

ALBERT HARTNETT

v

CATHOLIC DIOCESE OF WILCANNIA-FORBES

&

Ors

FILED

29 SEP 2025

A.V.



APPELLANT'S WRITTEN SUBMISSIONS

PART 1 – CONCISE STATEMENT OF FACTS AND ISSUES ON APPEAL

A INTRODUCTION

- 1 By Amended Statement of Claim filed on 7 December 2023, the Appellant commenced proceedings against the Respondents seeking damages for personal injury arising from alleged assaults and batteries committed by his infant school teacher, Sister Marietta Green ('Sr Green'), and an Aboriginal liaison worker/teacher's aide, Mr Alex 'Sweeney' Dixon ('Mr Dixon'). The alleged incidents occurred in or about 1993, while the Appellant was an infant student at St Ignatius Parish Primary School in Bourke (the 'School').
- 2 The Appellant, born on 15 September 1986, is a First Nations man who, as found by the Trial Judge, is functionally illiterate and experienced profound childhood deprivation and significant psychological trauma, including the witness of his aunt's murder prior to the alleged assaults. In his claim, the Appellant alleged that he was subjected to repeated assaults and batteries by Sr Green, who used a one-metre wooden ruler – referred to by her as 'Montgomery' – to strike him while he was a student in her 'Aboriginal-only' infant class at the School between 1992 and 1995. He further alleged that he was assaulted by Mr Dixon on various occasions during the course of Mr Dixon's duties at the School.
- 3 The trial was heard in the Supreme Court of New South Wales before Campbell J (the 'Trial Judge') over 15 consecutive hearing days in February 2024.¹ An additional hearing day was held in December 2024 to address the discrete issue of vicarious liability and non-delegable duty, following the delivery of the decision in *Bird v DP* [2024] 41.
- 4 The central factual issue at trial was whether the alleged assaults occurred, which was denied. The central legal issue concerned whether either or both of the alleged assaults, if established, satisfied the statutory definition of 'serious physical abuse' for the purposes of s 6A of the *Limitation Act 1969* (NSW), thereby disapplying the limitation bar. Notably, this case presented as the first opportunity for a NSW Court to consider this

¹ *Hartnett v Trustees of the Roman Catholic Church for the Diocese of Wilcannia-Forbes* (No 7) [2025] NSWSC 128 at Red 139-213.

provision in the context of an institutional setting.²

- 5 On 28 February 2025, the Trial Judge delivered judgment for the Respondents. In doing so, the Trial Judge:
- a. did not accept that Sr Green hit the Appellant (or any other student ever) with ‘Montgomery’ or any other implement at TJ [12]; Red 146N-O and [213]; Red 202K-L;
 - b. did not accept that Mr Dixon assaulted the Appellant in the manner alleged at TJ [12]; Red 146N-O and [209] Red 200W-X;
 - c. found that Sr Green did administer unspecified physical discipline to the Appellant at TJ [12]; Red 146P and [215]; Red 202U-W ;
 - d. found that Mr Dixon did hit the Appellant, but of a kind less severe than alleged; at TJ [12] Red 146P-Q;
 - e. found that the assaults of the Appellant by both Sr Green and Mr Dixon were excused by the defence of lawful chastisement of a child at TJ [215]; Red 202U-W, TJ [217]; Red 203I-L; and
 - f. held that the assaults by Sr Green and Mr Dixon did not meet the statutory definition of ‘serious physical abuse’ for the purposes of s 6A of the *Limitation Act 1969* (NSW) and were thus time-barred at TJ [12]; Red 146S-U, TJ [217]; Red 203I-L.
- 6 The Trial Judge made contingent findings as to damages, accepting the evidence of the expert psychiatrists at TJ [244]; Red 209O and [246]; Red 210F-O and contingently assessing total damages at \$180,500, which comprised:ⁱ
- a. General damages of \$135,000;
 - b. Interest of \$40,500; and
 - c. Future out-of-pocket expenses of \$5,000.

B COMMON ISSUES UNDERPINNING THE GROUNDS OF APPEAL

- 7 The following matters are relevant to each of the enumerated grounds of appeal below.

B1 Facts not in issue

- 8 Sr Green admitted that she owned a ruler named ‘Montgomery’. She admitted to disciplining her infant school students by striking ‘Montgomery’ against the blackboard and on students’ desks (see TJ [42]; Red 158F-I). Through her Senior Counsel, it was put to the Appellant’s witnesses that to suppress ‘unruly behaviour’, Sr Green would sometimes say to the class ‘where’s Montgomery’ to regain control of the class before giving ‘it a good thump on the desk’: (T 36:30; Black Vol 1 36N-P). She also admitted that – save for one incident in

² cf *Anderson v State of New South Wales*; *Perri State of New South Wales* [2023] NSWCA 160 (Gleeson and White JJA, Griffiths AJA) which considered the provision in the context of a police strip search of a minor.

1989 involving another student – she used ‘light smacking’ as a method of discipline with students (but not the Appellant) until about 1995 (at TJ [34]; Red 155X-Y; Black Vol 1 10T-U).

- 9 Central to Sr Green’s denial of the alleged assaults was her unequivocal assertion that she had never struck any child with ‘Montgomery’ – the one-metre wooden ruler – at any point during her nearly 40-year teaching career (at TJ [66]; Red 168L-M and T569.50; Black Vol 2 569W-Y). The emphatic nature of that denial was underscored in the following exchange between the Trial Judge and Senior Counsel for the Respondents on the fourth day of the hearing at T 319:1-46; Black Vol 1 319B-W:

‘HIS HONOUR: She’s got a general statement about her practice, I’d overlooked that.
LLOYD: No, no, your Honour, it doesn’t matter one bit about what your Honour just ruled or of the substance of it, I just wanted your Honour know our case which is a denial of any physical abuse at any time anywhere by Sister Marietta.
HIS HONOUR: I see that. Could I say this, though? Well, look, I am of the generation that was very familiar with corporal punishment in the school system, and I experienced it for myself on a number of occasions, I’ll say.
LLOYD: Your Honour and I are in the same boat.
HIS HONOUR: Am I wrong about this. She certainly says, and I well understand why she would say so, if I may put it that way in a neutral way, that she’s never behaved in a cruel fashion ever. I know a lot of these statements suggest the contrary and that is all a little bit - I’ll say - obscure and hard to penetrate. She doesn’t say she never used corporal punishment. Have I got this right or have I got it wrong? Or that she didn’t, sort of conduct herself in accordance with the changing standards of the times over which she was a teacher.
LLOYD: Her position and I’ll make it plain right now because I hope it is helpful. To the extent that there was physical contact by here with any student in the sense of discipline, it was limited to light smacking over the clothes on or around the bottom. She deals with it - I don’t need to take your Honour—
HIS HONOUR: She deals with that—
LLOYD: -at para 26.
HIS HONOUR: Yes, at St Ignatius. She says that is a lifelong practice?
LLOYD: Yes. It may or may not come as a surprise having regard to what your Honour could perhaps take judicial notice about the times in the 1970s and 1960s and the perhaps widespread use of corporal punishment in that era. But her position is that she did not use it. She did not cane or hit students ever. She did use a ruler or cane in the way that your Honour has heard me put to multiple witnesses, by hitting it on desks and blackboards and the like, but that is her factual position, your Honour.
HIS HONOUR: I’ll add that to your opening. Thank you for making that clear to me. All right, I’d better get back to the evidence. Mr Haimes?’ [Emphasis]

B2 The witness ‘camps’

- 10 The Trial Judge approached the parties’ witnesses as forming two partisan ‘camps’ and assessed the Appellant’s evidence through that prism (see TJ [41]; Red 157X and [191]; Red 195B. This approach was wrong, and the resulting error irreparably tainted the Trial Judge’s assessment of the Appellant’s evidence, his factual findings and the sufficiency of his reasons.
- 11 In support of his case, the Appellant called 17 lay witnesses, all adduced on a tendency basis. Those witnesses attested to their experiences with both Sr Green and Mr Dixon at the School over the span of about three (3) decades. Only 6 of these witnesses were the Appellant’s classmates, the remaining were not. Beyond the

superficial, the Appellant's witnesses did not form a homogenous 'camp'. And while the majority were First Nations people, that was the natural consequence of Sr Green's 'Aboriginal only' classes at the School.

- 12 Like many of the witnesses called in his case, the Appellant had long since left Bourke. Aside from the shared experience of having been taught by Sr Green and/or Mr Dixon at some point between the 1970s and 2000s, there was no unifying doctrine, ideology, or common purpose among the witnesses. This was particularly evident in the case of Mr Haimes, a non-Aboriginal former student of Sr Green from the 1970s in South Australia, who had no connection to the Appellant or to the School in question (see TJ [95]; Red 175F-G).
- 13 The same could not be said of the Respondents' witnesses. All but one were former teaching or support staff at the School. Given the nature of the allegations – impugning both the culture of the School and, by implication, the conduct of its former staff – the Respondents' witnesses did share a common institutional affiliation and interest. Their evidence reflected, if not an explicit alignment, then at least a shared commitment to preserving the reputation of the School and their professional peers. In this regard, the Trial Judge himself observed that several of the Respondents' key witnesses expressed a continuing sense of 'admiration' and 'loyalty' towards Sr Green at TJ [198]; Red 197Q-R:

'It is true that the recollection of some of the teacher's aides were somewhat affected by their admiration for, and loyalty to, Sister Green.'

- 14 By analysing the evidence through the lens of metaphoric 'camps', the Trial Judge's fact-finding process erred in the following respects. *First*, although the Trial Judge acknowledged the presence of partisanship among the Respondents' witnesses, he failed to identify which witnesses were affected or explain how that partisanship was addressed in his evaluation of their evidence. *Second*, his Honour drew a false equivalence between the Respondents' so-called 'camp' on the one hand and the Appellant's witnesses on the other, despite the absence of any coherent, coordinated, or ideologically aligned group supporting the Appellant. Unlike the Respondents' witnesses – some of whom were found to harbour enduring 'admiration' and 'loyalty' toward Sr Green – there were no similar findings in respect of the Appellant's witnesses towards him. Senior Counsel for the Respondent expressly disavowed any allegation of conspiracy or collusion among the witnesses called by the Appellant, further negating any proper basis for treating the Appellant's evidence as emanating from a unified or partisan 'camp'. *Third*, by categorising and assessing the evidence in terms of opposing 'camps', the Trial Judge failed to assess the probative value of the Appellant's witnesses on an individual basis and for the specific purposes for which their evidence was adduced. This erroneous framework led his Honour to treat the Appellant's evidence as a homogenous and partisan body, resulting in its wholesale rejection without proper consideration of its distinct and independent components at TJ [191]-[192]; Red 194S-195J:

[191] Notwithstanding the large number of witnesses called on either side of the record, there is no suggestion before me that these allegations of serious physical abuse of the Appellant (and others) had been made or aired until just prior to the commencement of the proceedings in 2022. It was only in the context of the bringing of the Appellant's claim that he and his witnesses on the one hand, and the defendant's witnesses on the other, were asked to give an account of events which occurred in the Aboriginal children's stream of the infants' school at St Ignatius in the early 1990s. As I have said, there was a tendency for the competing cohorts of witnesses to divide themselves into quite separate camps. As I have attempted to show on both sides of the record, there was

an absence of consistency in essential matters and inconsistency in the details of some. To my mind, this was an inevitable effect of the passage of time impoverishing the available evidence.

[192] If one were to take all of the Appellant's evidence together frankly, the sum of the evidence would suggest that Sister Green was conducting something in the nature of a reign of terror on infant Aboriginal school-children at St Ignatius. I do not mean to be facetious, but I cannot accept that as accurate. I cannot accept that as accurate, partly because of the equally numerous cohort of competing evidence called upon on the defendant's side of the record, who deny the accuracy of the picture painted by the Appellant's body of evidence.'

