman Catholic Church. It also concerned claims of sexual abuse against members of the Christian Brothers and claims of breaches of duty by the hierarchy of the Church committed many years previously.

70 The relevant legislation created a statutory corporation known as The Roman Catholic Archbishop of Perth. Cole JA, with whom Meagher JA agreed, held that on its proper construction the legislation was directed only to the holding acquisition, disposition, and management of property. His Honour observed that there was nothing in the act creating the corporation which purported to render it liable for actions in tort arising from the conduct of person being Catholic Clergy unrelated to property.

71 Despite the Defendants submissions, I am not persuaded that I am bound to regard the decision of the Court of Appeal in *Archbishop of Perth* as binding authority for the proposition that the Trustees cannot be liable in this case. The Western Australian Act differs in its terms and does not contain the wide powers conferred upon the Trustees by the 1986 amendments. Those amendments, as I have indicated, largely reflected, according to the Plaintiff's contention, the actual state of affairs.

72 There is authority for the proposition that the doctrine of ultra vires does not relieve a company of tortious liability (*Campbell v Paddington Corp*

(1911) 1KB 869. In **Trustees of the Roman Catholic Church for the Diocese of Sydney & Anor v Hogan** (2001) 53 NSWLR 343, the Trustees were sued, without apparent complaint for tort, in the form of assaults committed upon a school pupil in 1984.

- 73 I am not required to decide the matter finally. Although the evidence relied upon by the Plaintiff in the form of minutes of meetings, records regarding pre 1986 activities beyond mere land holding etc. are, in my opinion, somewhat equivocal, when such evidence is coupled with the evidence of Dr Austin, and the evidence of the submission of a draft release naming the Trustees, there is, I think an arguable case that the Trustees, at all relevant times, constituted the entity which the Roman Catholic Church in the Archdiocese of Sydney adopted and put forward as the permanent corporate entity or interface between the spiritual and temporal sides of the Church legally responsible for the Acts and omissions of the Archbishop and his subordinates in the performance of his role as identified by Dr Austin. In other words, I think the approach taken in *Doe v Bennett* is at least arguable in NSW

**Section 58 of the Act:**

- 74 The section is in the following terms:

**"58 Ordinary action**

(1) This section applies to a cause of action founded on negligence nuisance or breach of duty, for damages for personal injury, not being a cause of action which has survived on the death of a person for the benefit of the person's estate under section 2 of the *Law Reform (Miscellaneous Provisions) Act 1944*, and not being a cause of action which arises under section 3 of the *Compensation to Relatives Act of 1897*.

(2) Where, on application to a court by a person claiming to have a cause of action to which this section applies, it appears to the court that:

(a) any of the material facts of a decisive character relating to the cause of action was not within the means of knowledge of the applicant until a date after the commencement of the year preceding the expiration of the limitation period for the cause of action, and

(b) there is evidence to establish the cause of action, apart from any defence founded on the expiration of a limitation period,

the court may order that the limitation period for the cause of action be extended so that it expires at the end of one year after that date and thereupon, for the purposes of an action on that cause of action brought by the applicant in that court, and for the purposes of paragraph (b) of subsection (1) of section 26, the limitation period is extended accordingly.

(3) This section applies to a cause of action whether or not a limitation period for the cause of action has expired:

(a) before the commencement of this Act, or

(b) before an application is made under this section in respect of the cause of action.

75 The section, in effect, requires the Plaintiff to establish that a material fact of a decisive character relating to the cause of action was not within his means of knowledge until after 14 March 1984, and that this action was commenced within one year after that material fact was within his means of knowledge.

76 Section 57B of the Act provides:

“57B Interpretation

(1) For the purposes of this Subdivision:

(a) (repealed) .....

(b) the material facts relating to a cause of action include the following:

(i) the fact of the occurrence of negligence nuisance or breach of duty on which the cause of action is founded,

(ii) the identity of the person against whom the cause of action lies,

(iii) the fact that the negligence nuisance or breach of duty causes personal injury,

(iv) the nature and extent of the personal injury so caused, and

(v) the extent to which the personal injury is caused by the negligence nuisance or breach of duty,

(c) material facts relating to a cause of action are of a decisive character if, but only if, a reasonable person, knowing those facts and having taken the appropriate advice on those facts, would regard those facts as showing:

(i) that an action on the cause of action would (apart from the effect of the expiration of a limitation period) have a

reasonable prospect of success and of resulting in an award of damages sufficient to justify the bringing of an action on the cause of action, and

