

FILED

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ALBERT HARTNETT

v

CATHOLIC DIOCESE OF WILCANNIA-FORBES

&

Ors



APPELLANT'S WRITTEN SUBMISSIONS IN REPLY

A REPLY – FACTUAL CHALLENGE – SISTER GREEN

- 1 The Respondents' Submissions ('RS') elide the fundamental and irreconcilable flaws in the Trial Judge's fact-finding and reasoning, as identified in the Appellant's Submissions [20]-[119] ('AS'). The paradigm example appears at RS [34]-[40], where the only response to inconsistent acceptance of Mr Haimes' evidence that he was caned by Sister Green, in the face of her denial to the contrary, is to retreat to asserted error: RS [39]. This inability to provide a cogent explanation reconciling this inconsistency is demonstrative of a reasoning process by the Trial Judge that is illogical, incomplete, and incapable of sustaining the ultimate findings.

A1 Mr Haimes' Evidence – RS [34]-[40]

- 2 RS [34]-[40] does not grapple with the obvious forensic consequence of the Trial Judge's acceptance of Mr Haimes' evidence that Sister Green *did* physically discipline him with a ruler-like implement when he was a student: TJ [197]; Red 197D-K. That finding squarely contradicts a fundamental aspect of Sister Green's own evidence—central to the Trial Judge's ultimate findings—that she had never used an implement to administer physical discipline to students at any time in her career: TJ [66]; Red 168H-M; AS [9]; T 319:36-42; Black Vol 1 319R-W; T 569:50, Black Vol 2 569W-570G nor had she even witnessed its practice, including during an era when such discipline was widespread: T 576:1-25 Black Vol 2 576C-M. It is inconsistent with her evidence that the most serious form of discipline she ever employed was '*smacking*' students: T 593:48-594:6 Black Vol 2 593W-594E. These denials were advanced (and accepted) in answer to the primary allegations of the appellant and the tendency witnesses, as well as on an '*anti-tendency*' basis, that such conduct was anathema to her. Yet, no explanation is given

as to how the Trial Judge's acceptance and reliance on Sister Green's evidence can stand in the face of these fundamental inconsistencies, seemingly disregarded in the overall assessment of her credibility.

- 3 With respect, RS [40] misapprehends the forensic significance of these critical inconsistencies. It was both irrelevant and factually wrong for the Trial Judge to find (TJ [197]; Red 197D-K) that the discipline administered to Mr Haimes did not offend '*the contemporary standards of the time*', given Sister Green's own evidence that such conduct was prohibited at the school during that period: T 575:40-45 Black Vol 2 575T-W. Nor was the probative value of that evidence contingent on it establishing or supporting a '*reign of terror*'—neither being the basis on which the appellant adduced it. Rather, it was led in support of the specific tendencies identified in the written notice: Red 118B-K—which appear to have been overlooked, at least insofar as the evidence of Mr Haimes is concerned.

A2 Glaringly improbable evidence

- 4 Viewed in light of the Trial Judge's acceptance that Sister Green *did* administer physical discipline with an implement in the 1970s—thereby exhibiting a propensity to engage in that conduct—the broader factual findings in respect of the appellant and the tendency witnesses are rendered not merely improbable, but contrary to the inferences reasonably open on the evidence.
- 5 Sister Green commenced her teaching career in the 1950s, and the Trial Judge accepted the evidence of various witnesses who euphemistically described her as '*strict*'.¹ So notorious was the practice of corporal punishment through her formative years that the respondents' Senior Counsel submitted that the Trial Judge could '*perhaps take judicial notice about the times in the 1970s and 1960s*' and '*the widespread use of corporal punishment in that era*': T 319:35-42; Black Vol 1 319S.
- 6 Against that background, Sister Green admitted to '*smacking*' students '*a few times*' per week: T 569:43-45; Black Vol 2 569U-W, despite awareness of its prohibition at the School: RS [40]; TJ [81], [211]; Red 172I-K; Red 201O-Q. She was reprimanded by the School's principal for smacking Janine Monaghan: TJ [180]; Red 191U-Y. She admitted to '*smacking*' Margaret Dixon, for conduct that the Trial Judge accepted did not even meet her own definition of '*serious misbehaviour*': TJ [68]; Red [168T-169E]; T 595:31-34; T 595:41-46 Black Vol 2 595P-W. The Trial Judge accepted that she caned Mr Haimes in the 1970s (TJ [197]; Red 197D-K) and she admitted owning two rulers, including one she named '*Montgomery*': TJ [42]; Red [158F-G]; T 587:10-27 Black Vol 2 587F-O. On that evidence, it is difficult to imagine a stronger candidate for a teacher prone to using corporal punishment. Her professed ignorance as to why students feared '*Montgomery*' (T 636:41-637:11 Black Vol 2 636T-637G) and why the mere call of '*Where's Monty?*' elicited a Pavlovian response from the infant school children, restoring order to the