15 This failure tainted the entirety of the fact-finding process.

B3 The Appellant's witnesses

16 All of the Appellant's lay witnesses were called on a tendency basis, in accordance with the prescribed notice. Three of those witnesses gave direct eyewitness accounts of the alleged assaults committed by Sr Green upon the Appellant

17 The lay witnesses called by the Appellant can be categorised in the following broad categories (the 'tendency witnesses'):

- a. Contemporaneous witnesses: This group included six of the Appellant's classmates, each of whom suffered similar assaults with 'Montgomery' by Sr Green and Mr Dixon.³ Notably, three (3) of these witnesses gave evidence of witnessing Sr Green hitting the Appellant with 'Montgomery';
- b. Retrospectant: This group comprised three (3) students of Sr Green's class at the School between 1978 and 1983 who described being hit by 'Montgomery';
- c. Prospectant: This group comprised five (5) students who post-dated the Appellant's attendance at the School, who variously described being hit with 'Montgomery' by Sr Green and Mr Dixon;
- d. A parent of a former student: A parent of a non-Aboriginal student at the School whose son complained to her about Sr Green 'screwing her son's ears'; and
- e. Former student not from Bourke: A non-Aboriginal student who attended St Scholastica's in South Australia in 1974 recalled Sr Green hitting him with a cane-like implement.⁴

18 The only discernible consideration by the Trial Judge of this body of 'tendency' evidence appears at TJ [197]; Red 197D-K:

[197] The evidence of the lay witnesses called to corroborate his case have not dispelled my concerns about the Appellant's accuracy and reliability. Cases, of course, are not decided on weight of numbers, although the numbers are impressive and gave me pause for consideration. In particular, Mr Haines, who was taught by Sister

³ See: Mr Charles Edwards at Trial Judgment [75]-[78]; Red 170W-171Q, Mr Lesley Leonard at TJ [79]-[81]; Red 171R-172K, Ms Margaret Leonard at TJ [82]-[84]; Red 172L-173D, Ms Pagan Leigh Buford at TJ [85]-[92]; Red 173E-174S; Mr Terrence Hines at TJ [123]-[126]; Red 181B-O.

⁴ See also evidential ruling permitting this evidence on a tendency basis in *Hartnett v Trustees of the Roman Catholic Church for the Diocese of Wilcannia-Forbes (No 2)* [2024] NSWSC 98.

Green in South Australia in the mid-1970s gave potentially significant evidence, despite the obvious deficiencies in his memory that I have detailed. I am satisfied that his evidence was accurate. However, his evidence really fell a long way short of providing support for the “reign of terror” described by the witnesses at St Ignatius. I am not persuaded that what he described offended the standards of those times.’

- 19 The Trial Judge gave no apparent consideration or weight to the tendency evidence when ultimately considering the Appellant’s evidence at TJ [196]; Red 196N-197D:

‘[196] I am of the view that the criticisms of the Appellant’s evidence levelled by the defendants (at [52]–[56]) above are well made. Regrettably, the Appellant has experienced what is referred to in the criminal law as profound childhood deprivation: *Bugmy v the Queen* (2012) 249 CLR 571; [2013] HCA 37 at [44]. This circumstance brought him into frequent contact with the criminal justice system as a juvenile (commencing at age eleven) and a young man. The cross-examination in relation to some of these matters have been summarised. The only remotely contemporaneous documents available dealing with matters relevant to the Appellant’s mental health are documents prepared for the purposes of the criminal justice or custodial systems. There were six such documents utilised in cross-examination. They are dated February 2001 (T. 67.43; T. 68.43); November 2008 (T. 69.50–70.15); October 2010 (T. 70.32); November 2012 (T. 71.21–72.14); August 2019 (T. 72.30) and September 2019 (T. 73.10). The Appellant does not mention any physical abuse at St Ignatius to any of the persons interviewing him for the purposes of the preparation of these reports. He makes frequent mention of the murder of his aunt, the drowning of his cousin and the death of close friends in the motor vehicle accident. This leaves me with serious unresolved questions about the accuracy and therefore the reliability of his account.’

PART 2 – GROUNDS OF APPEAL

A GROUNDS 1-3 AND 5-9 – THAT SR GREEN DID NOT ASSAULT THE APPELLANT AS ALLEGED

A1 Summary of the findings and Grounds of Appeal

- 20 The Appellant alleged that Sr Green would regularly hit him with ‘Montgomery’ and was particularised in his pleading as (at TJ [29]; Red 154D-K):

(b) Physical abuse, including:

- i. hitting him along his back, bottom, legs and hands with a long wooden ruler.
- ii. on one occasion, Sister Green struck the Plaintiff across the back with a ruler with such force that it broke.
- ii. on occasions, Sister Green grabbed the Plaintiff by the ears, twisted his ears and dragged him.
- iv. on occasions, Sister Green made the Plaintiff stand outside under the sun in high temperatures for a prolonged period of time.
- v. taking the plaintiff into a separate room, pulling down his pants unintentionally catching his penis on one occasion, and smacking his naked bottom with a long ruler.

- 21 The Appellant gave evidence of the assaults by Sr Green which comprised: (a) being hit with ‘Montgomery’ and other rulers/pointers; (b) being smacked by Sr Green on his bare bottom; (c) having his ears ‘screwed’: and (d) being placed in the ‘poison circles’ at recess and lunch (T 104:25-30; Red 104N-Q). He said that the physical discipline of him by Sr Green would occur at least once a day, sometimes twice a day, noting his attendance at school was irregular, and he did not attend school every day (T 90:18-24; Red 90J-L).

- 22 In her written evidence, Sr Green’s anchored her complete denial of the Appellant’s allegations to her recollection of him being a quiet and withdrawn boy who would not have been a candidate for discipline, let

alone physical discipline (First Statement of Sr Green at ~~[45]~~ [39]; Blue 66C-E and TJ [34]; Red 156B-D, [214]; Red 202M-T):

‘I recall Albert as being a lovely boy. I do not recall a time when I had to discipline Albert. He was quite quiet and withdrawn.’

- 23 Accordingly, the Trial Judge rejected the Appellant’s case that he was frequently struck with ‘Montgomery’ or any other implement (TJ at [213]; Red 202K-L)⁵ However, and without any evidential footing from either the Appellant or Sr Green, the Trial Judge found that the Appellant was subjected to some unspecified degree of physical discipline by Sr Green and Mr Dixon at TJ [12]; Red 146O-S:

‘I accept that the [Appellant] was subjected to a degree of physical punishment by Sister Green and Mr Dixon by way of discipline. However as I explain later, I am not satisfied on the evidence before me on the balance of probabilities that such punishment constituted “child abuse” in the sense of serious physical abuse within the meaning of s 6A(2) *Limitation Act*.’

A1.2 Error as to fact finding

- 24 The Trial Judge’s finding – rejecting the Appellant’s evidence that he was struck by Sr Green with ‘Montgomery’ – is in error because the Trial Judge:
- a. failed to consider the effect of the ‘eyewitnesses’ (Grounds 1 and 7);
 - b. failed to consider the effect of the ‘tendency witnesses’(Grounds 1 and 7);
 - c. failed to consider the impact of Mr Martin Haines’ irreconcilable evidence with Sr Green’s evidence (Grounds 1, 6, 7 and 8);
 - d. failed to consider the impact of Brother Hollamby’s irreconcilable evidence with Sr Green’s evidence (Grounds 1, 2, 3, 5, 8 and 9);
 - e. failed to consider the impact of Brother Hollamby’s irreconcilable evidence with the ‘teacher’s aides’ evidence (Grounds 1 and 9);
 - f. erred by finding Sr Green was a person of good character and attributing undue weight to that matter (Grounds 1, 5 and 8); and
 - g. made an ultimate factual finding that:
 - i. Sr Green assaulted and battered the Appellant in an unspecified manner for unspecified reasons;
 - ii. but such an assault and battery would have been lawfully justified as ‘reasonable chastisement’,without any evidential basis for making either finding, and such a finding was not supported by the evidence of either Sr Green or the Appellant (Grounds 1, 2, 3, 5, 8 and 9).

A2 Failed to consider the effect of the ‘eyewitnesses’ (Grounds 1 and 7)

- 25 The Appellant adduced evidence from Charles Edwards, Leslie Leonard, and Terrence Hines – three former classmates – each of whom gave eyewitness accounts of the alleged assaults by Sr Green using ‘Montgomery’.
- 26 Charles Edwards gave evidence that he witnessed Sr Green strike students with ‘Montgomery’, including the Appellant and six other named students (T 208:35–40; Black Vol 1 208R-U). He recalled seeing the Appellant being struck on as many as a dozen occasions (T 209:28; Black Vol 1 209L-O). Similarly, Leslie Leonard (T 452:35; Black Vol 2 452Q-T) and Terrence Hines (T 476:25–30; Black Vol 2 476N-P, T 479:5; Black Vol 2 479D-E) also gave evidence of having observed Sr Green strike the Appellant and other children with ‘Montgomery’.
- 27 In his written submissions, the Appellant expressly identified and relied upon the ‘eyewitness evidence’, including that of Mr Hines (Plaintiff’s Closing Submissions at [24]-[25]; Black Vol 3 1073C-I) This directly contradicts the Trial Judge’s finding at TJ [123]; Red 181B-E that ‘The evidence of Mr Hines does not seem to be relied upon in any respect by the Appellant’. That finding was plainly incorrect.
- 28 The forensic significance of this eyewitness evidence was self-evident. If accepted, it provided compelling corroboration of the Appellant’s allegations and supported the credibility of his account. Despite its importance, the Trial Judge afforded the evidence minimal consideration. The Trial Judge’s treatment of it was confined to a brief summary of its content, without any meaningful analysis of its probative value or its relevance to the central factual issues in dispute.
- 29 Mr Charles Edwards. The evidence of Charles Edwards is addressed over four paragraphs (13 sentences) at TJ [75]-[78]; Red 170W-171Q. At TJ [77]; Red 171J-L, the Trial Judge records that in cross-examination, Mr Edwards named several other pupils – including the Appellant – whom he had seen being disciplined by Sr Green using ‘Montgomery’, and that he described himself as having a ‘really good memory’ (TJ [78]; Red 171M-O and T 225:42-45; Black Vol 1 225V-W). The Trial Judge provides no commentary on Mr Edwards’ demeanour, credibility, or the reliability of his evidence. Despite the apparent significance of his testimony, his Honour offered no evaluative findings or reasons for rejecting it. The necessary inference from the judgment is that Mr Edwards’ evidence – at least insofar as it corroborated the Appellant’s account – was rejected. Yet no reasoning is provided to explain why that conclusion was reached. The Trial Judge’s failure to engage with the substance of Mr Edwards’ corroborative evidence – particularly as it related to the Appellant’s core allegations – is a failure to properly evaluate relevant evidence, and it undermines the Trial Judge’s fact-finding process.
- 30 Mr Lesley Leonard. The evidence of Mr Leslie Leonard is considered over three paragraphs (15 sentences) at TJ [79]-[81]; Red 171R-172L. The discussion at TJ [79]-[80]; Red 171R-172G is confined to a factual summary of Mr Leonard’s written evidence and his cross-examination. Although the Appellant’s written

submissions expressly identified Mr Leonard as an eyewitness to Sr Green striking the Appellant with ‘Montgomery’, this important aspect of his evidence is not mentioned by the Trial Judge. ⁶

- 31 Mr Terence Hines. The evidence of Mr Terence Hines is considered in four paragraphs (comprising eight sentences) at TJ [123]-[126]; Red 181B-O. Although Mr Hines gave a direct account of witnessing Sr Green strike the Appellant with ‘Montgomery’, this important aspect of his evidence is not mentioned by the Trial Judge.⁷ The only express demeanour finding made in relation to any of the eyewitnesses appears at TJ [123]; Red 181D-E, where the Trial Judge observed that Mr Hines’ ‘body language exhibited a strong disinclination to be in Court giving evidence’. His Honour ultimately concluded at TJ [126]; Red 181O that ‘it is difficult to accept Mr Hines’ evidence as an accurate account’. However, the reasoning for that conclusion is not set out.
- 32 Beyond the limited treatment set out above, there is no further substantive consideration of this eyewitness evidence in the Trial Judge’s reasons. There was no suggestion in cross-examination that any of the witnesses were fabricating their accounts, nor was there any challenge suggesting they suffered from physical impairments that would have prevented them from witnessing the events they described or recalling them in court. The most pointed challenge to Mr Edwards’ recollection during cross-examination occurred at T 229:6–10; Black Vol 1 229D-G:

‘Q. Isn’t it possible that what you really remember here is being scared of her and her hitting the tables, but the hitting of you and the other kids, that just didn’t happen?’