(ii) that the person whose means of knowledge is in question ought, in the person's own interests, and taking the person's circumstances into account, to bring an action on the cause of action,

(d) "appropriate advice", in relation to facts, means the advice of competent persons, qualified in their respective fields to advise on the medical legal and other aspects of the facts, as the case may require,

(e) a fact is not within the means of knowledge of a person at a particular time if, but only if:

(i) the person does not, at that time, know the fact, and

(ii) in so far as the fact is capable of being ascertained by the person, the person has, before that time, taken all reasonable steps to ascertain the fact, and

(f) "limitation period" means a limitation period fixed by an enactment repealed or omitted by this Act or fixed by or under this Act. "

77 I am of the opinion that, at all relevant times, the Plaintiff knew of the acts of Father Duggan on which his cause of action is founded and that they caused some personal injury. He was also aware of the identity of Father Duggan and had the means of identifying the Second Defendant, established by public Act of Parliament. I reject the submission that he was incapable of identifying the Second Defendant until he received the draft release naming it as a releasee.

78 The situation in relation to subparagraph (iv) of Section 57 B (1) is not nearly as apparent. Its meaning was explained by Kirby P in *Ditchburn v Selstram Ltd (1989) 17 NSWLR 697 at 702* in terms which, in my view, have relevance to the present case:

"Knowledge of the "nature and extent" of injury:

In considering what are the "material facts relating to a cause of action" it is important to remember that Parliament has taken the trouble to provide an inclusive definition. By s57 (1) (b) there is listed a series of "material facts", amongst which is "(iv) the nature and extent of the personal injury so caused." These words cannot be wished away. They are particularly relevant where the "personal injury" relied upon is a disease or any other "impairment of the physical or mental

condition of a person" which is of gradual onset. That such kinds of injury are within the statute is made plain by the definition of personal injury" in s 57 (1) (a).

It has been suggested that the mere fact of the knowledge that an injury has occurred causing symptoms is enough to put the potential plaintiff on notice of the relevant "material facts relating to the cause of action". Upon this view, the fact that an injured person suffers and knows the fact that he suffers a headache would be sufficient to propel that person to seek medical advice and to track down the precise diagnosis. Upon that approach, in the present case, the claimant had symptoms in his chest, was asked about asbestos employment and received a letter from the Board which referred to exposure to asbestos. He therefore had knowledge, or the means of knowledge, of sufficient facts to warrant and require him to commence proceedings.

In support of this approach, the opponent relied upon passages, in the judgment of McHugh JA in *Brunton v D O'Bryan & Co Pty Ltd* (Court of Appeal, 4 August 1988, unreported). These remarks appear to have been approved by Meagher JA in *Dousi v Colgate Palmolive Pty Ltd* (No 2)

However, it was agreed properly in my view, that this approach is not part of the binding rule of either *Brunton* or of *Dousi*. In *Brunton* it was not followed by Clarke JA (the other member of the majority). In *Dousi* it was not part of the basis upon which Hope JA reached his conclusion. At least in a case such as the present, it is my opinion that the approach is inapplicable. This is because the statute, in terms, envisages its application to diseases which may be of gradual onset. And by s 57(1)(b)(iv) it addresses attention to that feature of the "material facts" which concerns "the nature and extent of the personal injury so caused."

- 79 The issue raised by s57 B (1)(b)(iv) of the Act involves questions of degree and judgment to be approached, in my opinion, in accordance with the observations of Kirby P expressed above.
- 80 I find that the symptoms which, on the evidence, had their genesis in the sexual assaults of Father Duggan progressively worsened, particularly when the Plaintiff was obliged to face other stressors in his life. Minds might, I think, legitimately differ as to when it might reasonably be said that

the Plaintiff was or should have been aware of the nature and extent of the personal injury inflicted upon him by Father Duggan. The Defendants submitted that the Plaintiff was or should have been sufficiently aware years earlier, at least by the occasion when he acknowledged at a meeting, that he had been sexually assaulted in his youth. Despite the Defendants' submissions, in my view the Plaintiff should be accepted that it was not until September 2001, in his consultation with Mr Murray, that he had the means of knowledge of the nature and extent of the personal injury caused by the alleged sexual assaults of Father Duggan. The question remains as to when, in accordance with s57 B (1) (c), the material fact of the nature and extent of his injury became a decisive fact. Again, minds might differ, but in my opinion a reasonable man, having taken appropriate advice, might hesitate in regarding the facts at that stage as justifying the bringing of an action. However, he would hesitate no longer, in my view, once he realized, during 2004, that there was a connection between Father Duggan's assault and the grave economic consequences then facing the Plaintiff.