¹ (Lesley Leonard) TJ [79]; Red [171T], (Margaret Leonard) TJ [82]; Red [172N], (Pagan Burford) TJ [86]; Red [173K], (Lauretta Wheeler) TJ [134]; Red [183O], (Jennifer Ward) ; TJ [163]; Red [188U], (Br O'Brien); TJ [175]; Red [190X] .

class, is illogical: T 589:44-49; Black Vol 2 589V-Y.² The obvious and compelling inference is that ‘*Monty*’ was used as a mode of physical discipline—in the manner the Trial Judge found she used in the case of Mr Haines and alleged by the appellant and the tendency witnesses.

A3 ‘The Teachers’ Aides’ RS [44]-[47]

- 7 The attempt in RS [44] and [46] to minimise the forensic impact of the discrepancies in the teachers’ aides’ evidence—by dismissing them as the product of faded memories of trivial or insignificant matters—should be rejected. This cohort was advanced by the respondents, and accepted by the Trial Judge, to support the proposition that they were always present and would have observed and reported any instance of physical discipline by Sister Green had it occurred: TJ [198]; Red 197R-W. But, when considered through the prism of Sister Green’s own admitted disciplinary practices, the fundamentally defective nature of their evidence renders their accounts so materially inconsistent that they ought to have been rejected in their entirety.

A3.1 Inconsistent evidence

- 8 Logically, Sister Green’s observable conduct within the classroom was fixed by her admitted disciplinary practices employed throughout her career, which she said were reserved for particularly serious classroom misbehaviour such as ‘*fighting, punching and pinching*’: TJ [64]; Red [167Q-R], TJ [68]; Red 168T-Y; T 590:38-591:11 Black Vol 2 590S-591H. Principal among those included (a) using ‘*Montgomery*’ to ‘*whack*’ the desk of a child who was doing the wrong thing: TJ [42]; Red 158H-I; T 588:3 Black Vol 2 588B-C; (b) drawing a circle in the playground for children to sit or stand in; and (c) giving a child a ‘*smack*’ on the bottom as a means of discipline: TJ [34]; Red 155V-W; TJ [65]; Red 167S-168H, which she said happened ‘probably a few times a week’: T 569:26-40; Black Vol 2 569N-U. However, the evidence of the teacher’s aides’ witnesses bore little resemblance to these asserted practices.
- 9 Notwithstanding the respondents’ Senior Counsel putting to the appellant that when hitting the students’ desks with ‘*Montgomery*’ Sister Green would ‘*give it a good thump on the desk*’: T 36:31-32; Black Vol 1 36N-Q and that it made a ‘*big sound*’, which was ‘*terrifying*’: T 133:35-46 Black Vol 1 133R-Y, none of the teacher’s aides gave evidence recalling Sister Green striking desks or blackboards with a ruler as a

² At T 589:44-49 Black Vol 2 589V-Y:

‘Q. What was it about you saying to the children “Where’s Monty?” that would stop them misbehaving?

