

IN THE SUPREME COURT OF VICTORIA
AT MELBOURNE
COMMON LAW DIVISION
INSTITUTIONAL LIABILITY LIST

S ECI 2020 02137

RWQ (a pseudonym)

Plaintiff

v

CATHOLIC ARCHDIOCESE OF MELBOURNE

First Defendant

- and -

GEORGE PELL

Second Defendant

JUDGE: McDonald J

WHERE HELD: Melbourne

DATE OF HEARING: 4 August 2022

DATE OF JUDGMENT: 24 August 2022

CASE MAY BE CITED AS: RWQ v The Catholic Archdiocese of Melbourne & Ors

MEDIUM NEUTRAL CITATION: [2022] VSC 483

STATUTES - Plaintiff's claim for nervous shock against first defendant arising from alleged sexual assault of plaintiff's child by second defendant - Plaintiff not a primary victim of child abuse - Whether *Legal Identity of Defendants (Organisational Child Abuse) Act 2018* applies to plaintiff's claim - Whether plaintiff's claim 'founded on or arising from child abuse' - Whether application of the Act to first defendant confined to a claim founded on or arising from child abuse of the plaintiff - *Legal Identity of Defendants (Organisational Child Abuse) Act 2018* ss 1, 3, 4, 7, 8 - *Supreme Court (General Civil Procedure) Rules 2015* r 47.04.

APPEARANCES:

Counsel

Solicitors

For the Plaintiff

Mr JWK Burnside AO QC
with Mr D Seeman

Shine Lawyers

For the First Defendant

Mr CM Caleo QC with
Ms GF Gray

Corrs Chambers Westgarth

For the Second Defendant

Mr N O'Bryan

Galbally & O'Bryan Lawyers

HIS HONOUR:

Introduction

1 The present proceeding concerns the application of the *Legal Identity of Defendants (Organisational Child Abuse) Act 2018* ('the Act') to the first defendant, the Catholic Archdiocese of Melbourne. The plaintiff claims damages against the first defendant for nervous shock which he alleges is founded on or arises from the sexual abuse of his son by the second defendant. The first defendant contends that the application of the Act is confined to claims by plaintiffs who have been subjected to child abuse ('primary victim'). It contends that the Act has no application to the plaintiff's claim because he does not allege that he was subjected to child abuse. The plaintiff claims to have suffered psychiatric injury upon learning of his son having been subjected to child abuse and subsequent death caused by the child abuse ('secondary victim').

2 I have concluded that the application of the Act to non-government organisations is not confined to claims founded on or arising from child abuse *of the plaintiff*. The plain meaning of the words 'founded on or arising from child abuse' in s 4(2) of the Act includes a claim for nervous shock brought by a parent of a child alleged to have been sexually abused. The contextual considerations relied upon by the first defendant do not warrant the application of the Act to non-government organisations being confined to claims brought by a plaintiff who is an alleged primary victim of child abuse.

3 On the proper construction of s 4(2) of the Act, the Act does apply to the plaintiff's claim against the first defendant. On the proper construction of s 7 of the Act, a proper defendant nominated by the first defendant would incur any liability arising from the plaintiff's claim against the first defendant.

Background

4 By a further amended statement of claim filed 4 February 2022 the plaintiff alleges:

- That his son (AAA) and a friend (BBB) were abused by the second

defendant sometime between July and December 1996;¹

- That as a result of the abuse AAA commenced using illicit drugs at the age of 14 and used drugs consistently until his death;²
- AAA died on 8 April 2014 from a heroin overdose caused by the psychological impact of the abuse;³
- RWQ was informed of the abuse of AAA by a member of the SANO Task Force on 1 July 2015;⁴
- As a result of learning about the abuse of his son RWQ has suffered nervous shock for which he makes a claim at common law and pursuant to Part XI of the *Wrongs Act 1958* (Vic);⁵
- The first defendant owed RWQ a duty to take care not to cause RWQ pure mental harm;⁶
- The first defendant breached the duty to RWQ which was a cause of RWQ's injury.⁷

5 RWQ alleges that by reason of the second defendant's position as Archbishop, the first defendant is directly liable for the abuse of AAA and the injury to RWQ.⁸ In the alternative, RWQ alleges that the first defendant is vicariously liable for the abuse of AAA by reason of the abuse occurring in the course of the second defendant's role as Archbishop.