A. No, no, she’s - she hit us a lot of times, all of us - a lot of us. Like I said before I got to school and my older cousins dealt with it.’

- 33 Despite the absence of substantial challenge to his credit, the Trial Judge provides no reasons for rejecting the evidence of Mr Edwards in its entirety. The same omission applies to the evidence of Mr Leslie Leonard and Mr Terence Hines. The Trial Judge’s reasons fail to articulate any evaluative findings, or rationale, explaining why these corroborative eyewitness accounts were not accepted.
- 34 The nearest the Trial Judge comes to articulating any reasoning for rejecting this eyewitness evidence is in two brief paragraphs commencing at TJ [197]; Red 197D-K and [203] Red 199I-Q, where the Trial Judge appears to dismiss all of the evidence attributed to the Appellant’s so-called ‘camp’. In those paragraphs, the Trial Judge stated:

‘[197] The evidence of the lay witnesses called to corroborate his case have not dispelled my concerns about the Appellant’s accuracy and reliability. Cases, of course, are not decided on weight of numbers, although the numbers are impressive and gave me pause for consideration. In particular, Mr Haines, who was taught by Sister Green in South Australia in the mid-1970s gave potentially significant evidence, despite the obvious deficiencies in his memory that I have detailed. I am satisfied that his evidence was accurate. However, his evidence really fell a long way short of providing support for the “reign of terror” described by the witnesses at St Ignatius. I am not persuaded that what he described offended the standards of those times’

⁶ Plaintiff’s Closing Written Submissions at [25]; Black Vol 3 1073C-I. See also transcript, Day 5 at 452:35-40; Black Vol 2 452Q-T.

⁷ Plaintiff’s Closing Written Submissions at [25] Black Vol 3 1073C-I; See transcript, Day 5 at 476:27-31; Black Vol 2 476N-P.

[203] In coming to these conclusions, as I have tried to make clear, I have had regard to the eroding effect of the passage of time on memory. I have also had regard to the consideration that there are no contemporaneous documents casting any light on the facts in issue. As I have said, the only contemporaneous documents are the reports prepared for the purpose of the Appellant's involvement with the juvenile or criminal justice systems. There are virtually no objectively established facts of any significance. One is really left with the witness testimony of 30 lay witnesses who have been asked to cast their minds back 30 years to say what they can now remember of events not previously called into question or requiring examination. In sifting through this unruly body of evidence, I have attempted to assess it in accordance with my appreciation of the "apparent logic of events".

35 With respect, those reasons are inadequate to explain why the individual evidence of Mr Charles Edwards, Mr Leslie Leonard, and Mr Terence Hines was rejected. Each gave their evidence independently, and it was the Trial Judge's function to assess their credibility and reliability on an individual basis, rather than subsume their accounts within the undifferentiated notion of an evidentiary 'camp'. While it is accepted that all witnesses were asked to recall events that occurred some 30 years ago, the mere passage of time does not affect all recollections equally. Notably, Mr Edwards expressly stated that he had 'a really good memory', a factor that warranted consideration but was not addressed in the Trial Judge's reasons.

36 The Trial Judge's evidential method in this regard is to be contrasted, and starkly so, to the way the Trial Judge assessed the evidence of the Respondents' witnesses. Based on an unsubstantiated judicial notice type directive about the superior recall of teachers, notably at TJ [214]; Red 202O-T the Trial Judge reasoned and found:

'However, experienced and long-serving teachers often have a good recall of many of the students they have taught over many years or decades. It is quite apparent from the testimony of many of the witnesses who were adults on staff at the school at the time with which I am concerned that they had a clear recollection of many of the former students who gave evidence before me.'

A3 The Tendency Witnesses (Grounds 1 and 7)

37 The Trial Judge's treatment of the Appellant's lay tendency witnesses suffers from the same deficiencies as in the treatment of the eyewitnesses. Beyond a brief summary of each witness's evidence, there is no meaningful engagement with the probative force of the witness's evidence. Instead, the Trial Judge's analysis is subsumed within the generalised and dismissive reasoning found at TJ [197]; Red 197D-K and TJ [203]; Red 199I-Q, extracted above at paragraph [34].

38 Notwithstanding the Trial Judge's limited treatment of the lay witness evidence, the Appellant had given notice of his intention to rely on that evidence for a tendency purpose [Blue 259-261]. Pursuant to s 97 of the *Evidence Act 1995* (NSW), the Appellant served a tendency notice which stated [Blue 260T-261J]. :

'The [Appellant] intends to lead the Marietta evidence [which included Mr Haimés' evidence] to prove that at the time of the alleged assault and battery occasioned by Sister Marietta in her role as a teacher at St Ignatius' Primary School, Bourke between 1978 and 1999, she had:

- a. the tendency to act in a particular way, namely, to engage in acts of serious physical abuse towards students;
- b. to excessively, gratuitously and without any proper reason, dispense corporal punishment by use of striking students with a wooden ruler at the School; and
- ...
- c. to excessively, gratuitously and without any proper reason, strike students with a ruler or cane.'

39 As noted above, the evidence adduced by the Appellant at trial included retrospectant, concomitant, and prospectant accounts establishing a tendency on the part of Sr Green to use 'Montgomery' to inflict physical

punishment on students over several decades. Despite this, the Trial Judge made no reference to the tendency purpose for which that evidence was adduced, nor to the formal tendency notice served under s 97 of the *Evidence Act 1995* (NSW). Instead, the Trial Judge – by resort to metaphor – characterised the evidence as suggesting a ‘reign of terror’ by Sr Green at the School, which was not a characterisation that reflected the case advanced by the Appellant. The failure to engage with the tendency notice, or the probative significance of the tendency evidence, represented a serious omission in the fact-finding process. The tendency evidence included the testimony of Mr Martin Haimes, a non-indigenous man from South Australia and not connected with the appellant, the School or Bourke.

A4 Failed to consider the impact of Martin Haimes’ irreconcilable evidence with Sr Green’s (Grounds 1, 6, 7 and 8)

40 Sr Green taught Mr Haimes at St Scholastica’s Infant School in Mount Barker, South Australia, in or about 1974 to 1975, prior to Sr Green’s arrival in Bourke. Mr Haimes gave evidence that Sr Green possessed a large wooden stick, which she used to strike him on the fingers as a form of punishment. He also testified that he observed her inflict similar punishment on other students for what he perceived to be minor or trivial infractions TJ at [94]; Red 175C-E and (Ex# CB78; Blue 154S-Y; T 322:25).

41 Notwithstanding the limited consideration of Mr Haimes’ evidence across three (3) short paragraphs at TJ [93]-[95]; Red 174T-175G, the Trial Judge accepted his evidence as ‘accurate’ and said at TJ [197]; Red 197D-K:

‘In particular, Mr Haimes, who was taught by Sister Green in South Australia in the mid-1970s gave potentially significant evidence, despite the obvious deficiencies in his memory that I have detailed. I am satisfied that his evidence was accurate. However, his evidence really fell a long way short of providing support for the “reign of terror” described by the witnesses at St Ignatius. I am not persuaded that what he described offended the standards of those times.’

42 The acceptance of Mr Haimes’ evidence is significant in a number of respects. *First*, it established as a matter of fact that Sr Green used a long wooden stick to administer corporal punishment to infant school children during her tenure at St Scholastica’s in 1974 to 1975. This evidence was the subject of the tendency notice and was adduced for the purpose of demonstrating that Sr Green had a propensity to engage in such conduct, thereby making it more likely that she did so in relation to the Appellant.⁸ *Second*, Mr Haimes’ testimony directly contradicted Sr Green’s emphatic denial – maintained throughout the trial – that she had ever used any implement to administer corporal punishment, whether at that school or at any point during her teaching career. This included her giving direct evidence on that topic in chief at (T 569:46-570:12) Black Vol 2 569W-570G:

Q. Can I ask you this. In this paragraph D you also talk about whether you’d ever hit a child with a cane or ruler or other implement? It’s at the top of page 6?

A. No, that’s, that’s, that’s correct. I did never hit a child, ruler.

Q. With a ruler? Or any other—

⁸ This evidence was admitted over objection: *Hartnett v Trustees of the Roman Catholic Church for the Diocese of Wilcannia-Forbes (No 2)* [2024] NSWSC 98.

A. Any—

Q. Sorry, I spoke over you—

A. No.

Q. --I think you said “Or with any implement”?

A. Yes.

Q. Is that correct? That is--

A. Yes.’

43 In cross-examination, Sr Green said at T 589:27-37; Black Vol 2 589N-S:

Q. You’re aware that in this case, there’s evidence from the child students that you would hit them with the metre-long ruler?

A. Never hit anybody with a metre-long ruler.

Q. You would say you’ve never hit anyone with any implement at all.

A. Never hit a child with any implement.

Q. To the extent that it’s said against you by those child students that you did hit them with different types of rulers or different things resembling rulers, you just say that they’re wrong, it didn’t happen.

A. It didn’t happen.

44 Moreover, Sr Green’s evidence extended beyond a denial of personally administering physical discipline. She also gave emphatic evidence that she had never witnessed any other teacher engage in such conduct at any time during her teaching career. At T 576:4-30 Black Vol 2 576C-M, Sr Green said:

Q. What type of things did you see at the school by way of physical discipline when you first started there?

A. Say that again, please?

Q. In 1976 when you first started at the school –

A. Yes.

Q. – and physical discipline was permitted –

A. Yes.

Q. What types of physical discipline did you see teachers use on students?

A. I never saw any other teacher discipline a child physically.

Q. Through your whole career at St Ignatius at Bourke, primary school?

A. Yes.

Q. So from 1976 through to when you retired in 2005 –

A. Yes.

Q. – You didn’t see another teacher do any form of physical discipline on a student.

A. No, I didn’t.

45 Apart from recording Sr Green’s denial that she never used a ruler or other implement to strike children at any point in her teaching career at TJ [66] Red 168L-M, the Trial Judge provides no reasoning as to how that Sr Green’s categorical denial can be, and is to be, reconciled with contradictory evidence of Mr Haimés’, which the Trial Judge’s accepted as ‘accurate’ (at TJ [197]) Red 197H-I.

46 The acceptance of Mr Haimés’ evidence gives rise to two fundamental and irreconcilable flaws in the reasoning of the Trial Judge. *First*, it directly undermines the credibility of Sr Green’s evidence in its entirety. Sr Green

gave sworn evidence – maintained under cross-examination – that she had never used a cane or any implement to administer corporal punishment at any stage of her career. *Second*, Mr Haimés’ testimony constituted probative tendency evidence establishing Sr Green’s propensity to engage in such conduct, yet the Trial Judge failed to engage with that tendency purpose in the reasons.

- 47 The only reference to Mr Haimés’ accepted evidence in the Trial Judge’s reasons appears at TJ [197] Red 197D-K. Although this evidence was adduced for a clear tendency purpose, it is apparent that the Trial Judge did not consider it in that context. Instead, his Honour dismissed the evidence on the basis that it did not support the notion of a ‘reign of terror’ and that it did not offend ‘the standards of those times’. This reasoning reflects a mischaracterisation of the purpose for which the evidence was admitted, and a failure to consider its probative value in establishing Sr Green’s relevant and asserted tendency. At TJ [197]; Red 197I-K, the Trial Judge said:

‘I am satisfied that his evidence was accurate. However, his evidence really fell a long way short of providing support for the “reign of terror” described by the witnesses at St Ignatius. I am not persuaded that what he described offended the standards of those times.’

- 48 But the Appellant did not adduce Mr Haimés’ evidence in support of either of the propositions posited by the Trial Judge. It was never the Appellant’s case – nor was it alleged or submitted – that Sr Green presided over a ‘reign of terror’. On the contrary, both the Appellant and other witnesses, including Pagan Buford,⁹ acknowledged that Sr Green was a capable teacher when not engaging in physical discipline. With respect, it was an error for the Trial Judge to evaluate Mr Haimés’ evidence against a misconceived ‘straw man’; namely, that it needed to establish a ‘reign of terror’. It was equally irrelevant whether the conduct described conformed to the ‘standards of the time’. Mr Haimés’ evidence was adduced and relied upon for the specific and proper purpose of establishing Sr Green’s tendency to engage in physical punishment, as outlined in the Appellant’s tendency notice; a purpose that the Trial Judge appears to have wholly disregarded.