A. I don’t know, they just reacted that way.

Q. Do you think they were scared of you hitting Monty on the desk?

A. I don’t really know what they were scared of,’

mode of discipline.³ With the exception of Ms Edwards: T 922:14-16 Black Vol 3 922H-I, none of them gave evidence of Sister Green using the phrase ‘*Where’s Monty?*’.⁴ None of them gave evidence corroborating Sister Green’s evidence that the teacher’s aide would at times ‘*fetch Montgomery*’ for her: *cf* T 587:49-50; Black Vol 2 587X-Y. Ms Wheeler denied knowledge of ‘*Montgomery*’ at all: T 617:36-50 Black Vol 2 617R-Y). Ms Edwards recalled ‘*Montgomery*’ but stated that it was never picked up and simply sat in the room ‘*like the other pieces of furniture*’: T 757:23-36; Black Vol 2 757L-S. Ms Cubby never saw students fighting in Sister Green’s class, including pinching, pushing, or punching: T 754:43-755:7; Black Vol 2 754U-755E. With the exception of Ms Mannix, none of the teacher’s aides recalled Sister Green requiring students to stand in chalk circles in the playground⁵ or physically disciplining a student by smacking their bottom.⁶ Ms Mannix recalled such smacking on about five occasions: (TJ [130]; Red 183A-E; T 699:29 Black Vol 2 699E-R). When it was put to Ms Wheeler that Sister Green had admitted to smacking students at the School, she said: ‘*If she said she did, she obviously has, but I didn’t witness it*’: T 620:47; Black Vol 2 620V-X. None of the teachers’ aides gave evidence of their awareness of either the Margaret Dixon⁷ or Janine Monaghan⁸ incidents.

- 10 Despite their inconsistent and deficient evidence recalling Sister Green’s admitted disciplinary practices, the teachers’ aides—Ms Cubby, Ms Mannix and Ms Edwards—were consistent in advancing a curious, and not objectively acceptable, counter-narrative that Sister Green did not need to resort to physical discipline because she innately commanded respect from her Kindergarten and infant school students. To this end, Ms Cubby said Sister Green did not need to use physical discipline because she maintained order through a combination of her voice and her ‘*presence*’: T 755:22-756:20 Black Vol 2 755K-756K. Likewise, Ms Mannix considered physical discipline unnecessary because her infant school students innately ‘*respected*’ Sister Green—in part, she said, because the kindergarten children ‘*just knew*’, or possibly from their siblings or because ‘*they just had the respect*’: T 697:29-32; Black Vol 2 697O-Q; T

³ (Wheeler) TJ [138]; Red 184L-M; T 617:6-35 Black Vol 2 617D-W, (Cubby) T 752:15-26 Black Vol 2 752H-N, (Mannix) T 698:26-29; Black Vol 2 698M-P; T 703:1-12; Black Vol 2 702B-H; (Edwards) T 921:10-14; Black Vol 3 921D-H.

⁴ (Wheeler) TJ [138]; Red 184L; T 617:40-50 Black Vol 2 617T-Y, (Cubby) T 757:23-26; Black Vol 2 757L-N.

⁵ (Wheeler) TJ [134]; Red 183R; T 622:39–43; Black Vol 2 622S-V, (Cubby) T 752:34-43; Black Vol 2 752Q-V (Edwards) T 920:18-30; Black Vol 3 922I-O.

⁶ (Wheeler) TJ [134]; Red 183Q; T 618:5-25; Black Vol 2 618C-M, (Cubby) TJ [138]; Red [184K]; T 751:11-23; Black Vol 2 751F-L, (Edwards) TJ [141]; Red 185D; T 920:8-16 Black Vol 3 920E-I.

⁷ (Edwards) T 921:30-34; Black Vol 3 921O-Q, (Wheeler) T 623:10-21; Black Vol 2 623F-L, (Cubby) T 751:43-752:13; Black Vol 2 751U-752H.

⁸ (Edwards) T 921:16-25; Black Vol 3 921I-M, (Wheeler) T 622:13-20 Black Vol 2 622G-L; T 624:5-45 Black Vol 2 624C-X, (Cubby) T 753:12-20; Black Vol 2 753F-K.