81 I would hold that the Plaintiff's case falls within the requirements of s58 of the Act.

**Section 60 G of the Act:**

82 Sections 60F and 60G are in the following terms:

**"60F Purpose of this Subdivision**

The purpose of this Subdivision is to provide a procedure for a further discretionary extension of limitation periods where the plaintiff was unaware of the fact, nature, extent or cause of the injury, disease or impairment at the relevant time. This procedure is available for causes of action accruing on or after 1 September 1990, and also (by the operation of Schedule 5) for causes of action that accrued before that date."

**60G Ordinary action (including surviving action)**

(1) This section applies to a cause of action that accrues on or after 1 September 1990, founded on negligence, nuisance or breach of duty, for damages for personal injury, but does

not apply to a cause of action arising under the *Compensation to Relatives Act 1897*.

(2) If an application for an order under this section is made to a court by a person claiming to have a cause of action to which this section applies, the court, after hearing such of the persons likely to be affected by the application as it sees fit, may, if it decides that it is just and reasonable to do so, order that the limitation period for the cause of action be extended for such period as it determines. "

83 Notwithstanding the terms of subsection (1) of s60G, it applies to causes of action accruing before 1 September 1990 by virtue of Schedule 5. Further Transitional Provisions (**Dedousis v Water Board of NSW 125 ALR 193**).

84 Section 60G must be read with s60 I which provides:

"60I Matters to be considered by court

(1) A court may not make an order under section 60G or 60H unless it is satisfied that:

(a) the plaintiff:

(i) did not know that personal injury had been suffered, or

(ii) was unaware of the nature or extent of personal injury suffered, or

(iii) was unaware of the connection between the personal injury and the defendant's act or omission,

at the expiration of the relevant limitation period or at a time before that expiration when proceedings might reasonably have been instituted, and

(b) the application is made within 3 years after the plaintiff became aware (or ought to have become aware) of all 3 matters listed in paragraph (a) (i) - (iii).

(2) Subsections (2), (3) and (4) of section 60E apply, with any necessary adaptations, in relation to applications for orders under this Subdivision. "

85 In light of my findings above, I am of the opinion that this application was made within 3 years after the Plaintiff became aware or ought to have become aware of the nature or extent of the personal injury (which by definition in section 11 includes disease and impairment of his mental condition) which he alleges arises from the assaults perpetrated upon him by Father Duggan. In my opinion, the Plaintiff did not become aware until

September 2001 of the nature and extent of his injury nor, in my opinion, ought he have become so aware at any earlier time.

**Relief should be granted?**

86 The Plaintiff having established conditions precedent to the exercise of jurisdiction under ss58 and 60 G is not necessarily entitled to the relief he seeks. His entitlement is no more than to have the court exercise a discretion to grant an extension of time. S58 confers a discretion, in my opinion, which is difficult to distinguish from the Queensland statutory provisions considered by the High Court in **Brisbane South Regional Health Authority v Taylor (1996) 186 CLR 541**. S60 G expressly includes the phrase "just and reasonable" as the relevant criterion.

87 Principally, as it seems to me, the question is whether there can be a fair trial of the Plaintiff's action. In considering this question, of course consideration of the undoubted prejudice to the Defendants arising from the delay must loom large.

**The Death of Father Duggan:**

88 The fact that Father Duggan died in October 2004 and was not, as I have found, able to provide a full response to the Plaintiff's claim is potentially an important matter. However, in my opinion, the uncontested evidence of Mr Steven Smith deprives that circumstance of much of its force.

89 On the evidence before me the Church and hence, in my opinion, the Trustees had the opportunity as long ago as 1983 to investigate the alleged sexual misconduct of Father Duggan. Again, on the evidence before me, it appears to have been somewhat disinterested in doing so. I can infer that it would have been equally disinterested in pursuing a complaint made at the time by the present Plaintiff.

90 Of course there may be good reasons why the complaint of Mr Smith was not properly investigated and documented. But such reasons were not

advanced before me. No evidence was adduced from Father McGloin and this absence was not explained. It is rather chilling to contemplate that he is the same Father McGloin referred to in the judgment of the Court of Appeal delivered 16 September 2005, against whom allegations were made similar to those made against Father Duggan by Mr Smith and the Plaintiff.