6 By its defence, the first defendant:

- Admits that it is an unincorporated non-government organisation ('NGO') within the meaning of s 5 of the Act;⁹
- Admits that a proceeding can be commenced against it by which a claim to which the Act applies is made;¹⁰
- Denies that the claim made by RWQ is a claim to which the Act applies, as it is not a claim founded on or arising out of child abuse in respect of which it is sued for and alleged to be liable for child abuse.¹¹

1 Plaintiff, Further Amended Statement of Claim dated 4 February 2022, [8].

2 Ibid [12].

3 Ibid [13].

4 Ibid [14].

5 Ibid [16].

6 Ibid [17].

7 Ibid [19].

8 Ibid [20].

9 First Defendant, Defence to Further Amended Statement of Claim dated 13 July 2022, [1(a)].

10 Ibid [1(b)].

11 Ibid [1(c)].

7 By summons dated 23 November 2021 the plaintiff applied for orders pursuant to r 47.04 of the *Supreme Court (General Civil Procedure) Rules 2015* that there be a trial of separate questions relating to the application of the Act. On 2 February 2022 Matthews AsJ made an order that there be a separate trial of the following questions:

- (a) On the proper construction of s 4(2) of the *Legal Identity of Defendants (Organisational Child Abuse) Act 2018*, does the Act apply to the plaintiff's claims against the Catholic Archdiocese of Melbourne; and
- (b) On the proper construction of s 7 of the *Legal Identity of Defendants (Organisational Child Abuse) Act 2018*, would a proper defendant nominated by the Catholic Archdiocese of Melbourne incur any liability arising from the plaintiff's claims against the Catholic Archdiocese of Melbourne?

Legal Identity of Defendants (Organisational Child Abuse) Act 2018

8 The relevant sections of the Act are as follows:

1 Purpose

The main purpose of this Act is to provide for child abuse plaintiffs to sue an organisational defendant in respect of unincorporated non-government organisations which use trusts to conduct their activities.

3 Definitions

In this Act – ...

child abuse means –

- (a) an act or omission in relation to a person when the person is a minor that is physical abuse or sexual abuse; and
- (b) psychological abuse (if any) that arises out of that act or omission –

and includes alleged child abuse;

4 Application of Act

- (1) This Act applies to any proceeding for a claim founded on or arising from child abuse.
- (2) This Act applies to an NGO if –
 - (a) a plaintiff commences or wishes to commence a claim against an NGO founded on or arising from child abuse; and
 - (b) but for being unincorporated, the NGO would be capable of being sued and found liable for a claim founded on or arising from child abuse; and

(c) the NGO controls one or more associated trusts.

(3) This Act applies to a claim founded on or arising from child abuse whether the child abuse occurred or occurs before, on or after the commencement of this section.

7 Nomination of proper defendant

(1) An NGO to which this Act applies, in relation to any claim founded on or arising from child abuse, with the consent of the nominee, may nominate an entity that is capable of being sued –

(a) to act as a proper defendant to the claim on behalf of the NGO; and

(b) to incur any liability arising from the claim on behalf of the NGO.

(2) If an NGO nominates a proper defendant under subsection (1), that entity –

(a) is taken to be the defendant in the claim on behalf of the NGO for all purposes; and

(b) incurs any liability arising from that claim on behalf of the NGO as if the NGO had been incorporated and capable of being sued and found liable for child abuse.

(3) Unless the court otherwise orders, a nomination of a proper defendant may occur at any time within 120 days after the commencement of the proceeding for the claim against the NGO.

(4) A court may substantively determine a claim in a proceeding founded on or arising from child abuse for which there is a proper defendant under this section as if the NGO itself were incorporated and capable of being sued and found liable for child abuse in respect of the claim.

(5) The nomination of a proper defendant under this section does not relieve an NGO from any obligations it may have in relation to the conduct of the proceeding, including any interlocutory matters, and for that purpose, the NGO is taken to be incorporated and capable of being sued and found liable for child abuse in respect of the claim.

8 Associated trust to be proper defendant

(1) This section applies to a claim if –

(a) an NGO fails to nominate a proper defendant under section 7 within 120 days from the commencement of the proceeding against the NGO; or

(b) the proper defendant nominated by the NGO is not an entity capable of being sued or does not have sufficient assets or property to meet any judgment or order that may arise in or from the proceeding for the claim.

(2) The plaintiff in a proceeding for a claim to which this section applies may apply to the court for an order that the claim is to proceed against the trustees of an associated trust of an NGO on behalf of the NGO as a proper defendant.

(3) For the purposes of an application under subsection (2), the NGO bears the onus of identifying any associated trust.

(4) On an application under subsection (2), the court may make an order that the claim is to proceed against the trustees of an associated trust of the NGO on behalf of that NGO as a proper defendant.

(5) If the court makes an order under subsection (4), any trustee of the associated trust –

(a) is taken to be the defendant to the claim on behalf of the NGO for all purposes; and

(b) incurs any liability arising from the claim on behalf of the NGO as if the NGO had been incorporated and capable of being sued and found liable for child abuse.

(6) More than one trustee of an associated trust, and more than one associated trust, may be a proper defendant and liability may attach to more than one such trustee or trust.

(7) A court may make any further order under this section that the claim may proceed, or any judgment obtained on that claim be enforced, against the trustees of one or more other associated trusts of an NGO.

(8) A court may substantively determine a claim in a proceeding founded on or arising from child abuse for which there is a proper defendant under this section as if the NGO itself were incorporated and capable of being sued and found liable for child abuse in respect of the claim.