A5 Failed to consider the impact of Brother Hollamby’s irreconcilable evidence with Sr Green’s (Grounds 1, 2, 3, 5, 8 and 9)

- 49 Brother Hollamby was the principal of the School during the relevant period, having commenced in that role in 1993. He gave evidence that he had reprimanded Sr Green for physically striking Janine Monaghan.
- 50 In cross-examination, Brother Hollamby gave the following evidence (T780:34 Black Vol 2 780Q-781E):

‘Q. When you were in your period of principalship at St Ignatius you were aware that on occasions corporal punishment did occur?’

A. I, I said in my statement on two or three occasions. So two or three occasions is all I can recall over a six-year period.

Q. Do you recall the details of those two or three occasions?

⁹ In cross-examination, the Appellant agreed to having positive memories of Sr Green’s classroom, save for the physical assaults at (T 31:38-33:10; Black Vol 1 31S-33F). Ms Buford, a classmate of the Appellant also gave evidence that she expressed praise for Sr Green’s work as a very good art teacher: (T 365:35 Black Vol 1 365Q-R) and recalled that not all the time in Sr Green’s classroom was miserable: (T 365:15-30 Black Vol 1 365H-Q).

A. I, I really don't, except for what I said in my statement with regard to the parent, the grandparent who came to see me.

Q. In relation to the Sister Marietta—

A. Yes.

Q. --incident?

A. Yes.

Q. If we just go to the Sister Marietta incident. On that occasion a grandmother had come to the school?

A. That's correct.

Q. And the grandmother had raised with you the fact that the child student had been smacked by Sister Marietta Green?

A. That's correct.'

51 Brother Hollamby recalled that child to be Janine Monaghan at T: 781:36-50 Black Vol 2 781R-782B:

'Q. I think the child was Janine Monaghan?

A. That's correct.

Q. After the grandmother spoke to you, it seems that you went and had a conversation with Sister Marietta?

A. That's correct.

Q. Was that on the same day or was it days subsequent to when the grandmother attended?

A. No, that would have been the same day and it would have - I don't know what time of the day the grandmother came to see me, but it would have been in one of the breaks, or most likely it would have been after school.

Q. You had a discussion with Sister Marietta in which you, I take it, confronted her about what had been reported by the grandmother?'

52 Brother Hollamby confronted Sr Green about the incident, in the presence of at least one teacher's aide: at T 781:49-782:1 Black Vol 2 781X-782Y:

'Q. You had a discussion with Sister Marietta in which you, I take it, confronted her about what had been reported by the grandmother?

A. That's correct.

Q. I think at the time there was a teachers aid present as well?

A. There would have - there's, there was always a teachers aid, most likely two teachers aids in that room at all times.

Q. Do you recall who those teachers aids were?

A. I can tell you who the teachers aids were but I can't tell you who was there on that day and I can't tell you which one. All I know is when I spoke to Sister Marietta, she told me what happened, and then she indicated that the aid, whether it was Pat or Loretta or Joanne, was there, and I, then I, I spoke to that who confirmed exactly what Sister Marietta had told me.

Q. Pat is, if we just get their names?

A. Pat Mannix, Loretta Wheeler and Joanne Wheeler were the three -Pat Mannix was there for three years while I was there I think, and then Loretta took Pat's place for the next three years, and Joanne was there for the entire six years in that classroom with Sister Marietta.

Q. I think you said "Joanne Wheeler", is it Joanne Edwards?

A. Joanne Edwards. Pat Mannix and Loretta Wheeler were the non-Aboriginal teacher assistants in that classroom over that six year period, I'm not sure whether it was three years each or four or two, but they were, it was those two, and Joanne was the Aboriginal education worker in that classroom for the six years that I was principal. It's one of those people and I don't know which one.

Q. In your conversation with Sister Marietta, did she describe to you how she smacked the student?

A. We had a conversation and she, she admitted that she, she hit the child, I'm not sure whether it was on the knee or on the back or, or on the bottom, and it wasn't very hard, and it was to set an example because of something that had happened, and that was confirmed later by the teacher assistant. And our conversation was around that we're all human and we have our breaking point and from time to time there's - we err in judgment, it doesn't reflect any pattern of behaviour but it needs to be acknowledged, addressed and not repeated, and that was the conversation around that. So not trying to trivialise it but trying to make the point that regardless of how much poor behaviour there was and whatever else may have been going on, it's not acceptable and it needs to be acknowledged.

Q. Did either Sister Marietta or the teachers aid describe to you what it was that the child had done that had led to the child being dealt with in that way?

A. Yes, they would have but I honestly have, I have no recollection. There are so many things that happened on so many occasions with regard to behaviour. I could make something up for you but I can't, I can't tell you what it was, but it was something - the buttons were pushed and, and, and there was a reaction that shouldn't have happened, and that was acknowledged.'

53 This evidence was significant because Sr Green denied recollection of this event at T 643:3-31 Black Vol 2 643B-P:

'Q. Sister Green, this was what Mr Romaniuk was asking you about just before we had that short break, about the grandmother coming to the school to talk about a smacking and the grandmother saying she'd do the hitting and Brother Hollamby said he spoke to you about that. Do you remember those questions?

A. I don't remember. I don't remember the incident.

Q. No, but do you remember Mr Romaniuk asking you about it this morning?

A. Now what am I - I'm all confused now.

Q. Just take your time.

A. Okay.

Q. This is the incident that Mr Romaniuk was asking you about just before we had that five-minute break.

A. Yes.

Q. You told us that you couldn't recall having a conversation with Brother Daniel about that matter. Do you remember those questions?

A. Did I say I recalled, I, I remembered that?

Q. No, you said you didn't remember it.

A. That's right, I don't either.

Q. You're being asked some follow-up questions. Apparently, the student was Janine Monaghan or Monaghan, and you're asked if that made any difference to your recollection of that incident.

A. I don't have any, any recollection of Brother Daniel speaking to me about that.'

54 The event's significance is enhanced in circumstances where Sr Green did not recall being reprimanded by the principal on any other occasion at all: T 640:41-50 Black Vol 2 640T-Y:

'Q. Six. You say that you do not recall ever being reprimanded by the principal for your teaching. Is that--

A. For my teaching?

Q. Yes?

A. Never about, for, for my teaching.

Q. Do you recall being reprimanded by the principal for the manner in which you disciplined the children?

A. I have never have any recollection of Brother Daniel doing that.'

55 The Trial Judge was impressed by Brother Hollamby. During the course of oral submissions, the Trial Judge said he found Brother Hollamby to be a 'very impressive' witness (T 1023:4 Black Vol 3 1023C-D):

‘Brother Hollamby, who I'm prepared to say was a very impressive witness’

56 In the reasons for judgment, the Trial Judge referred to the ‘favourable impression’ left by Brother Hollamby’s testimony at TJ [84] Red 173B-D:

‘Given his [Brother Hollamby] evidence and the favourable impression he made on me...’

57 This evidence is significant in several respects. *First*, it directly undermines the reliability – if not the credibility – of Sr Green’s evidence. She denied ever physically disciplining a student throughout her career, save for the incident involving Margaret Dixon (T569:1 Black Vol 2 569B-M), addressed below. *Second*, it establishes that Sr Green was a teacher who engaged in physically striking children.

A6 Error by finding Sr Green was a person of ‘good character’ and attributing weight to that finding (Grounds 1, 5 and 8)

58 The Trial Judge found that Sr Green was a person of ‘good character’ and attributed weight to this finding. With respect, that conclusion was erroneous both as a matter of fact and of law.

59 Leave was granted to the Respondent to adduce oral evidence in chief from Sr Green, where she supplemented her written evidence to state she recalled only one instance where she ‘smacked’ a student in her entire teaching career. This involved a St Ignatius pupil by the name of Margaret Dixon (T 568.50-569.19 Black Vol 2 568V-569M), who had run away from Sr Green’s class three times to the nurses’ office (T 579.50 Black Vol 2 579W-Y). Margaret Dixon was called in reply by the Appellant, where her evidence of being physically disciplined by Sr Green included being smacked on multiple occasions (T 937:43-50 Black Vol 3 937U-Y).

60 Sr Green’s own admission that she physically struck children is inconsistent with a finding of good character. Moreover, her conduct attracted professional reprimand from Brother Hollamby and was contrary to the School’s policies.

61 In attributing weight to Sr Green’s purported good character, the Trial Judge failed to give proper assessment to the fundamental deficiencies in her evidence. Sr Green was unable to recall being professionally admonished by Brother Hollamby for administering physical discipline (above). Although this omission was acknowledged by the Trial Judge, his Honour did not consider its broader forensic consequence on the reliability and credit of Sr Green’s evidence as a whole. An example of this appears at TJ [180] Red 191S-Y:

‘Notwithstanding his limited opportunity to make direct observations, he did not see or hear of Sister Green hitting children with a ruler or otherwise physically abuse them. He did not receive any complaints about her except for the incident involving Janine Monaghan. That complaint related to Sister Green smacking the child on her bottom with an open hand which resulted in the student’s grandmother complaining. Sister Green does not recall this incident. Janine Monaghan was an infant pupil in the Aboriginal stream from 1992 to 1995 and the complaint would have been in one of those years (T. 781.4 - .38). He had cause to counsel Sister Green about the matter...’

62 This included the fundamentally irreconcilable inconsistency between the evidence of Mr Haimes – accepted by the Trial Judge as ‘accurate’ – and Sr Green’s repeated denials that she had ever used an implement to administer corporal punishment during her teaching career (see above at [40]-[48]). Despite the stark

contradiction, the only discernible criticism made by the Trial Judge of Sr Green's evidence was the euphemistic observation that she had a tendency to 'put her best foot forward' at TJ [67]-[68] Red 168N-169E:

[67] I interpolate, if I had any criticism, it was Sister Green's – perhaps natural and understandable – tendency to put her best foot forward in explaining her approach to disciplining her students. To this extent, it is my view that she understated somewhat the force with which she applied when "whacking" the children on the bottom. I accept this was not borne of a desire to mislead the Court. However, I was nevertheless left with an impression that more of a "smack" than a "whack" was involved, even though Sister Green preferred the latter expression.

[68] Sister Green's evidence is not without difficulty. The plaintiff points out the malleability (my expression) of Sister Green's own definition of "serious misbehaviour". That is, while Sister Green's written statement indicates that the disciplinary measures referred to at [64] above were reserved for "serious misbehaviour" entailing "fighting, punching or pinching", she conceded in cross-examination that Ms Margaret Dixon's precipitating behaviour of running away from her class did not meet her own definition of "serious misbehaviour" (Plaintiff's Closing Submissions ("PCS"), [38]; T595.31-34; T595.41-46). This was reinforced when Sister Green was cross-examined about being counselled by Brother Hollamby when he was principal over smacking Janine Monaghan, she again changed her definition to include "pushing" to the list of "serious misbehaviour" warranting physical discipline (PCS, [38]; T639.9-11).'

A7 Accepted the 'teacher's aides' evidence in the face of irreconcilable internal conflicts (Grounds 1 and 9)

63 The Trial Judge should not have accepted the evidence of the 'teacher's aides' because:

- a. it was in conflict with the 'impressive' evidence of Brother Hollamby; and
- b. was in conflict with the evidence of Sr Green.

A7.1 *In conflict with Brother Hollamby*

64 As set out above at [49]-[57], Brother Hollamby gave evidence that at least one of the teacher's aides was present when he reprimanded Sr Green in relation to the incident involving Janine Monaghan. He specifically identified Joanne Edwards, Pat Mannix, and Loretta Wheeler as the aides he believed were present. However, each of Joanne Edwards (T921.16-33 Black Vol 3 921H-Q), Pat Mannix (T705.47-706.20 Black Vol 2 705W-706O), and Loretta Wheeler (T624.5-47 Black Vol 2 624C-X) denied any recollection or knowledge of the incident. The same position was adopted by the other teacher's aides, including Phyllis Cubby (T753.12-21 Black Vol 2 753G-K) and Mr Dixon (T678.15-17 Black Vol 2 678H-J).