700:45-702:50; Black Vol 2 700V-702Y. Ms Edwards gave evidence that Sister Green maintained classroom discipline ‘*with her mouth*’: T 919:48-920:6; Black Vol 3 919W-920E.

- 11 Contrary to RS [46], these ‘*inconsistencies*’ are not mere ‘*slight differences in recollection*’. At best, they reflect the limited and *ad hoc* nature of the interactions they each had with Sister Green within her classroom. At worst, they reflect a body of evidence, perhaps unconsciously, given to protect their most revered colleague. In either scenario, the absence of corroboration from the teachers’ aide witnesses carried no forensic weight, and the Trial Judge’s reliance upon it was in error.

A3.2 Failure to recall the ‘Janine Monaghan incident’

- 12 Br Hollamby gave evidence that one of the four (4) teacher’s aides called to give evidence was present during the ‘*Janine Monaghan incident*’: T 782:4-27; Black Vol 2 782C-N, yet each denied it was them.⁹ On any one of their respective versions, that incident must have been significant, given their professed recollection of Sister Green’s benign disciplinary methods. As RS [44] acknowledges, the identity of that witness remains unknown, and the logical consequence is that the evidence of all four (4) aides must be regarded as tainted.
- 13 At the very least, it was illogical for the Trial Judge to conclude, as the Trial Judge did, that had the alleged abuse of the appellant and other students been occurring, the teacher’s aides ‘*would have noticed*’ and ‘*would have told the truth about it*’: TJ [198]; Red 197S-U. The proper inference to be drawn is that the teachers’ aides’ loyalty to Sister Green, and their desire to protect her reputation, consciously or unconsciously, shaped their testimony and should not have been acted on.¹⁰

A3 ‘Extreme allegations of systematic abuse’ RS [10]-[12]

- 14 The apparent attack at RS [2], [10]-[12] of the hyperbolic descriptions of the alleged assaults used by the appellant and his witnesses must be assessed in the context of the Trial Judge’s finding that the appellant had experienced profound deprivation: TJ [196]; Red [196P]. A circumstance shared by most, if not all, of the First Nations witnesses called by him. The cross-cultural challenges faced by First Nations people giving evidence are well-recognised in authority: *Bugmy v The Queen* (2013) 249 CLR 571, cited at TJ [196]; Red [196P].

⁹ (Mannix) TJ [130]; Red 183B, (Wheeler) TJ [134], (Cubby) TJ [139]; Red 183S-184R, (Edwards) T 921:16-28; Black Vol 3 921H-O.

¹⁰ See Plaintiff’s Closing Submissions at p 5, paragraph [21] Black Vol 3 1072J-K citing *Murray v Feast* [2023] WASC 273 at [84]-[123] where Solomon J summarised the relevant cases and principles dealing with the communication difficulties encountered by First Nations people, including the notion of ‘gratuitous concurrence’.

- 15 Against that background, the appellant’s use of expressions such as ‘*tortured*’ and ‘*every day*’ (or ‘*most of the days*’: TJ [29]; Red 154B; T 40:34-47 Black Vol 1 40Q-X; T 108:5-38 Black Vol 1 108C-S) in describing his experiences should be understood as an attempt—within a limited and unsophisticated vocabulary—to convey the subjective impact of events upon him as a young child. The same is true of his tendency witnesses: see T 305:24-50 Black Vol 1 305L-Y; T 360:12-17 Black Vol 1 360G-J. This was not the language of a sophisticated or educated witness deliberately embellishing their evidence: see T 107:46-108:1-16; Black Vol 1 107V-108J. In cross-examination, the appellant readily accepted that he had positive experiences in Sister Green’s classroom: T 31:38-32:10 Black Vol 1 31S-32P, so too did other witnesses: T 365:34; Black Vol 1 365Q-R (Pagan Buford). In re-examination, the appellant gave evidence that he had moved away from Bourke during his infant years at the School: T 149:32-50; Black Vol 1 149P-Y, and that he did not regularly attend school; and thus, his description of being hit ‘*every day*’ was a reference to his experiences on the intermittent days he attended the School—rather than it occurring on every day of the School’s calendar.
- 16 The difficulties faced by unsophisticated and educationally deprived plaintiffs giving evidence are self-evident. This is especially so in the case of historical incidents in civil claims unconstrained by a limitation period. As was emphasised by the High Court in *GLJ v Trustees of the Roman Catholic Church for the Diocese of Lismore* [2023] HCA 32 at [40]: ‘*Judicial fidelity to this new normative structure is required*’. That fidelity must extend to claimants from diverse backgrounds, including those whose disadvantaged circumstances not only rendered them vulnerable to the original tortious harm, but have also left enduring effects on their ability to give evidence. For a Court to fail to acknowledge such a circumstance is to put form over substance, and to fail to assess the evidence of the witnesses in the proper context of that evidence. In this case, the appellant’s case relied on the evidence of people, including himself, who were disadvantaged young child children at the time of the relevant events. This was to be compared to the respondent’s case that relied on the evidence of educated adults, in the role of child educators, at the time of the relevant events.