(9) The appointment of a proper defendant under this section does not relieve an NGO from any obligations it may have in relation to the conduct of the proceeding, including any interlocutory matters, and for that purpose, the NGO is taken to be incorporated and capable of being sued and found liable for child abuse in respect of the claim.

The proper construction of s 4(2) of the Act

9 The first defendant submits that the reference in s 4(2)(a) to ‘a plaintiff’ is a reference to a ‘child abuse plaintiff’. It submits this construction is consistent with the purpose of the Act as stated in s 1, which is to provide for child abuse plaintiffs to sue an organisational defendant in respect of unincorporated non-government organisations which use trusts to conduct their activities. The first defendant submits that this construction is also consistent with the definition of ‘child abuse’ in

s 3, meaning an act or omission in relation to a person when the person is a minor that is physical abuse or sexual abuse, and psychological abuse that arises out of that act or omission.¹²

10 The first defendant submits that when the reference to ‘a plaintiff’ is read as a ‘child abuse plaintiff’, the Act only applies to an NGO if a plaintiff commences or wishes to commence a claim against an NGO founded on or arising from child abuse of *the plaintiff*.¹³ The first defendant submits that as RWQ’s claim is founded on or arises from child abuse of AAA the Act has no application to it in respect of RWQ’s claim.

11 The starting point for the proper construction of s 4(2) of the Act is the words of s 4(2).¹⁴ The plain and ordinary meaning of the words in s 4(2)(a) ‘a claim against an NGO founded on or arising from child abuse’, includes a claim for nervous shock arising from the child abuse of RWQ’s child.

12 There is no material distinction between the words ‘founded on’ and the words ‘brought in respect of’.¹⁵ The words ‘founded on’ are words of wide import.¹⁶ A claim ‘arising from’ child abuse requires a less proximate causal relationship between the claim and the child abuse than is required for a claim founded on child abuse.¹⁷ The use of ‘or’ in the phrase ‘founded on or arising from’ manifests a legislative intention to extend the application of the Act beyond claims against NGOs founded on child abuse. Absent the phrase ‘arising from’ it is strongly arguable that a claim by a plaintiff for damages for nervous shock consequent upon

¹² First Defendant, Outline of Submissions filed 13 July 2022, [34].

¹³ Transcript of Proceedings, T 34 L 20–4 (4 August 2022).

¹⁴ *R v A2* (2019) 269 CLR 507, 522 [37] (Kiefel CJ and Keane J) (*R v A2*); *Firebird Global Master Fund II Ltd v Republic of Nauru & Anor* (2015) 258 CLR 31, 85–6 [186] (Nettle and Gordon J) (*Firebird Global v Nauru*); *Project Blue Sky Inc v Australian Broadcasting Authority* (1998) 194 CLR 355, 381 [69] (McHugh, Gummow, Kirby and Hayne JJ); *Alcan (NT) Alumina Pty Ltd v Commissioner of Territory Revenue (NT)* (2009) 239 CLR 27, 46–47 [47] (Hayne, Heydon, Crennan and Kiefel JJ); *Momcilovic v The Queen* (2011) 245 CLR 1, 175 [441] (Heydon J).

¹⁵ *Lew Footwear Holdings Pty Ltd v Madden* [2014] VSC 320, [220] (Elliott J).

¹⁶ *Brighton Automotive Holdings Pty Ltd & Anor v Honda Australia Pty Ltd & Anor* (2021) 65 VR 146, 159 [32], 160 [37] (Button J).

¹⁷ *Repatriation Commission v Law* (1980) 47 FLR 57, 68 (Bowen CJ, Brennan and Lockhart JJ); *Government Insurance Office of New South Wales v RG Green & Lloyd Pty Ltd* (1966) 114 CLR 437, 443 (Barwick CJ, McTiernan and Taylor JJ agreeing at 444), 445 (Menzies J), 447 (Windeyer J).

the plaintiff being told that their child had been sexually abused, would be a claim founded on child abuse. However, the use of the phrase 'arising from' puts the matter beyond doubt. A claim by a plaintiff for damages for nervous shock consequent upon the plaintiff being told that their child had been sexually abused is plainly a claim arising from child abuse.

13 If as contended by the first defendant the application of the Act to NGOs is confined to claims brought by primary victims of child abuse, the words 'or arising from' in s 4(2)(a) would be inutile. All words of a statute must be given meaning unless there is a good reason to the contrary.¹⁸ A claim against an NGO by a primary victim of child abuse will always be a claim founded on child abuse. If the application of the Act is limited in the way the first defendant contends, there would have been no occasion for the Parliament to have extended the application of the Act to NGOs by the inclusion in s 4(2)(a) of the words 'or arising from'.

14 Mr Caleo QC who appeared with Ms Gray for the first defendant, accepted that on the ordinary meaning of the words in s 4(2)(a) 'a claim founded on or arising from child abuse' would include RWQ's claim for nervous shock.¹⁹ However, he submitted that when considered in context, the effect of s 4(2) is that the Act only applies to a claim by a primary victim of child abuse.²⁰ Mr Caleo submitted that the mischief to which the legislation is directed is the capacity of an NGO to rely upon the *Ellis* defence²¹ in respect of a claim brought by a primary victim.²² Mr Caleo submitted that the reference to 'child abuse plaintiffs' in s 1 of the Act makes clear that the mischief to which the Act is directed is the capacity of an NGO to rely upon the *Ellis* defence in respect of a claim by a primary victim.