- 91 I infer that Father McGloin's evidence would not have assisted the Plaintiff and in the circumstances, I would not regard the death of Father Duggan as a matter of significance in the matter before me.

**Other Prejudice suffered by the Defendant:**

- 92 Two affidavits were read by Mr Rushton which established that the defendants will suffer actual prejudice if the Plaintiff obtains the relief he seeks, namely the affidavits of John Dalziell sworn 15 December 2004 and John Usher, sworn 19 July 2005.

- 93 Mr Dalziell, solicitor for the Defendants, testified as to relevant enquiries made by him. His letter to the English Benedictine congregation seeking information as to whether there was any record of relevant complaints against Father Duggan while he was at Fort Augustus produced a negative response. He then testified as to a conversation with Father John O'Neill, currently parish priest in the Diocese of Parramatta as follows:

"I said: Do you remember Father Aidan Duggan?"

Father O' Neill said: Yes, I served as assistant Parish Priest with him for two weeks in Bass Hill before I went to the Parish of Baulkam Hills. I remember that Father Farrar was the Parish Priest then. I think that Father Duggan has passed away.

I said: Do you remember an altar server named John Ellis who was also in Bass Hill around 1974?

Father O'Neill said: I remember the name but otherwise cannot place him, remember we are going back 30 years.

I said: What do you remember about Father Duggan?

Father O'Neill said: I remember him as a man of intelligence and culture, a gentleman. We got on well for the short time we were at Bass Hill together.

I said: Do you remember ever seeing Fr. Duggan with John Ellis?

Father O'Neill said: No, I don't remember that."

94 Father Usher, a Catholic Priest and presently (since May 2005) Chancellor for the Sydney Archdiocese, provided the following material:

"Parish of Christ the King at Bass Hill – 1975 to 1979

For the purposes of swearing this affidavit, I made enquiries of the Archdiocesan files in order to ascertain who were the priest/s resident at the Parish of Christ the King at Bass Hill (Parish) between the years 1975 and 1979.

AS a result of my enquiries, I understand that the following priests held appointments at the Parish:

- (a) 1970 – 1978: Father John Carl Farrar; and
- (b) 1978 – 1985: Father John Dougherty.

As a result of my enquiries, I also understand that the following assistant priest held appointments at the Parish:

- (a) 1974: Father J O'Neill; and
- (b) 1974 – 1979: Father A Duggan

The Archdiocese does not appear to hold any records or documents concerning the Plaintiff's alleged engagement as an altar server in the Parish of Bass Hill between 1974 and 1979. The Archdiocesan record also shows that Father Farrar died on 24 September 1998 aged 76 years.

#### The Archdiocese of Sydney 1975 - 1986

The following persons are the person within the Archdiocese with canonical/spiritual authority in relation to the Third Defendant in respect of the period 1975 to 1986;

- (a) His Eminence Sir James Darcy Cardinal Freeman;
- (b) His Eminence, Edward Bede Cardinal Clancy;
- (c) His Grace, Archbishop James Patrick Carroll;
- (d) His Lordship, Bishop Thomas William Muldoon;
- (e) His Lordship, Bishop Edward Francis Kelly MSC
- (f) His Lordship, Bishop Patrick Laurence Murphy;
- (g) His Lordship Bishop Bede Vincent Heather;
- (h) His Lordship Bishop John Edward Heaps; and
- (i) His Lordship Bishop Geoffrey James Robinson.

I have reviewed the Archdiocesan records in respect of the period 1975 to 1986, and have adduced the following information.

- (a) His Eminence Sir James Darcy Cardinal Freeman, the Archbishop between 1971 and 1983, died on 16 March 1991;
- (b) His Eminence, Edward Bede Cardinal Clancy; the Archbishop between 1983 and 2001 has now retired;
- (cc) His Grace, Archbishop James Patrick Carroll, was ordained Auxiliary Bishop of Sydney from 1954 and from 1965 to 1984 Auxiliary Archbishop of Sydney, died on 14 January 1995;
- (d) His Lordship, Bishop Thomas William Muldoon, auxiliary Bishop between 1960 and 1982, died on 13 January 1986.
- (e) His Lordship, Bishop Edward Francis Kelly MSC, Auxiliary Bishop between 1969 and 1975, died on 2 September 1994;

(f) His Lordship, Bishop Patrick Laurence Murphy, Auxiliary Bishop between 1977 and 1986, has now retired;

(g) His Lordship, Bishop Bede Vincent Heather, Auxiliary Bishop between 1979 and 1986 has now retired;

(h) His Lordship, Bishop John Edward Heaps, Auxiliary Bishop between 1981 and 1992, died on 21 June 2004;

(i) His Lordship Bishop Geoffrey James Robinson, Auxiliary Bishop and Vicar General between 1984 and 2004, has now retired.