A4 Inconsistent findings of discipline of the appellant

- 17 The apparent contention at RS [30] that the Trial Judge did not find Sister Green ‘*smacked*’ the appellant as a means of discipline is misleading by omission. Although referring to TJ [201]; Red 198T-199B; RS [30] appears to confine the Trial Judge’s finding to the limited forms of physical discipline it lists—namely, placing hands on children at assembly, putting them in a chalk circle for a short time, or requiring them to stand in a corner. That is not what the Trial Judge found. The finding at TJ [12]; Red 146P—where the Trial Judge accepted that the appellant was subjected to a degree of physical punishment by Sister Green (and Mr Dixon) by way of discipline—must be read together with TJ [201]; Red 198T-U, which expressly provides:

‘I am satisfied then that Sister Green did use some physical forms of discipline in terms of the smacking I have referred to.’

- 18 As identified in AS [98]-[99], that finding was inconsistent with Sister Green’s own evidence—accepted by the Trial Judge at TJ [34]; Red 155V-156E—that the Appellant was a well-behaved boy who did not require chastisement or correction by way of physical punishment (see also TJ [214]; Red 202N). The finding that Sister Green did smack the appellant is not a trivial matter in the context of this case. On the respondents’ own case, such conduct was prohibited at the School: RS [40], [68], and Sister Green denied the conduct outright on the basis that the appellant was not a candidate for discipline at all. The finding is therefore not only at odds with her testimony, but also further undermines Sister Green’s credibility. Contrary to RS [30], it was incumbent on the Trial Judge to make express findings on this issue—it was in direct conflict with Sister Green’s evidence and because the appellant had pleaded that he was physically abused by her on multiple occasions (Red [5K-S]).

A5 Rejection of the ‘eyewitness’ evidence – RS [31]-[32]

- 19 The critique in RS [31]-[32] of the ‘eyewitness’ accounts of the witnesses’ own alleged abuse by Sister Green, adduced for a distinct tendency purpose, fails to address the Trial Judge’s rejection of their *direct evidence* of having witnessed assaults on the appellant. Contrary to RS [32], the Trial Judge was required to give reasons for rejecting this discrete body of evidence. The mere brief recitation of their evidence in the Trial Judgement does not explain why, or on what basis, this separate and probative aspect of their evidence was rejected in its entirety.

A6 ‘Proper rejection of the tendency evidence’ – RS [33]

- 20 The appellant’s tendency notice set out the basis upon which the tendency evidence was to be adduced and relied upon (Red 116-118). In relation to Sister Green, it identified seven (7) specific tendencies, including, *inter alia*, a tendency to strike students with a ruler or cane (Red 118F). Contrary to RS [33], the Trial Judge did not consider his own finding—that Sister Green struck Mr Haines with a ruler—for the notified tendency purpose, nor did he address the consequential forensic effect of that finding on the remainder of the tendency evidence.