Extrinsic material

15 The first defendant submits that extrinsic material, including the Report of the Royal

¹⁸ *Commonwealth v Baume* (1905) 2 CLR 405, 414 (Griffith CJ); *Chu Kheng Lim v Minister for Immigration, Local Government and Ethnic Affairs* (1992) 176 CLR 1, 12–13 (Mason CJ).

¹⁹ Transcript of Proceedings, T 14 L 25 – T 15 L 1 (4 August 2022).

²⁰ Transcript of Proceedings, T 15 L 3–21 (4 August 2022).

²¹ *Trustees of the Roman Catholic Church v Ellis* (2007) 70 NSWLR 565.

²² Transcript of Proceedings, T 16 L 1–6 (4 August 2022).

Commission into Institutional Responses to Child Sexual Abuse ('Royal Commission Report') and the Betrayal of Trust Report of the Victorian Parliament Family and Community Development Committee ('Betrayal of Trust Report')²³ that preceded the introduction of the Act, establish that its intended purpose is to provide survivors (defined in the Royal Commission Report²⁴ and the Betrayal of Trust Report²⁵ as primary victims of child abuse) with a proper defendant capable of being found liable for abuse in circumstances where the defendant was a non-government organisation.²⁶ The first defendant submits that the Betrayal of Trust Report did not discuss secondary victims in the context of civil law reform. Rather, the civil law reform section of the Betrayal of Trust Report focused solely on the difficulties encountered by the survivors of criminal child abuse in bringing civil actions.²⁷

16 The first defendant further submits that the Royal Commission Report did not make any recommendations for civil law reform in respect of secondary victims.²⁸ The first defendant submits that the Royal Commission Report's recommendation concerning 'identifying a proper defendant' was recommendation 94 which stated:

State and Territory Governments should introduce legislation to provide that, where a survivor wishes to commence proceedings for damages in respect of institutional child sexual abuse where the institution is alleged to be an institution with which a property trust is associated, then unless the institution nominates a proper defendant to sue that has sufficient assets to meet any liability arising from the proceedings:

- (a) the property trust is a proper defendant to the litigation;
- (b) any liability of the institution with which the property trust is associated that arises from the proceedings can be met from the assets of the trust.²⁹

²³ Family and Community Development Committee, Parliament of Victoria, *Betrayal of Trust – Inquiry into the handling of child abuse by religious and other NGOs* (Final Report, November 2013).

²⁴ *Royal Commission into Institutional Responses to Child Sexual Abuse* (Redress and Civil Litigation Report, August 2015) p 536.

²⁵ Family and Community Development Committee, Parliament of Victoria, *Betrayal of Trust – Inquiry into the handling of child abuse by religious and other NGOs* (Final Report, November 2013), p xxii. Cf p xxi.

²⁶ First Defendant, Outline of Submissions dated 13 July 2022, [13].

²⁷ Ibid [16].

²⁸ Ibid [20].

²⁹ *Royal Commission into Institutional Responses to Child Sexual Abuse* (Redress and Civil Litigation Report, August 2015) p 511.

- 17 The first defendant also submits that the second reading speech for the *Legal Identity of Defendants (Organisational Child Abuse) Bill 2018* ('Bill') supports a finding that the reference to 'child abuse plaintiffs' in the Act is a reference to survivors claiming compensation for child abuse.³⁰ The first defendant relies upon the following extracts from the second reading speech:

The Family and Community Development Committee delivered its final report, *Betrayal of Trust*, on 13 November 2013. *Betrayal of Trust* reported that survivors of organisational child abuse face significant barriers in recovering compensation for the abuse they suffered. In particular, *Betrayal of Trust* found that identifying a correct organisational entity to sue is a major obstacle to civil litigation where child abuse plaintiffs wish to commence proceedings against an institution that is unincorporated.

A survivor will always have a cause of action against the perpetrator of the abuse. However, in some cases the perpetrator may have limited, or no, assets. Alternatively, the survivor may not be able to identify the perpetrator, or the perpetrator may have died. Survivors may therefore seek to sue the institution in which they were abused. However, survivors of institutional child abuse face considerable difficulty in bringing civil claims against certain non-government institutions, because of the way some institutions structure their affairs.

...The royal commission also examined the problems for survivors in identifying a proper defendant to sue. In its final report into redress and civil litigation, released in September 2015, the royal commission stated that survivors should have more certainty when seeking to commence litigation against religious or other institutions associated with statutory property trusts or other property trusts. The royal commission recommended that the government introduce legislation to provide that, where a survivor wishes to sue an institution with an associated property trust, unless the institution nominates a proper defendant with sufficient assets to meet liability arising from the proceedings, the property trust is a proper defendant to the litigation, and any associated liability of the institution can be met from the trust assets.