65 The Appellant addressed this fundamental inconsistency in his written submissions at paragraphs [39]-[40] Black Vol 3 1076K-S:

[39] Br Daniel Hollamby gave evidence of receiving a complaint from the grandmother of Janine Monaghan after Sr Green had smacked her during the school day: (Ex#CB43 at [15]-[16]). He gave evidence that he confronted Sr Green about the incident, who admitted it had occurred and reported that the incident was witnessed by at least one of the teachers' aides, either: Ms Pat Mannix, Ms Loretta Wheeler or Ms Joanne Edwards: (T 782:10-15). Br Hollamby recalled speaking with the teachers' aide who witnessed the incident, who confirmed that it occurred but could not recall which teachers' aides he spoke to: (T 782:1-25). He could not recall whether Sr Green admitted to hitting Janine Monaghan on the knee, back or bottom, but recalled that it was done to set an example of what because of something that happened in the class, which was later confirmed by the teacher assistant who witnessed the incident: (T 782:30-35).

[40] Sr Green had no recollection of that incident involving Janine Monaghan, nor any recollection of Br Hollamby speaking to her about it: (T 643:1-30). She had no recollection of ever being reprimanded by the

Principal for her teaching: (T 640:50; Ex#CB56 at [31]). Each of the teachers' aides identified by Br Hollamby as having potentially been present when Sr Green slapped Jannine Monaghan denied witnessing the incident: Ms Loretta Wheeler: (T 624:10-40); Ms Pat Mannix (T 706:15-20) and Joanne Edwards (T 921:15-30). So, too, did Ms Phyllis Cubby: (T 753:5-20) and Sweeney Dixon: (T 678:15).'

- 66 On the Respondent's case, Brother Hollamby's reprimand of Sr Green for administering corporal punishment would have been a significant event; one that ought to have been memorable. Yet, none of the teacher's aides identified as present at the time could recall the event, despite at least one of them having been in the room when the event occurred. Despite this, the Trial Judge's consideration of this important forensic issue was limited. Whilst the Trial Judge's reasons noted the inability of Patricia Mannix (TJ [130] Red 183A-E) and Phyllis Cubby (TJ [139] Red 184Q-S) to recall the incident involving Janine Monaghan, the absence of recollection was not addressed when evaluating the evidence of Joanne Edwards (TJ [140]-[142] Red 184S-185I), Loretta Wheeler (TJ [131]-[135] Red 183E-V), or Sweeney Dixon (TJ [69]-[73] Red 169E-170L).
- 67 However, this overlooks the fundamental deficiencies in the evidence of the teacher's aides, and deficiencies that cannot be adequately explained or dismissed through euphemistic reasoning. To the extent that the pool of teacher's aide witnesses may have been affected by partisan motivations, and given the Trial Judge's acceptance of Brother Hollamby's evidence that at least one of those aides was present during the reprimand, their collective failure – or refusal – to recall what, on the probabilities, was a significant event required careful scrutiny by the Trial Judge. It was incumbent on the Trial Judge to approach their evidence with appropriate caution and to provide clear reasons for doing so. The Trial Judge did not do so.

A7.2 *Internal conflict between the teacher's aides*

- 68 Another obvious defect in the evidence of the teacher's aides was its inconsistency with Sr Green's own account of her disciplinary practices.
- 69 In her written evidence, Sr Green described employing specific disciplinary measures in response to 'particularly serious misbehaviours such as fighting, punching and pinching' (Ex#CB56 at [25]-[26]; Blue 63K-64K), which she stated she had used throughout her teaching career (T596.25 Black Vol 2 596K-O). These measures included: (a) maintaining a 'pest list' on the blackboard; (b) drawing a circle in the playground for misbehaving children to sit or stand in; and (c) personally escorting children to the principal's office (Ex#CB56 at [32]; Blue 64V-65D). Additionally, Sr Green admitted to giving children a 'whack' on the bottom as a form of discipline (Ex#CB56 at [26]; Blue 63W-X). She described this as a light smack administered to children who were fighting, occurring 'probably a few times a week' (T596.35-40 Black Vol 2 569U-W; Ex#CB56 at [26] Blue 64H-I).
- 70 Through her Senior Counsel, it was put to the Appellant's witnesses that to suppress 'unruly behaviour', Sr Green would sometimes say to the class 'where's Montgomery' to regain control of the class before giving 'it a good thump on the desk': (T 36:30 Black Vol 1 36N-Q) or blackboard to make a loud noise. It was put to the Appellant that Sr Green would hit students' desks with 'Montgomery' so hard that it would make a 'big sound'. The Appellant agreed that the action was 'terrifying' and did in fact scare him: (T 133:35-50 Black

Vol 133R-Y). In cross-examination, Sr Green did not know why the children reacted to her saying 'where's Monty?' and did not know what they were scared of: (T 589:40-590:10 Black Vol 2 589S-Y).

- 71 During cross-examination, the teacher's aides variously denied any awareness of several disciplinary practices that Sr Green herself admitted to employing. Given evidence of Sr Green as to her disciplinary practices, the Appellant's written submissions specifically identified the internal inconsistency between the evidence of the aides and that of Sr Green, at paragraphs [44]-[49] Black Vol 3 1077J-1078Q:

[44] **Ms Lauretta Wheeler** worked solely with Sr Green between 1994 and 1996: (Ex#CB47 at [7]). She could not recall a time when Sr Green would ask the class 'where's Monty?' and was otherwise unaware of Sr Green's ruler 'Montgomery' (T 617:35-50). She had no recollection of a 'pest list' being used in the classroom, nor the practice of Sr Green drawing circles on the playground in chalk for students to sit in: (T 622:20-40). She never saw Sr Green hit the longer ruler on the students' desks: (T 617:5). She never saw Sr Green make physical contact with her hand on a child's bottom whilst in her class: (T 618:20-25). She did not witness Sr Green smack Margaret Dixon: (T620:45).

[45] **Ms Pat Mannix** worked in Sr Green's room for two and a bit years from 1991 through to 1993: (T 695:20-30). She never heard Sr Green yell and did not recall her resorting to physical discipline: (T 702:45). However, she did concede to observing Sr Green 'tapping a child on the bottom on about five occasions': (T 699:50). She never heard a ruler or implement being struck on a student's desk or the blackboard: (703:5-10). She never saw children standing in chalk circles in the playground but saw them doing so on the school veranda: (T 703:20). She had no knowledge of Sr Green smacking Margaret Dixon: (T 706:25).

[46] **Ms Phyllis Cubby** worked as a teacher's aide with Sr Green for 14 years commencing in about 1987 (T 756:35-50). She did not recall Sr Green saying 'where's Montgomery?' as a discipline method and could not recall 'Montgomery' ever being moved. She recalled the ruler just sat there 'like the other pieces of furniture in the room': (T 757:25) and recalled that Sr Green never picked up that ruler: (T 757:35). She never witnessed Sr Green hit any desks or blackboards with rulers of any kind: (T 752:15-30). She never witnessed students having to stand in chalk circles in the playground: (T 752: 30-45). She never witnessed fighting, including punching, pinching and pushing students amongst the students in Sr Green's class (T 754:45-50). She was emphatic in her denial of never seeing Sr Green 'smack' or 'whack' a student: (T 751:7-20). She had no knowledge of the incident involving Margaret Dixon: (T 751:40 -T 752-5).

[47] **Ms Joanne Edwards** worked in Sr Green's classroom from 1989: (T 919:15). She denied ever seeing Sr Green hit a ruler on the blackboard or a student's desk: (T 921:5-15), and she never saw Sr Green require a student to stand in chalk drawn circles on either the playground or the veranda (T 920:20). She never saw Sr Green 'whack' or 'smack' a student: (T 920:10), she did not recall Sr Green leaving the classroom during class hours: (T 921:35), she did not witness the incident involving Janine Monaghan, nor Br Hollamby talking to Sr Green about the incident afterwards: (921:15-30). She was unaware of the smacking incident involving Margaret Dixon: (T 921:30).

[48] **Mr Sweeney's** written evidence was that he was in and out of Sr Green's room from about 1987 until she stopped teaching: (Ex#CB49 at [15]). In cross-examination, he said he would spend up to one hour daily in Sr Green's classroom: (T 666:40-45). Over his 23-year career, he never saw children fighting in the classroom or misbehaving: (T 667:10-20). He never saw children required to sit in chalk circles drawn on the bitumen: (T 667:25-30); never saw any teacher hit a ruler on a student's desk or the blackboard: (T666:5-15), never saw any teachers yell at the students: (T 666:7) and he never saw any physical discipline between teachers and students at the school: (T 672:40), other than the time he admitted to physically disciplining the Appellant: (T 673:5). He did not witness Sr Green smack Janine Monaghan: (T 678:15)

[49] Whatever the reason, the evidence of the teachers' aides (Ms Lauretta Wheeler, Ms Pat Mannix, Ms Joanne Edwards, Ms Phyllis Cubby and Mr Sweeney Dixon) is so unreliable that no weight should be placed upon it. Essentially, these witnesses were put forward by the defendants as 'eyewitnesses' of the denied events. Of all the witnesses called, this group contained those persons who had the opportunity to closely observe Sr Green over many years. And yet, each of their evidence is at odds with what Sr Green says was her usual and routine discipline methods she deployed throughout her teaching career. As regards the teachers' aides evidence as a whole compared to Sr Green's admitted evidence, it is unreliable to such an extent is not credible.'

- 72 Despite the Appellant having expressly drawn these fundamental inconsistencies to attention as part of his case, there is no substantive consideration of them in the reasons, apart from a passing reference at TJ [42] Red 158C-I. However, even there, the inconsistencies are not the subject of any forensic analysis or evaluation of their bearing on the reliability of the evidence of the individual witnesses. Rather, they are subsumed within the Trial Judge's broader 'camps' theory outlined in the preceding paragraph at TJ [41] Red 157U-158C, and treated as representative of partisan alignment, rather than addressed on their own terms as matters going to the credibility and reliability of the Respondents' witnesses.
- 73 Similar fundamental conflicts in the evidence of other witnesses called by the Respondent were also present and were specifically raised in the Appellant's written submissions at paragraphs [54]-[57] Black Vol 3 1079L-1080L:
- a. Teacher, **Ms Judith Ryan** taught at the School in 1993 in a separate class from Sr Green. did not witness children sitting in a chalk-drawn circle in the playground or the veranda: (T 928:35-40), nor was she aware of Sr Green giving students a whack on the bottom as a method of discipline, nor was she aware of the incidents involving Janine Monaghan or Margret Dixon: (T 929:5-35).
 - b. Teacher **Annette Welch** could not recall seeing Sr Green hit Montgomery on the desk or a blackboard but observed that the noise would be very loud: (T 845:25). She recalled witnessing teachers administer physical discipline in the nature of a light smack with a bare hand: (T 843:50- T 844:1-5) and expected Sr Green to have done so, but she could not recall specifically seeing her do so: (T 846: 20-30). She recalled being mentored by Sr Green, and she mimicked her discipline methods: (T 846:15).
 - c. Teacher, **Ms Jennifer Ward** never witnessed Sr Green use any physical measures to discipline students at the school: (T 852:30-50).
 - d. Teacher, **Ms Lisa Green** was a student at the School between 1976 and 1977 in Sr Green's class. She did not recall Sr Green using a ruler or pointer to whack on blackboards or desks, nor did she ever see her use her hand to physically discipline a child: (T 890:5-15). She never saw students being required to sit in a chalk-drawn circle in the playground or veranda: (T 891: 1-5). Ms Green returned to the School in 1993 in a support teacher's role where she would assist students across all classes, usually on the veranda outside the students' classroom: (T 891:30-45). She commenced teaching with her own class of children next to Sr Green's classroom. She had never heard the phrase 'Montgomery', nor heard Sr Green say the 'where's Monty?' to gain control of the class: (T 897:20). She did not hear smacking of rulers on desks or the blackboard or see the 'whack' of children: (T 895:30-45).
- 74 There was, again, no attempt in the Trial Judge's reasons to reconcile this evidence with Sr Green's evidence regarding the disciplinary methods she in fact employed.