A7 ‘Brother Hollamby’s evidence supports Sister Green – RS [41]

- 21 The suggestion at RS [41] that Sister Green’s inability to recall being reprimanded by Brother Hollamby for assaulting Janine Monaghan does not undermine her credibility because it was a single incident over 30 years ago is untenable. The Trial Judge observed from his own experience that ‘*experienced and long-serving teachers often have a strong recall of the students they have taught over many years and decades*’: TJ [214]; Red 202Q. It is inherently unlikely that being personally called out by a newly appointed

principal for engaging in prohibited conduct towards Janine Monaghan would be forgotten—so too the teacher’s aide who was present. On Sister Green’s account, she was a highly respected senior teacher in the 1990s; such an event would have been significant in her professional career. That neither Sister Green nor the unidentified teacher’s aide could recall it is a serious and unexplained omission that bears directly on their credibility.

A8 ‘Sister Green’s good character undermines the allegations’ – RS [42]-[43]

- 22 The Trial Judge’s consideration of this issue fails to engage with the fact that both the Margaret Dixon and Janine Monaghan incidents occurred in direct contravention of the School’s prohibition on physical discipline. The same is true of Sister Green’s assault of Mr Haimes in the 1970s in South Australia. Her assaults on infant school children, in breach of the respective schools’ policies, are fundamentally incompatible with any finding that she was a person of ‘good character’.

A9 Lawful Chastisement – RS [48]-[50]

- 23 The appellant repeats the factual challenge above at paragraphs [20]-[21], insofar as the Trial Judge did find that Sister Green assaulted the appellant. Accordingly, the respondents bore an evidential onus to establish the availability of, and any entitlement to, a defence of lawful chastisement. Despite this, no evidence was led directed to either matter. Moreover, the Trial Judge’s finding as to that conduct is contrary to Sister Green’s own evidence regarding the appellant as being a well-behaved student not requiring discipline: RS [50].

B REPLY – FACTUAL CHALLENGE – SWEENEY DIXON

B1 Sweeney smacked the appellant – RS [52]-[58]

- 24 Contrary to RS [55], in cross-examination, Sweeney’s description of his so-called ‘*tap*’ was a ‘*smack on the side like that there and then told him to wake up to himself*’: T 668:48-50; Black Vol 2 668X-Y. The appellant’s pleaded allegations in respect of Sweeney were, *inter alia*, that on multiple occasions he ‘*hit*’ the appellant: Red [62F], which the appellant agreed occurred: T 138:26-32 Black Vol 1 138M-Q. That is what the Trial Judge found occurred, premised on Sweeney’s own admission: TJ [12]; Red 146P; TJ [206]; Red 200E-J.

B2 Lawful Chastisement – RS [64]-[68]

- 25 As with the allegation against Sister Green at [23], the respondents bore the evidential onus of establishing both the availability of, and any entitlement to, a defence of lawful chastisement in respect of the assault by Sweeney. The appellant’s position is that they did not discharge that onus. Physical discipline was prohibited at the School, and Sweeney was not a teacher. It cannot be the law

that any person standing *in loco parentis* to a student may lawfully assault them under the guise of discipline. Moreover, on his own evidence, immediately before assaulting the appellant, Sweeney had been called to the classroom by Sister Green to take the appellant outside and ‘*have a yarn with him*’ (T 668:13–15; Black Vol 2 668G-I). Sweeney did not witness any misbehaviour that could justify the administering of physical discipline, and the alleged misbehaviour was inconsistent with Sister Green’s asserted recollection of the appellant as a well-behaved student.

C REPLY – CHALLENGE TO CONTINGENT LIABILITY FINDINGS

- 26 The appellant’s challenge to the Trial Judge’s factual findings necessarily extends to the contingent liability findings. If, as submitted, it is accepted that Sister Green was administering prohibited physical discipline, that was conduct of which the School was, or ought to have been, aware, and in respect of which it failed to implement adequate systems—including effective supervision—to prevent. The School would also have been vicariously liable for that conduct. The same reasoning applies in relation to the matters concerning Sweeney.

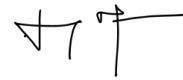
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