...The bill forms part of the government's response to these problems for survivors outlined by *Betrayal of Trust* and the royal commission. It will ensure that survivors of institutional child abuse can pursue compensation, and solve the problem in the existing common law that child abuse plaintiffs are, in many instances, unable to identify an organisational defendant to sue in respect of unincorporated non-government organisations (NGOs) that control trusts to conduct their activities.

...The bill provides that, where an institutional child abuse plaintiff

³⁰ First Defendant, Outline of Submissions dated 13 July 2022, [24].

wishes to pursue damages against an unincorporated NGO that controls one or more associated trusts used to conduct the NGO's activities, that association may nominate an entity that is capable of being sued to act as a proper defendant in the proceedings, and incur any liability arising from the proceedings, within 120 days.

...Any claim founded on or arising from child abuse can be brought in reliance on the provisions of the bill, including negligence, vicarious liability, or direct liability, regardless of when the abuse occurred.³¹

18 The first defendant further submits that the explanatory memorandum for the Bill, or the Act when it was proclaimed, does not refer to the Bill having application to claims brought by secondary victims. The first defendant submits that the 'Background' part of the explanatory memorandum states that the Bill responds to findings 26.3 and recommendation 26.1 of the Betrayal of Trust Report as well as adopting recommendation 94 of the Royal Commission's 2015 Redress and Civil Litigation Report. The first defendant submits that these are references to recommendations and findings concerning survivors' claims for child abuse, not secondary victims' claims.³²

19 The extracts from the second reading speech relied upon by the first defendant lend support to its contention that the references in the speech to 'survivors' is a reference to primary victims of institutional child abuse. However, the following extracts from the speech suggest that the references to 'survivors', are not confined to primary victims of institutional child abuse:

The *Ellis* case highlighted the problem survivors can face in seeking justice. In that case, the claimant sought to sue the Catholic Archdiocese of Sydney and the trustees of the Roman Catholic Church, for abuse perpetrated by a Catholic assistant priest in the 1970s. The NSW Court of Appeal held that the Archdiocese could not be liable, as it was unincorporated and could not be sued. The court also held that the trustees could not be sued. The fact that the trustees held and managed property for and on behalf of the Catholic Church did not make them liable for legal claims associated with church activities. The court was unable to identify a proper defendant and the case was dismissed.

The current common-law position in Australia, based on the *Ellis* case, is that an unincorporated association that conducts its affairs by way of trusts cannot

³¹ Emphasis added by the first defendant.

³² First Defendant, Outline of Submissions dated 13 July 2022, [29].

be held organisationally accountable in civil litigation for institutional child abuse.

This problem appears to be unique to Australia. For example, in the United States, most churches are either incorporated entities, or are structured as a 'corporation sole' which can be sued in abuse claims. In England, case law has overcome the issues raised in *Ellis*. Therefore, institutional child abuse plaintiffs in Victoria, and Australia, are uniquely disadvantaged.

The *Betrayal of Trust* inquiry heard from a number of survivors that unincorporated associations have used all defences available to them, including the *Ellis* defence, to defeat claims. For example, Mrs Chrissie and Mr Anthony Foster explained that the Catholic Church's lawyers had strenuously defended litigation brought by them, despite having earlier accepted that the abuse had occurred. *Betrayal of Trust* found that the strictly legalistic approach adopted by the church failed to address the issue of genuine accountability.

...

In introducing this reform, I acknowledge the important work of the Family and Community Development Committee in preparing their *Betrayal of Trust* report, and the immense courage of survivors who have spoken, and continue to speak, about past organisational child abuse. I particularly acknowledge the work of the late Anthony Foster and his wife, Chrissie Foster, and the strong support they received from their local member, the former MP for Oakleigh, Ann Barker. Their advocacy over many years, especially at a time when few were listening, is a significant part of why we have this bill before us today.³³

- 20 It is common ground that the reference in the second reading speech to the litigation brought by Mrs Chrissie Foster and Mr Anthony Foster included legal proceedings in which Mr and Mrs Foster made claims in their own respective individual capacities for damages arising out of the alleged sexual abuse of their daughters. All of these proceedings were settled prior to trial.
- 21 The claims brought by Mr and Mrs Foster arising from the alleged sexual abuse of their children were not claims brought as primary victims of institutional child abuse. As with RWQ's claim, the claims were founded on or arising from the alleged abuse of their children. Nevertheless, Mr and Mrs Foster are referred to in the second reading speech as 'survivors'. It is inexplicable and improbable³⁴ that in

³³ Victoria, *Parliamentary Debates*, Legislative Assembly, 7 March 2018, 16 (Martin Pakula, Attorney-General).