A7.3 False 'omnipresent teacher's aide'

- 75 The second limb of the Trial Judge's acceptance of the teacher's aide's evidence is that he believed the teacher's aide would have noticed the alleged conduct at TJ [198] Red 197Q-U:
- '...It is true that the recollection of some of the teacher's aides were somewhat affected by their admiration for, and loyalty to, Sister Green. On the other hand, had there been daily or even more frequent punishments of children by striking them with Montgomery in the classroom, I am satisfied they would have noticed, and from my impression of them, so far as that helps, would have told the truth about it.'
- 76 With respect, this finding proceeds from a false premise that all of the witnesses, particularly the teacher's aides, had the opportunity of constant and comprehensive visibility of Sr Green's conduct in the classroom. If the Trial Judge accepted as truthful the evidence of the Respondent's witnesses who claimed not to have observed Sr Green engaging in the disciplinary practices, Sr Green herself admitted to (detailed above), the

only logical inference is that she was able to carry out such disciplinary practices in the absence of the teacher's aides or without the teacher's aides observation or knowledge.

77 All of the teacher witnesses conceded they were not in the class with Sr Green all the time. This matter was raised in the appellant's written submissions at paragraphs [53]-[57] Black Vol 3 1079J-1080L:

- a. **Ms Judith Ryan** taught at the School in 1993 in a separate class from Sr Green. She could not see into Sr Green's classroom and did not visit her classroom: (T 927:5-25).
- b. **Annette Welch** taught at the school and gave evidence that despite the rooms being divided by concertina doors, each teacher had their own dedicated teaching space with walls and doors: (T 842:15-50).
- c. **Ms Jennifer Ward** taught at the School from 1974 to 2000. Her evidence was to the effect that each of the classes undertaken in the 'Unit' as part of the Australia Street Scheme were in individual enclosed classrooms, divided by a concertina divider: (T 851:10-30). She agreed that the teachers within the 'Unit' were not watching what was going on all the time: (T 851: 25).
- d. The Schools principals: Sr Eileen Quade, Br John O'Brien (and Br Daniel Hollamby all agreed to having limited day-to-day interaction or supervision over Sr Green and her classroom.

78 Teacher's aide Lauretta Wheeler said she never witnessed Sr Green physically discipline a child ever at T 618:44-50 Black Vol 2 618V-W:

'Q. Just to make it clear, you haven't seen Sister Marietta ever apply her hand in any way to a student in the context of disciplining the student.

A. No.'

79 In following up why that might have been, the following exchange occurred at T 620:45-621:1-18 Black Vol 2 620V-621J:

'Q. Would it surprise you if Sister Marietta has given evidence to this Court that she has smacked a student whilst at St Ignatius Primary School?

A. If she said she did, she obviously has, but I didn't witness it.

Q. Would it surprise you if Sister Marietta has given evidence to this Court that whilst inside the classroom she has made physical contact with a student in the context of disciplining students?

HIS HONOUR: I think you should add the description she gave as to what she did.

ROMANIUK Q. And Sister Marietta describes that she gave students a whack, which she described as being a light flick with her hand?

A. I didn't witness it.

Q. When you're doing your role as a teacher's aid in Sister Marietta's class, it is not your job to watch what she is doing - to monitor how she is conducting herself as a teacher - is it?

A. No.

Q. Because you're there attending to the tasks that you need to?

A. Yes'

80 Ms Wheeler gave evidence that she was frequently in and out of Sr Green's classroom at T 624:40-625:1-11 Black Vol 2 624T-625G:

'Q. At the time when Janine Monaghan was a student in Sister Marietta's class who was the other teachers aid?

A. Well Joanne Edwards may have been in there, or Phyllis Cubby. It may have happened when I wasn't there, 'cause I was in and out a lot, randomly. I didn't observe it.

Q. Did those other teachers aids discuss that incident with you at any time?

A. No.

Q. When you said you were in and out randomly what did you mean by that?

A. There was tasks that I sometimes had to do. Like photo - duck over do photocopying. On Fridays there was a time when I did what we called Student of the Week. I'd take the book around or the thing around to all the other teachers so they could put their student of the week down. It could be any number of things. I may have taken a child to sick bay. It could be any, any one of a number of things that I've been asked to of, yeah.

Q. So your duties as a teachers aid had you out of the classroom on many occasions?

A. There might have been day - yes. Yes. I might have been days when I was there and I never went anywhere, and there was days when I was in and out, more than once or twice'

- 81 Similar issues arose in relation to the other teacher's aides, who did not witness Sr Green's own admitted disciplinary practices, likely because they were engaged in their own duties, and were not consistently present in the classroom.

A8 Unsupported factual finding that Sr Green did assault and batter the Appellant in an unspecified manner, but that such assault constituted 'lawful chastisement' where there was no evidential basis for any of the findings of fact or law (Ground 3).

- 82 Despite rejecting the Appellant's specific factual allegations of assault by Sr Green, the Trial Judge nevertheless found that the Appellant had been subjected to physical discipline by Sr Green, albeit of an unspecified nature and for an unspecified purpose. His Honour further found that any such conduct would have been lawfully justified as an instance of lawful chastisement. This conclusion was reached notwithstanding Sr Green's categorical denial that she had ever disciplined the Appellant at all. With respect, this finding was erroneous.

A8.1 The Factual Finding

- 83 As noted above, the Trial Judge did find that the Appellant was subjected to a degree of unspecified physical punishment by Sr Green and Mr Dixon by way of discipline at TJ [12] Red 146O-S:

'I accept that the Appellant was subjected to a degree of physical punishment by Sister Green and Mr Dixon by way of discipline. However as I explain later, I am not satisfied on the evidence before me on the balance of probabilities that such punishment constituted "child abuse" in the sense of serious physical abuse within the meaning of s 6A(2) *Limitation Act*.'

- 84 However, the nature and quality of these assaults are ambiguous when read in conjunction with TJ [213] Red 202E-M:

'But the question is not whether smacking a child in the way I have described is corporal punishment, the question is whether it constitutes serious physical abuse. I have set out my understanding of the meaning of the statutory expression "serious physical abuse" above at [14]–[22]. It should be borne in mind that other than the evidence of the Appellant that he was taken into the adjoining room and spanked hard on his naked bottom on one occasion, which I am not satisfied occurred, there is no evidence that Sister Green smacked him in the manner I have found she utilised from time to time to discipline children in her infants' class. I have rejected his case that he was frequently struck with Montgomery, or another implement, as not having been established on the balance of probabilities. He has failed to establish a case that he was subjected to serious physical abuse at the hands of Sister Green.'

[emphasis added]

85 Assuming the Trial Judge did in fact find that the Appellant was subjected to physical punishment by Sr Green, that finding is factually incomplete in several material respects. *First*, it fails to specify the nature and degree of the physical punishment and the circumstances it was administered. *Second*, it omits any detail as to the quality or severity of the assaults; matters that are critical to the evaluation of whether the statutory threshold of ‘serious’ under s 6A of the *Limitation Act 1969* (NSW) is satisfied, and whether the conduct could properly attract the defence of lawful chastisement. The absence of specific findings in this regard is further complicated by the Trial Judge’s own observation that Sr Green understated the degree of force she used when administering physical discipline to other students at the School at TJ [67] Red 168 N-S:

‘I interpolate, if I had any criticism, it was Sister Green’s – perhaps natural and understandable – tendency to put her best foot forward in explaining her approach to disciplining her students. To this extent, it is my view that she understated somewhat the force with which she applied when “whacking” the children on the bottom. I accept this was not borne of a desire to mislead the Court. However, I was nevertheless left with an impression that more of a “smack” than a “whack” was involved, even though Sister Green preferred the latter expression.’

and at TJ [199] Red 197 W-Y:

‘I am of the view, however, that Sister Green perhaps understated the nature of her “whack”. And I was not persuaded by her explanation of there being a distinction between a “whack” and a “smack”.’

86 Further, and importantly, this finding of fact lacked any foundation in the evidence of the primary witnesses. The Appellant did not allege being ‘whacked’ or ‘smacked’ by Sr Green. Sr Green described the Appellant as a quiet and withdrawn child who, in her view, did not require discipline at all (see First Statement of Sr Green at [39]; Blue 66C-D and TJ [34]; Red 156B-D, [214]; Red 202M-O).

87 These matters have significance in this case because the Appellant, as the recipient of these unspecified assaults, was a psychologically vulnerable infant child.

A8.2 *The Defence of Lawful Chastisement*

88 It is also unclear whether the Trial Judge accepted that the purported legal justification for Sr Green’s administration of unspecified physical punishment to the Appellant was the same as that which applied to her treatment of other students. Relevantly, the Trial Judge stated at TJ [215] Red 202U-Y:

‘Were I to assume that, from time to time, Sister Green found it necessary to administer to the Appellant the type of smack I have found she administered to other pupils under her care, I would regard it as no more than lawful chastisement, being both moderate and reasonable and for a proper purpose. This being so, I repeat, I am not satisfied that the Appellant has established severe physical abuse at the hands of Sister Green.’

[emphasis added]

89 Because the Respondents denied that the alleged assaults by Sr Green (and Mr Dixon) occurred, they led no evidence in support of their pleaded defence of lawful chastisement. In particular, no evidence was led as to the availability of that defence to Sr Green in light of Brother Hollamby’s evidence that corporal punishment was prohibited at the School and that he had reprimanded Sr Green for administering it. The Trial Judge’s finding that the defence of lawful chastisement remained available to Sr Green – despite the position of the School Authority prohibiting it – was, with respect, erroneous.

90 The Appellant's written submissions at paragraphs [83]-[87] Black Vol 3 1093G-1095D addressed the essential elements of the defence of lawful chastisement. It was submitted that a central requirement of the defence is that the use of force must be reasonable in all the circumstances, including consideration of the nature of the child's misbehaviour, the child's age, physique, and mental state.¹⁰ The Appellant further submitted that the School's decision to prohibit corporal punishment by those entrusted with the care of students extinguished recourse to the defence.

91 School prohibition of physical discipline. The evidence adduced by the Respondents made clear that physical discipline was not permitted at the School during the relevant period. Brother Brian, who served as principal between 1988 and 1992, gave the following evidence regarding the School's policy on corporal punishment (T798.33-41) Black Vol 2 798O-U:

'Q. Was corporal punishment permitted at the school at the time that you were there?

A. No.

Q. In paragraph 10 when you say that you have no memory of corporal punishment being used at the school, you intend to convey that corporal punishment was not permitted at the school in that period?

A. That's correct.

Q. Corporal punishment might mean different things to different people. What was your understanding of corporal punishment that was not permitted at the school at that time?

A. It would be sort of physical, physical punishment.'

92 Brother Hollamby, who succeeded Brother Brian as the School's principal and held that position at the time of the alleged abuse of the Appellant, gave the following evidence concerning the use of physical punishment on students at the School (T770.27-50) Black Vol 2 770N-Y:

'Q. You tell us in your statement that corporal punishment was not permitted at St Ignatius during your time as the principal at that school.

A. That's correct.

Q. When we talk about corporal punishment, was there an operating definition of "corporal punishment" that applied for the Marist Brothers and these type of schools at that time?

A. Could you just repeat that question, please?

Q. When we talk about corporal punishment, what was the operating definition or understanding that was applied by the Marist Brothers at the time of your appointment as principal at St Ignatius?

A. That, that there was no physical contact with children unless absolutely necessary, such as, as restraining a child who may be violent or distressed. There was an understanding, I can't recall anything formally in writing, but there was a clear understanding.

Q. Physical contact may have been appropriate to restrain a student who was behaving in a certain way and needed to be restrained for their own safety?

A. For their safety and the safety of others, that's correct.

Q. But otherwise there was to be no physical discipline of students.

A. That's correct.'

¹⁰ Citing the decision in *R v Terry* [1955] VLR 114 at fn 100 at p 27 of the Plaintiff's Written Submissions Black Vol 3 1094N-Q .

- 93 ~~Sr~~ Ms Green also gave evidence acknowledging her awareness that the use of physical discipline on students was prohibited at the School at T 896:16-39 Black Vol 3 896I-T:

‘Q. Did you have an understanding of whether corporal punishment was permitted at the school when you were a kindergarten teacher?

A. Can you just ask me that again?

Q. Did you have an understanding at the time that you were a teacher as to whether corporal punishment was permitted at the school?

A. Yes, I had an understanding.

Q. What was that understanding?

A. My understanding was that children's wellbeing, all their wellbeing, their physical, their spiritual, their academic wellbeing, was our job to look after. That was the culture of our school.