The Third Defendant:

The Archdiocese holds personal files in relation to all Catholic priests incardinated in the Archdiocese. Personal files contain, among other things, documents relating to appointments, commendations, complaints or allegations in respect of each Priest.

I have reviewed the Third Defendant's personal file. From that file, I understand that:

(a) the Third Defendant was born on 24 January 1920, and was therefore aged between 55 and 66 years during the period of alleged abuse; and

(b) the Third Defendant was ordained on 8 December 1959 by His Eminence Sir Norman Thomas Cardinal Gilroy.

I also understand that in about 1954, the Third Defendant moved to Fort Augustus Abbey in Scotland (Abbey) where he spent 20 years teaching and ministering at the Abbey school. To the best of my knowledge and belief:

(a) the Abbey school closed in 1999 and was canonically suppressed in 2001;

(b) the Abbey ceased to operate in 1998 due to declining numbers of monks;

(c) the Abbot during the time of the Third Defendant's attendance at the Abbey was Right Reverend Dom Mark Dilworth OSB who died on 28 February 1974 at the age of 79; and

(d) another former Abbot of Fort Augustus Abbey, Abbot Nicholas Holman, who also knew the Third Defendant, died on 13 August 2001."

**Can there be a Fair Trial?:**

The evidence undoubtedly establishes that the Defendant will suffer prejudice if the action in tort is allowed to proceed. It would, in any event, be inferred from the passage of such a lengthy period, but in addition the Defendants have produced positive evidence to the effect that persons whom one would expect could throw some light on the Plaintiff's claims are dead or have no relevant recollection. Moreover, there have been stresses in the Plaintiff's life which may be unconnected to the assaults of Father Duggan and which may have played some part in his mental condition. This will create difficulties in any assessment of damages on the issue of liability. However, this case does not concern, for example, some arcane medical procedure or complex industrial accident. The Plaintiff was voluntarily serving his church as an altar boy over a number of years. I infer that there must be many people alive who could attest to that service even though it took place 30 years ago. I also infer that there must be many people alive, including those mentioned by Father Usher, who could attest to the systems, if any, in place at Bass Hill and elsewhere to protect persons such as altar boys from the sort of conduct alleged against Father Duggan. Father Usher indeed does not suggest the contrary. Mr Steven Smith, who appears to have knowledge of Father Duggan's sexual proclivities, is probably just as available to the Defendants as to the Plaintiff.

95 In my opinion, the evidence sufficiently establishes that there can be a fair trial of the Plaintiff's action albeit not a perfect one. In my opinion, it would be just and reasonable to grant the Plaintiff the relief he seeks.

**The Plaintiff's claim for breach of Fiduciary Duty:**

96 I have already mentioned that in his Amended Statement of Claim, the Plaintiff pleads, in the alternative, a count against the Defendants for breach of fiduciary duty. This is an equitable cause of action to which the Act does not apply except by analogy.

97 In their Statement of Defence, the Defendants plead laches acquiescence and delay. Those defences will have to be dealt with at trial. Dr Morrison submitted that the fact that the case will need, in any event, to go to trial on the equitable cause of action, constitutes a reason why the relief now sought under the Limitation Act should be granted I reject that proposition.

98 The only matter before me is a motion seeking relief under the Act and that as it seems to me is the only matter with which I should deal. The claim for equitable relief is presently irrelevant.

**ORDERS:**

99 I make these orders:

1. I extend until 30 August 2004 the limitation period for the causes of action pleaded in the Statement of Claim herein against the Second Defendant, the Trustees of the Roman Catholic Church for the Archdiocese of Sydney.
2. I dismiss with costs the Notice of Motion seeking orders under the Limitation Act against the First Defendant, Cardinal Pell.

3. Otherwise costs are reserved for further argument on a date arranged with my Associate.

I CERTIFY THAT THIS AND THE 55  
PRECEDING PAGES ARE A TRUE COPY  
OF THE REASONS FOR JUDGMENT HEREIN  
OF THE HONOURABLE ACTING JUSTICE

Patten

Associate W. Marlow Date 3.2.06