³⁴ Cf *R v A2* (n 14) 524 [46] (Kiefel CJ and Keane J)

circumstances where the Attorney-General described Mr and Mrs Foster as survivors and acknowledged their advocacy as having played a significant part in the Bill coming before the Parliament, that the Parliament intended to enact legislation which would still have allowed the Archdiocese of Melbourne to rely on the *Ellis* defence in respect of claims brought by Mr and Mrs Foster arising out of the alleged sexual abuse of their daughters. Nevertheless, if the first defendant's submissions are accepted, this is the effect of the Act.

- 22 The second reading speech supports a finding that a principal focus of the Act is to ensure that the claims of survivors of institutional child abuse are not frustrated by the absence of a proper defendant. However, the second reading speech does not support a finding that Parliament intended that only those plaintiffs who were themselves victims of institutional child abuse should benefit from the Act.

Analysis

- 23 The task of the Court is to construe the language of the statute. If the meaning of the words in s 4(2) of the Act has a wider application than may have been contemplated by the draftsman, the Court must give effect to that wider meaning.³⁵
- 24 In *Stingel v Clark*,³⁶ the High Court held that the words 'breach of duty' in s 5(1A) of the *Limitation of Actions Act 1958* were capable of covering intentional torts such as trespass to the person where the damages claimed included damages in respect of personal injuries.³⁷ Section 5(1A) provides:

5 Contracts and torts

(1A) An action for damages for negligence nuisance or breach of duty (whether the duty exists by virtue of a contract or of provision made by or under a statute or independently of any contract or any such provision) where the damages claimed by the plaintiff consist of or include damages in respect of personal injuries consisting of a disease or disorder contracted by any person may be brought not more than 3 years from, and the cause of

³⁵ *Stingel v Clark* (2006) 226 CLR 442, 458 [26] (Gleeson CJ, Callinan, Heydon and Crennan JJ), 485 [132] (Hayne J agreeing) ('*Stingel*'); *Firebird Global v Nauru* (n 14) 56 [69] (French CJ and Kiefel J); *Secretary to the Department of Justice and Regulation v Century 21 Australia Pty Ltd* (2017) 53 VR 234, 248-9 [48] (the Court).

³⁶ *Stingel* (n 35).

³⁷ *Ibid* 459 [28] (Gleeson CJ, Callinan, Heydon and Crennan JJ).

action shall be taken to have accrued on, the date on which the person first knows—

- (a) that he has suffered those personal injuries; and
- (b) that those personal injuries were caused by the act or omission of some person.

25 Section 5(1A) was inserted into the *Limitation of Actions Act 1958* by s 3(b) of the *Limitation of Actions (Personal Injury Claims) Act 1983*. The second reading speech for the *Limitation of Actions Act (Personal Injury Claims) Bill* included the following:

In personal injury claims, other than disease or disorder claims, the injured person may bring his action for damages within six years after the date of the accrual of his cause of action. Normally that would be the date of the injury. In disease cases, such as asbestosis or pneumoconiosis, the injured person may bring his action for damages within six years from the date that he knows he has the disease or disorder and that someone is responsible – that is, when he knows he has a cause of action. That knowledge may not come to the injured person until many years after the disease or disorder start to develop...

Personal injury claims with respect to the contracting of a disease or disorder are treated differently from all other personal injury claims. No longer will a person have to seek an extension of time for the bringing of an action in disease or disorder cases simply because the disease or disorder was not discovered until after the expiration of the limitation period. The injured person in disease or disorder cases will no longer be dependent on the discretion of a court to extend the limitation period but will have a postponed limitation period as of right...

The amendments to the *Limitation of Actions Act* will produce the following benefits:

...

- (b) A recognition of and provision for the particular difficulties in disease and disorder cases concerning the possible expiration of the limitation period before the injured person knows he has a cause of action.

26 The explanatory memorandum in respect of s 3(b) of the *Limitation of Actions (Personal Injury Claims) Act 1983* which introduced s 5(1A) into the *Limitation of Actions Act 1958*, stated:

This sub-clause provides that in personal injury claims where the injury consists of the contracting of a disease or disorder the limitation period does not commence to run until the injured person knows he has the disease or disorder and that some person is responsible.

27 In *Clark v Stingel*³⁸ the Victorian Court of Appeal held that a claim for damages for trespass to the person did not fall within s 5(1A). The leading judgment, written by Eames JA, included the following passage from the judgment of Chernov JA in *Mazzeo v Caleandro Guastalegname & Co*³⁹ at 189 [45]:

The conclusion that, on its proper construction, s 5(1A) is concerned only with actions arising out of 'insidious' personal injuries (ie, those which have not been caused by trauma), gains support from the extrinsic material relating to the 1983 legislation.⁴⁰

28 The High Court upheld an appeal from the judgment of the Court of Appeal. As to the extrinsic materials in respect of s 5(1A) the plurality stated:

The extrinsic materials referred to by Chernov JA in *Mazzeo*, by Eames JA in the present case, and by counsel for the respondent, show that, when s 5(1A) was enacted, the focus of concern was insidious disease of the kind just described. It may be accepted that lung disease was the paradigm case to which s 5(1A) was directed. It may also be accepted that the discretionary power conferred by s 23A was regarded as the normal method by which any injustice resulting from the operation of the general limitation period could be remedied. Both considerations are relevant, but neither is conclusive. It is the text of s 5(1A) which is to be applied; not the prevailing opinion as to what was likely to be the most common kind of case in which it would be invoked. The task of a court is to construe the language of the statute. Extrinsic materials may be useful as an aid to deciding the meaning of that language, but the subjective contemplation of the drafters as to the kind of case in which that language would be most likely to be applied is not determinative. Let it be supposed, for example, that it was the problem of progressive lung disease that prompted the enactment of s 5(1A). It does not follow that the language of s 5(1A) should be confined to cases of progressive lung disease. That problem may explain why Parliament chose the words it used, but if the meaning of those words has wider application, then a court is bound to give effect to that meaning. To hold that 'personal injuries' as used in the section is confined to insidious or indeed any particular form of injury is to foreclose the factual inquiries which the section demands, these being whether the person has suffered 'personal injuries' and when she first knows that she has suffered them.⁴¹

29 The second reading speech in respect of the *Limitation of Actions (Personal Injury Claims) Bill 1983* supports the finding set out above that 'lung disease was the paradigm case to which s 5(1A) was directed'. Equally, some passages in the second

38 [2005] VSCA 107 ('*Clark*').

39 (2000) 3 VR 172.

40 *Clark* (n 38) [80].

41 *Stingel* (n 35) 458 [26].

reading speech relied upon by the first defendant in the present proceeding support a finding that ensuring survivors of institutional child abuse have a proper defendant to sue was a primary focus of s 4(2) of the Act. Even if, as contended by the first defendant, the references to ‘survivor’ in the second reading speech is confined to primary victims of institutional child abuse, the plain meaning of the words in s 4(2) gives the Act wider application than claims against an NGO brought by a primary victim of child abuse. There is no reference in s 4(2) to ‘survivor’, ‘primary victim’ or ‘secondary victim’. There is nothing in the text of s 4(2) which limits its operation to a claim founded on or arising from child abuse *of the plaintiff*.

30 The first defendant contends that the word ‘plaintiff’ in s 4(2)(a) should be read as ‘child abuse plaintiff’ and that so read the Act only applies to a claim founded on or arising from child abuse of the plaintiff. The words ‘child abuse plaintiff’ do not appear in s 4(2). The only reference to the words ‘child abuse plaintiff’ in the Act is in s 1 which provides that the main purpose of the Act is to provide for child abuse plaintiffs to sue an organisational defendant in respect of unincorporated non-government organisations which use trusts to conduct their activities. A purpose provision is a statement of legislative intent which may properly inform the construction of a statute. However a purpose provision expressed in general terms may serve little function as an aid to the construction of a more specific substantive provision.⁴²

31 Properly construed, ‘child abuse plaintiffs’ in s 1 means plaintiffs who commence or wish to commence a claim against an NGO founded on or arising from child abuse. If I am wrong and the words ‘child abuse plaintiffs’ in s 1 means a plaintiff who is a victim of child abuse, it does not follow that the application of the Act is limited to claims by plaintiffs who are the victims of child abuse. First, s 4(2) uses the word ‘plaintiff’ rather than ‘child abuse plaintiff’. Second, s 1 provides that the *main* purpose of the Act is to make provision for child abuse plaintiffs. If ‘child abuse plaintiffs’ means victims of child abuse, a construction of s 4(2) whereby the Act also

⁴² *Douglas v Harness Racing Victoria* [2021] VSCA 128, [78] (the Court).

applies to claims by secondary victims is not inconsistent with a main purpose of providing for primary victims of child abuse to sue non-government organisations.

32 In addition to relying upon extrinsic materials the first defendant submits that other provisions of the Act support a finding that the application of the Act is limited to claims founded on or arising from child abuse of the plaintiff. The first defendant draws attention to the words ‘capable of being sued and *found liable for child abuse in respect of the claim*’ in ss 7(4)–(5) and ss 8(8)–(9). The first defendant submits that the phrase ‘found liable for child abuse in respect of the claim’, means that the claim against the NGO which the plaintiff brings must be a claim alleging liability for child abuse of the plaintiff as defined. It must be a claim which, if it is successful, results in a finding of liability on the part of the proper defendant, to the plaintiff, for child abuse.⁴³

33 The words ‘capable of being sued and found liable for child abuse in respect of the claim’ which appear in ss 7(4) and (5) must be read in the context of ss 7(1) and (2). Section 7(1) provides that an NGO to which the Act applies, in relation to any claim founded on or arising from child abuse, with the consent of the nominee, may nominate an entity that is capable of being sued:

- (a) to act as a proper defendant to the claim on behalf of the NGO; and
- (b) to incur any liability arising from the claim on behalf of the NGO.

34 The liability which the proper defendant incurs on behalf of the NGO is liability arising from any claim founded on or arising from child abuse. The principle of consistent usage ordinarily requires a consistent meaning to be given to a particular phrase wherever it appears in a suite of statutory provisions.⁴⁴ Accordingly, where it appears in s 7 the phrase ‘founded on or arising from child abuse’ must be construed consistently with the construction of that phrase where it appears in s 4(2).