Q. Did you understand that physical discipline was permitted or not permitted?

A. I understood that it was not permitted.’

- 94 At TJ [17]-[23] Red 148M-151Y, the Trial Judge relied on the historical authorities to support the proposition that the authority to administer corporal punishment of the child was not dependent upon delegation from the parent, but instead was inherent (and inalienable) to the teacher and student relationship. With respect, that proposition cannot be sustained. If correct, it would follow that, since the introduction of compulsory education in Australia, neither a parent nor a school authority could lawfully prevent a teacher, or any person acting *in loco parentis*, from physically chastising their child, even where the parent or school authority, as the teacher's employer, had expressly prohibited such conduct. That conclusion is untenable. It is contrary to the evidence of Brother Hollamby that the School not only prohibited such conduct, but that he had previously reprimanded Sister Green for physically disciplining students, in direct contravention of the School's prohibition on such practices (T781:3-50) Red 781E-X.

- 95 ‘Reasonableness’. Insofar as the Respondent relied upon the pleaded defence of lawful chastisement, the Trial Judge erred in concluding, at TJ [201] Red 198T-199C, that the Respondent bore no onus of proof in establishing the elements of that defence:

‘Always accepting the defendant carries no onus of proof, I am satisfied then that Sister Green did use some physical forms of discipline in terms of the smacking I have referred to. I am not persuaded it was a punishment that was administered very frequently and certainly not on a daily basis. My impression is, although I am not certain, that a smack on the bottom of a misbehaving child is different from putting hands on the child to put them in line at assembly or to move them along when assembly is over. I accept the chalk circle was used in the limited way I have described. Other techniques were probably also used such as the pest list and requiring a child to stand in the corner. These matters seem entirely unexceptionable.’

- 96 Establishing the defence of lawful chastisement required the Respondent to demonstrate that the nature and degree of physical punishment were reasonable in the circumstances. However, having denied that any physical assaults upon the Appellant occurred, the Respondents adduced no evidence in this regard. The Trial Judge's failure to identify the specific acts said to constitute ‘physical punishment’ is a fundamental error. In the absence of such findings, no proper assessment of the ‘reasonableness’ of the alleged conduct could be undertaken. Moreover, when regard is had to the prevailing social standards in 1993, the Appellant's young age, disadvantaged background, cultural dislocation, and particular vulnerabilities, there is a compelling case

that any physical discipline administered – short of the most extreme and justified circumstances – could not meet the threshold of lawful chastisement.

- 97 ‘Proper purpose’ for physical discipline. The Appellant’s written submissions clearly identified the essential elements of the defence of lawful chastisement, insofar as it was to be relied upon by the Respondent:¹¹

‘...If the alleged abuse by either Sweeney or Sr Green is found, it is submitted that such physical discipline could not be reasonable in the circumstances of infant school children, especially the particularly vulnerable Appellant. The essential feature of the defence is that the force used must be reasonable in the circumstances. Factors such as the age, physique, and possibly gender of the child, the nature of the punishment and the injury inflicted will be material to the consideration. Where the nature or extent of the force applied is so obviously out of proportion to the child’s misbehaviour, a real question arises as to the defendant’s actual motivations, including whether the force applied was carried out under the pretence of correction. If the punishment is immoderate, excessive, or administered for reasons unconnected with the proper purpose, then the punishment is unlawful...’

- 98 The Trial Judge’s finding that Sr Green’s administration of unspecified physical discipline would have satisfied the defence of lawful chastisement – on the basis that it was ‘moderate’, ‘reasonable’ and ‘for a proper purpose’ – is inconsistent not only with the evidence of Sr Green (above at [22]) and TJ [34] Red 156B-D, [214] Red 202N-O)), but also with the Trial Judge’s findings regarding the Appellant’s behaviour at the School at TJ [34] Red 156B-D:

‘Her [Sr Green] recollection is that the Appellant was well-behaved and did not require chastisement or correction by physical punishment.’

and at [214] Red 202N-O:

‘It should be borne in mind that Sister Green regarded the Appellant as a well-behaved boy. It is implicit from what she said that he was not in need of correction when a pupil in her class.’

- 99 Sr Green professed to having a clear memory of the appellant, and her evidence was that he was a well-behaved boy. Her own evidence establishes that the Appellant’s conduct was unlikely to have been of a kind to justify the use of physical punishment in 1993. Moreover, it was clear that the appellant was a particularly vulnerable child at the time he was in Sr Green’s class. He was a child of profound deprivation, suffering from a developmental disability and having witnessed the murder of his aunt at the age of four (4) he was psychiatrically vulnerable.

B GROUNDS 10-13 – THAT MR DIXON DID NOT ASSAULT THE APPELLANT AS ALLEGED

B1 Summary of the findings and Grounds of Appeal

- 100 In his pleading, the Appellant alleged that Mr Dixon twisted his ears and kicked him in the bottom on multiple occasions. In his oral evidence, the Appellant further stated that, in the context of Mr Dixon retrieving him while he was truanting (T81.20–30 Black Vol 1 81H-P; T138.26–30 Black Vol 1 138M-O), he was subjected to physical discipline by Mr Sweeney (T90.29–34 Black Vol 1 90O-R):

‘Q. What would the man identified as Sweeney do by way of coming to look for you and take you back to school?’

¹¹ Plaintiff’s Written Submissions at [85] (citations omitted) Black Vol 3 1093N-1094G

A. Well, [Sweeney] comes in a car and look for us and when he sees us he gets out and he come over and he'd karate chop me and boot me in the ass and screw my ears and then he'd take me to school and then I'd get in trouble off Sister [Green].'

101 In cross-examination, Mr Dixon admitted to smacking the Appellant on the upper thigh at the direction of Sr Green (T668:5–50 Black Vol 2 668C-669J). Despite this admission, the Trial Judge – consistent with his findings in respect of Sr Green – found that the Appellant had been subjected to an unspecified degree of physical punishment by Mr Dixon, purportedly by way of discipline (see TJ [12] Red 146P-S).

'I accept that the Appellant was subjected to a degree of physical punishment by Sister Green and Mr Dixon by way of discipline. However as I explain later, I am not satisfied on the evidence before me on the balance of probabilities that such punishment constituted "child abuse" in the sense of serious physical abuse within the meaning of s 6A(2) *Limitation Act*.'

B1.1 Error as to fact finding

102 The Trial Judge's findings that the Appellant was not assaulted by Mr Dixon is in error because he:

- a. failed to consider the admission of Mr Dixon that he gave the Appellant a 'smack on the side' constituted an assault (Grounds 10 and 11)
- b. failed to consider the effect of the 'tendency witnesses' and Brother Hollamby in determining whether the Appellant was assaulted by Mr Dixon (Ground 10);
- c. erred by finding Mr Dixon was a person of good character and attributing undue weight to that matter (Ground 13); and
- d. made an ultimate factual finding that:
 - i. Mr Dixon assaulted and battered the Appellant in an unspecified manner for unspecified reasons;
 - ii. but such an assault and battery would have been lawfully justified as 'reasonable chastisement'

without any evidential basis for making either finding, and was not supported by the evidence of either Mr Dixon or the Appellant (Grounds 10, 11 and 12).

B2 Failed to consider the admission of Mr Dixon that he gave the Appellant a 'smack on the side' constituted an assault (Grounds 10 and 11)

103 In denying the assaults alleged by the Appellant, Mr Dixon initially claimed not to know him and sought to cast doubt on whether he had ever been a student at the School (Ex#CB49 at [28]-[33] Blue 32T-33I). However, under cross-examination, Mr Dixon identified the Appellant in Court and conceded that he was one of only four students he had physically disciplined during his 23-year teaching career (T662:5–15 Black Vol 2 C-H; T667:30 Black Vol 2 667P-Y).

104 Mr Dixon further admitted, under cross-examination, that he had smacked the Appellant on the upper thigh at the direction of Sr Green (T668:5–50; Black Vol 2 668T-670C).

‘Q. Did you do anything to him physically when you told him to wake up to himself?

A. I just, just tapped him, I said, I told him to wake up to himself and that was it.

Q. When you say just tapped him--

A. Yep.

Q. --what do you mean?

A. I just told him I’m going to..(not transcribable).. smack on the side like that there and then told him to wake up to himself, and then later on he, he started - and then I made him sit down and then he walked back into Sister Marietta's class.

Q. I think you motioned, for the record, with your right hand somewhere on the upper thigh?

A. Yep.

Q. What part of the body did you connect your hand with?

A. On the side here.

Q. On the side of the leg.

A. Yeah.

Q. Was it not on the bottom?

A. No.

Q. On the side.

A. On the side.

Q. Was it below the clothing he was wearing or on top of the clothing he was wearing?

A. On top of the clothing just like there.

Q. Was he wearing shorts or pants?

A. I just can't remember what. It might've been shorts.

Q. That motion, how would you describe the force of that motion?

A. It wasn't hard, I don't think.

Q. It wasn't hard?

A. No, it was soft.

Q. What was Albert's reaction?

A. He was a little bit wild.

Q. He was a little bit wild?

A. Yeah.

Q. As in fighting back?

A. Yeah, you know, he's been attacking himself and that.

Q. Sorry, I missed what you said.

A. He was a bit wild, shaking, a bit wild, you know.

Q. He was shaking?

A. Yeah, no, he just, yeah, you know, you couldn't control him.

Q. You couldn't control him.

A. Yep

Q. Was he upset by what you'd done to him?

A. Probably a little bit, yeah.'

105 The Trial Judge noted his concerns with Mr Dixon's evidence at TJ [69]; Red 169I-L:

'In my view, and with respect, Mr Dixon was one of the witnesses entrenched in the defendants' "camp" referred to at [41] above. I have evaluated Sweeney's evidence with some caution.'

106 Notwithstanding Mr Dixon's admission, his evidence amounted to a clear acknowledgment that he had physically assaulted the Appellant. Yet, the Trial Judge failed to explain why that admission was not accepted, nor did his Honour address why the admission was not taken into account in assessing whether Mr Dixon assaulted the Appellant in the manner alleged.

B3 Failed to consider the effect of the Brother Hollamby and 'Tendency witnesses' evidence in determining whether the Appellant was assaulted by Mr Dixon (Ground 10)

107 As with the allegations against Sr Green, the Appellant relied on circumstantial evidence – including the evidence of Brother Hollamby and the designated tendency witnesses – in support of his allegations against Mr Dixon.

B3.1 *The Tendency witnesses*

108 The Appellant's allegations of assault by Mr Dixon were supported by the tendency evidence of several witnesses, including: Janine Monaghan (T272:35-50 Black Vol 1 272P-273K; T274:10 Black Vol 1 274F-J); Terrence Hines (T481:35-50- T482:50 Black Vol 2 481P-482W; TJ [125] Red 181J-N); Pagan Burford (T362:1-30 Black Vol 1 361X-362Q; TJ [90] Red 173U-W); Charles Edwards (T220:25-T223:15 Black Vol 1 220M-223I); Margaret Leonard (T433:40 Black Vol 2 433O-U; TJ [84] Red 173B); Rachel Dixon (TJ [98] Red 175T); and Sylvia Fernando (TJ [116] Red 179U-W).

109 As with the allegations concerning Sr Green, the Trial Judge failed to consider the tendency evidence adduced by the Appellant in assessing the allegations against Mr Dixon. Nor did the Trial Judge engage with the evidence of Brother Hollamby, who gave direct evidence that he had admonished Mr Dixon for administering physical discipline to students at the School.

B3.2 *Brother Hollamby*

110 In his written evidence, Brother Hollamby stated that he had spoken to Mr Dixon regarding his use of physical discipline on students. In his first evidentiary statement, Brother Hollamby said at paragraphs [21]-[22] Blue 103I-M:

[21] I recall a staff member at St Ignatius named Tony Dixon. He was an AIEW (Aboriginal Education Worker) who also did liaison work and was actually the uncle to a lot of the kids at the school. He lived in the local Aboriginal community, and it was not unusual that he (and other 'uncles') would hit children by way of discipline in the community.

[22] I never received a complaint from a parent or student about Mr Dixon hitting the children at the school, although I do recall speaking to Mr Dixon on about two occasions to make sure that he did not treat the children during school time the same way as he might back in the community.'

