

Article Information

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How far does vicarious liability stretch? The High Court of Australia further analyses this question

A recent case before the High Court of Australia provided it with an opportunity for the High Court to clarify the scope and application of the doctrine of ‘vicarious liability.’

What is ‘Vicarious Liability?’

Vicarious liability is a cause of action used to attribute fault upon an organisation or person for conduct which is carried out by an individual under their control. Such liability can be impugned on the basis that the acts were instructed or within the course of the relationship that the wrongdoer is said to have had with that person or organisation. Justice Gleeson outlined that for such liability to be imposed, two elements must exist:

1. There is a recognised relationship between the tortfeasor and the defendant; and
2. The tortfeasor committed a tort in the course of that relationship [\[1\]](#).

Vicarious liability is ascribed where a wrong is done and there is either; an agency relationship (done with defendant’s “seal of approval”), a non-delegable duty (“duty to ensure that reasonable care is taken”), and an employment relationship. Where one of these arises, vicarious liability is a form of strict liability, meaning that liability is imposed on a defendant for the wrongdoing of another, regardless of whether there is any actual fault to be attributed to the defendant.

Victorian Proceedings

The High Court case of *Bird v DP* provided an occasion for the Court to opine on whether vicarious liability arises in the context of a relationship between a diocese and a Parish priest; a consideration which had not previously arisen before the Court. The Court explained that question before it boiled down to; “whether relationships that are akin to employment attract vicarious liability” [\[2\]](#).

Here, the victim was found to have been assaulted and sexually abused by a priest (Father Coffey) from a Diocese in Ballarat, Victoria. The Diocese was then twice found vicariously liable by the Victorian Courts. The Supreme Court of Victoria explained that the priest was not an employee despite “many ... features of the employment relationship.” Additionally, Father Coffey was said to not have been an agent of the Diocese, despite him performing a pastoral function on those visits to the victim’s family home where the offences occurred. However, the finding of vicarious liability was based on “the totality of the relationship” between the Diocese and Father Coffey.

The Court of Appeal of the Supreme Court of Victoria further agreed with the above position, explaining that “by virtue of his role as an assistant priest appointed by the Diocese, Father Coffey was an emanation of the diocese.”

High Court of Australia - *Bird v DP* [2024] HCA 41

As a starting point, the High Court objected to the use of categories such as “agents” or “representatives,” as it said using such descriptions “obscure the need to examine what exactly are the relationships between the various actors” [\[3\]](#). The Court noted that such words:

“Are statements of conclusion that do not necessarily proceed from an articulated underlying principle that identifies why there should be vicarious liability in one case but not another.”

The High Court explained that the Victorian courts based their judgements on:

“The principle of vicarious liability has not be confined ... to cases in which the relationship ... is that of employer and employee.”

The High Court further outlined that the Court of Appeal used “the authorities for other than their requisite purposes” which meant:

“They could and did conclude that Father Coffey was subject to the control and direction of the Bishop of the Diocese (which is undoubtedly correct insofar as Father Coffey’s religious duties were concerned), and was a “representative” and “emanation” of the Diocese, with the consequence that the Diocese could be vicariously liable for Father Coffey’s tortious conduct against the respondent.”

In finding him not to have been an employee, the Court of Appeal still found the Diocese vicariously liable on the basis that it provided Coffey with “not just the opportunity but also the occasion’ for the wrongful acts which he committed against the respondent” [\[4\]](#). However, the High Court explained that:

“The fact that a person’s position provided them with ‘not just the opportunity but also the occasion’ for tortious conduct does not constitute a separate feature enabling vicarious liability to be established in respect of the conduct of a person who is not an employee” [\[5\]](#).

Such a decision restrains the law regarding vicarious liability, in which the High Court restates that if it is found that an individual is not an employee, an extremely strong connection between the tortious act and the defendant must be established before a finding of a vicarious liability is delivered. The High Court explained that, because of this, “the reasoning of the primary judge and the Court of Appeal involve an extension and not an application of the common law.”

On this basis, the Diocese’s appeal succeeded and the finding of vicarious liability was dismissed.

Conclusion

This is a conclusive finding by the High Court which has restricted the expansion of vicarious liability which is at odds with other common law jurisdictions, such as, the UK and Canada.

Such a decision highlights the strict interpretation upon where a finding of vicarious liability will arise. Going forward, it is expected such a decision will impact the ability of victims of torts to hold non-employers liable for individuals under their “control.” Much will depend on the facts and circumstances of each case but claimants will need to carefully consider with their solicitors the prospects of alleging vicarious liability. Other causes of action such as negligence and non-delegable duties will no doubt still be relied upon by claimants. Further legislative law reform is likely to occur in each state. We will see how this decision impacts the quantum and liability aspects of future claims.

[\[1\]](#) *Bird v DP* [2024] HCA 41 (**Bird v DP**), [81].

[\[2\]](#) *Ibid*, [101].

[\[3\]](#) *Ibid*, [194].

[\[4\]](#) *Ibid*, [153].

[\[5\]](#) *Ibid*, [238].