35 Section 7(2)(b) provides that if an NGO nominates a proper defendant, that entity

⁴³ Transcript of Proceedings, T 22 L 4–10 (4 August 2022).

⁴⁴ *Tabcorp Holdings Limited v Victoria* (2016) 90 ALJR 376, 387 [65] (the Court).

incurs any liability arising from the claim on behalf of the NGO as if the NGO had been incorporated and capable of being sued and found liable for child abuse. The relevant claim is not a claim 'for child abuse'. Rather, it is a claim founded on or arising from child abuse. The right of an NGO to nominate a proper defendant under s 7(1) is only enlivened if there is a claim founded on or arising from child abuse. The words 'found liable for child abuse in respect of the claim' in ss 7(4)-(5) and 8(8)-(9) mean found liable for a claim founded on or arising from child abuse.

36 The words 'founded on or arising from child abuse' are used repeatedly throughout the Act: ss 4(1), 4(2), 4(3), 7(1), 7(4), 8(8), 12(1) and 13. The repeated use of these words points strongly to the conclusion that the application of the Act to NGOs is not confined to claims by primary victims of child abuse. To conclude otherwise renders the words 'arising from child abuse' otiose.

37 In *R v A2*,⁴⁵ Kiefel CJ and Keane J observed that:

As always with statutory construction, much depends upon the terms of the particular statute and what may be drawn from the context for and purpose of the provision.⁴⁶

The mischief which the Act was intended to remedy is not limited to the capacity of an NGO such as the first defendant to rely upon the *Ellis* defence in respect of a claim brought by a primary victim of institutional child abuse.⁴⁷ The text of the Act, particularly the repeated use of the words 'a claim founded on or arising from child abuse' points to the relevant mischief being the capacity of an NGO to rely on the *Ellis* defence in respect of a claim founded on or arising from child abuse, irrespective of whether the claim is brought by a primary or secondary victim. The text of a statute is important as it contains the words being construed.⁴⁸ The text of s 4(2) is the clearest indicator of the mischief which the Act is intended to remedy.

38 The plain meaning of the words in s 4(2) is that the Act applies to an NGO if a

⁴⁵ *R v A2* (n 14).

⁴⁶ *Ibid* 522 [36] (Kiefel CJ and Keane J).

⁴⁷ Transcript of Proceedings, T 16 L 15 (4 August 2022).

⁴⁸ *R v A2* (n 14) 522 [36] (Kiefel CJ and Keane J).

plaintiff commences a claim against an NGO founded on or arising from child abuse. This includes a claim for nervous shock by a plaintiff whose claim is founded on or arises from child abuse of the plaintiff's child. The contextual matters relied upon by the first defendant do not warrant a departure from the plain meaning of s 4(2). To construe 'plaintiff' in s 4(2)(a) as being limited to a plaintiff who is a primary victim of institutional child abuse forecloses the inquiry which the text of s 4(2) demands, namely whether the plaintiff's claim against an NGO is founded on or arises from child abuse.

39 The question of whether, on the proper construction of s 4(2), the Act applies to the plaintiff's claims against the first defendant, is to be answered in the affirmative. The consequence of this affirmative answer is that the claims made by the plaintiff against the first defendant are claims to which the Act applies. A further consequence is that the question whether, on the proper construction of s 7 a proper defendant nominated by the first defendant would incur any liability arising from the plaintiff's claims against the first defendant, should also be answered in the affirmative. The first defendant is an NGO to which the Act applies. The plaintiff's claim against the first defendant is a claim founded on or arising from child abuse. As such, the first defendant may nominate a proper defendant pursuant to s 7(1) of the Act to incur any liability arising from the claim on behalf of the first defendant. A proper defendant nominated by the defendant under s 7(1) will incur any liability arising from the plaintiff's claim against the first defendant.

Conclusion

40 The questions set down for preliminary determination pursuant to r 47.04 are answered as follows:

(a) On the proper construction of the s 4(2) to the *Legal Identity of Defendants (Organisational Child Abuse) Act 2018*, does the Act apply to the plaintiff's claims against the Catholic Archdiocese of Melbourne;

Yes.

(b) On the proper construction of s 7 of the *Legal Identity of Defendants (Organisational Child Abuse) Act 2018*, would a proper defendant nominated by the Catholic Archdiocese of Melbourne incur any liability arising from the

plaintiff's claims against the Catholic Archdiocese of Melbourne;

Yes.

41 I shall provide the parties with an opportunity to make submissions on the costs of the proceeding. My provisional view is that the first defendant should pay the plaintiff's costs of and incidental to the hearing on 4 August 2022, including reserved costs, on a standard basis to be taxed in default of agreement. As the second defendant played no active role in the hearing on 4 August 2022 my provisional view is that the appropriate order in respect of the second defendant is that there be no order as to costs.