111 In his second evidentiary statement, Brother Hollamby said Blue 184U-X:

[57] Upon further reflection, I believe the context of those conversations were when Tony was reporting to me on discipline measures he had taken with students at the School who had been misbehaving. I recall that the phrase Tony used was "I gave 'so and so student' a touch up" when he was reprimanding them. I understood the phrase of giving someone a 'touch up' was a slang term used in the local community for pulling them into line. Given my knowledge of the violent manner in which people in the Aboriginal community might treat each other, I instructed Tony that he was to ensure that he was not physically violent with students at the School.'

112 Brother Hollamby was cross-examined on his written evidence, which he confirmed (T 786:46-786:26) Black Vol 2 786W-787R. In cross-examination, Mr Dixon denied any recollection of speaking with Brother Hollamby about discipline matters at T 677:34-37; Black Vol 2 677Q-S :

'Q. Do you recall having conversations with Brother Daniel Hollomby where you were reporting to Brother Daniel Hollomby on the discipline measures that you had taken with students at the school who were misbehaving?

A. No.'

113 Despite this evidence, the Trial Judge's reasons are notably silent on Brother Hollamby's counselling of Mr Dixon concerning his use of physical discipline; a matter directly relevant to the factual enquiry into the alleged abuse. The Trial Judge's reasons also fail to address the clear conflict in the evidence regarding whether such counselling occurred, or to engage with its implications for Mr Dixon's credit and reliability as a witness. Nevertheless, the Trial Judge ultimately found at TJ [208]-[209] Red 200N-X:

[208] Generally, Sweeney was held in high regard by the principals of the school and was regarded as a good role model. He was cross-examined about having a domestic violence conviction, but notwithstanding this, I am of the view that on the whole, the evidence of witnesses who were responsible adults at the time these events were said to have occurred, establishes that Sweeney too was of good character and that is entitled to some weight when deciding whether the Appellant has proved his case on the balance of probabilities.

[209] The apparent logic of events suggests that a person in Sweeney's position, bent on the retrieval of truant schoolboys, may find it necessary to handle them a little roughly on apprehension. Such things may have occurred, including smacking the Appellant on the bottom if he showed recalcitrance about returning to school. However, it is difficult to make findings about these matters on the balance of probabilities. I am not satisfied that the Appellant has proved his case against Sweeney on the balance of probabilities.'

B4 Erred by finding Mr Dixon was a person of good character and attributing undue weight to that matter (Ground 13)

114 The Trial Judge found that Mr Dixon was a person of good character and held that this was a relevant consideration entitled to some weight in determining whether the Appellant had discharged the burden of proof on the balance of probabilities at TJ [208] Red 200N-R:

'Generally, Sweeney was held in high regard by the principals of the school and was regarded as a good role model. He was cross-examined about having a domestic violence conviction, but notwithstanding this, I am of the view that on the whole, the evidence of witnesses who were responsible adults at the time these events were said to have occurred, establishes that Sweeney too was of good character and that is entitled to some weight when deciding whether the plaintiff has proved his case on the balance of probabilities.'

115 It is axiomatic that a person convicted of domestic violence offences cannot properly be regarded as a person of good character. Moreover, the nature of such a conviction does not logically militate against the likelihood of the assaults alleged by the Appellant; rather, and more rationally, it may be probative of a propensity for violent conduct.

B5 Erred by making an ultimate factual finding that Mr Dixon assaulted and battered the Appellant in an unspecified manner for unspecified reasons, but such an assault and battery would have been lawfully justified as ‘reasonable chastisement’ (Grounds 10, 11 and 12).

116 Mr Dixon’s account of the circumstances leading to his admitted assault of the Appellant was that Sr Green had instructed him to take the Appellant outside to have a ‘yarn’ with him (T668:30) Black Vol 2 668E-T:

‘Q. With Albert, do you recall what he was doing when you had to take him, when you had to deal with him, what was he in trouble for?

A. I think he might have been - I was in another class and then they called for me to go over to Sister Marietta's class. Yep.

Q. Did Sister Marietta tell you what he had done or just tell you to take him to the principal?

A. Just told me to take him outside and have, have a yarn with him.

Q. Was he kindie or year 1 or year 2 at that stage?

A. I think he might have been kinder.

Q. Did you take him outside?

A. Yeah.

Q. Where did you take him to?

A. I took, took him outside and had a yarn with him.

Q. Where did you take him outside?

A. Just at, on the side of the staffroom, I think. Yep.

Q. When you had a yarn with him, what did you say, if you can recall?

A. I just told him to wake up to himself, you know, be good and that. Yep.’

117 Notably, Sister Green gave no evidence to suggest that she had delegated disciplinary authority – let alone the administration of physical punishment – to non-teaching staff such as Mr Dixon, even if such was legally possible. In any event, Mr Dixon himself gave evidence that he was aware that corporal punishment was not permitted at the School during his tenure (T657:20; Black Vol 2 657J-Q, TJ [70] Red 169L-M).

118 The Trial Judge erred in finding that the admitted assaults on the Appellant were lawfully justified. The conduct was expressly prohibited at the School, and there was no evidence to suggest that Mr Dixon’s role included any disciplinary function. In any event, even on Mr Dixon’s own account, there was no conduct on the part of the Appellant that could lawfully justify the administration of physical discipline.

119 Both the factual and legal findings in respect of Mr Dixon suffer the same defects as those identified in respect of the Sr Green findings above at [82]-[91].

C GROUND 4 - STATUTORY CONSTRUCTION

C1 The statutory formulation

120 The Trial judge erred in the construction of s 6A of the *Limitation Act 1969* (NSW) and in its application to the facts found. Relevantly, the Trial Judge said at TJ [213] Red 202E-H:

‘But the question is not whether smacking a child in the way I have described is corporal punishment, the question is whether it constitutes serious physical abuse. I have set out my understanding of the meaning of the statutory expression “serious physical abuse” above at [14]–[22].’

- 121 While the Trial Judge’s analysis of the common law defence of ‘lawful chastisement’ appears at TJ [19]–[22] Red 149D-151P (addressed above at paragraphs [94]–[96]), the core of his Honour’s statutory construction analysis is set out at TJ [14]–[16] Red 147F-148M:

[14] “Serious physical abuse” as it appears in s 6A *Limitation Act* is not a defined expression. The phrase is not one having a specific technical meaning, nor does it constitute a term of art. The expression is to be understood as having the meaning that ordinary people would understand it to convey. Like all undefined expressions used in a statute, the words are to be understood as having their ordinary meaning in their statutory context and having regard to the purpose of the statute in which they appear. Having regard to the factual conclusion I have reached, it is unnecessary and inappropriate for me to survey the metes and bounds of the expression’s legal meaning. Doubtless the meaning sought to be conveyed by the expression in its ordinary meaning is capable of covering a wide range of misconduct; but misconduct it must be. This much is made clear by the use of the participle “perpetrated” in the chapeau to s 6A(2). The verb “to perpetrate” is almost always used in connection with the execution, commission or performance of a crime, deception or other wrongful conduct. In this statutory context, I am inclined to think the expression, when one has regard to its constituent parts, is concerned with egregious misconduct perpetrated against a child.

[15] To ascertain its meaning, the expression must be considered as a whole, but the co-location of “serious” and “abuse” bespeak a high degree of misconduct. Moreover, by the use of the word “physical”, the misconduct must consist of the infliction of injury to the person of the child concerned, other than of a sexual nature, without lawful justification. The juxtapositioning of “sexual abuse” and “serious physical abuse” in the definition strongly suggests one does not include the other although ordinary speech might admit of a significant overlap. Not every assault or battery properly so called would suffice. It must be “serious” signifying an intensity well beyond what is minor or trivial. The requisite intensity can be supplied by either the severity in terms of injurious potential of a blow struck or by the period of time over which there has been ongoing physical abuse of the child. Abuse may cut both ways. It may consist of abuse of lawful authority over the child; or abuse of the child directly in the sense of ill treatment of the child by injurious misconduct towards the person of the child. As with all factual inquiries, questions of degree are doubtless involved.

[16] The purpose of the provision is to lift or remove the statutory bar otherwise applicable to an action for damages for death or personal injury, that is to say, civil liability. For this reason, it is not necessary to consider whether misconduct said to constitute the serious physical abuse in a given case constitutes a crime, although experience suggests that it very frequently will. As Garling J pointed out in this context in *Gersbach v Gersbach* [2018] NSWSC 1685 (“*Gersbach*”) (at [312]) by reference to *Gray v Motor Accident Commission* (1998) 196 CLR 1; [1998] HCA 70 (at [16]), in turn referring to *Uren v John Fairfax & Sons Pty Ltd* (1966) 117 CLR 118 (at [149]), the “roots of tort and crime” are “greatly intermingled”.

C2 Failure to have regard to the extrinsic materials

- 122 Despite Counsel drawing then to the Trial Judge’s notice, the Trial Judge failed to have regard to the extrinsic materials identified by the Appellant in his written submissions and addressed in oral argument, most notably, the Second Reading Speech.
- 123 In particular, the Appellant’s submissions concerning the proper construction of the statute were set out at paragraphs [89]–[93] Black Vol 3 1095N-1096M:¹²

[89] The statutory concepts of ‘sexual abuse’ or ‘serious physical abuse’ are not defined by the *Limitation Act 1969* (NSW). The Second Reading Speech introducing the amending legislation indicates Parliament’s intent to incorporate the socio-legal understanding of the definitions and to avoid being overly prescriptive or to exhaustively defining what conduct constitutes ‘sexual abuse’ or ‘serious physical abuse’. Rather, it was intended that Courts would be left to determine whether or not such abuse has occurred having regard to the circumstances

¹² Plaintiff’s Written Submissions at [89]–[93] (citations omitted).

of each case and the ordinary meaning of the terms, noting the term “child abuse”, should be interpreted in a beneficial manner.

[90] The Second Reading Speech recorded that the statutory notion of ‘serious physical abuse’ captures non-accidental physical contact with a child that could cause injury. This may consist of a series of relatively minor episodes that cause the conduct to become serious and serious, one-off conduct. Again, it was noted that the Royal Commission recognised that there was no standard definition of child sexual abuse within Australia and that definitions were based on community and legal standards, which change over time.

[91] To date there are no decisions considering what constitutes ‘serious physical abuse’ for the purposes of s 6A of the *Limitation Act 1969* (NSW) in an institutional setting.

[92] The alleged conduct of Sr Green and/or Sweeney comfortably meets, as a question of fact, the statutory definition of ‘serious physical abuse’. Relevantly, the Appellant was an infant child at the relevant times and that type of abuse was not permitted at the School, nor was it in line with community standards at that time. Objectively, the hitting of the Appellant was serious, and it was physical. The statutory language does not import, for example, the well-known graduated language of the criminal law requiring the abuse to have occasioned ‘actual’ or ‘grievous’ bodily harm. Had that been Parliament’s intention, the introduction of those well-developed concepts would have presented a yardstick. Instead, Parliament adopted the undefined notion of ‘serious physical abuse’, which includes abuse above de minimis abuse but not necessarily requiring actual bodily harm or more. In this case, the abuse of the Appellant was severe and sustained, it was not permitted by the School and not justified at law. The Appellant suffered immediate physical injuries including bruises and the like (T 57:30) and psychological injury.

[93] Because s 6A is a gateway, once some abuse is found to be ‘serious physical abuse’, all the abuse is within the cause of action because of it being ‘connected abuse’.

124 During final submissions on Day 14 of the hearing, Senior Counsel for the Appellant took the Trial Judge directly to the text of the Second Reading Speech (T1036.9-T1037.11; Black Vol 3 1036E-1037L), which included the Trial Judge being taken to the relevant parts of the Second Reading Speech (T1036.48-T1037.14 Black Vol 3 1036W-1037L) as follows :¹³

‘It’s relevant, if I interpolate, that the ‘ordinary meaning of the terms’, my friend’s construction seeks to bring concepts from other legislation and the criminal law into it. The term ‘child abuse’ should be interpreted in a beneficial manner. That’s important for reasons that don’t need to be touched upon and then it continues, ‘The following examples...are indicative of the type of conduct that may constitute child abuse. “Sexual abuse” of a child has been defined by the royal commission as “any act which exposes a child to, or involves a child in, sexual processes beyond his or her understanding or contrary to accepted community standards”. This includes sexual activities that do not involve physical contact with the victim, such as acts of exhibitionism exposure to pornography’ and this is important for your Honour’s consideration, ‘Serious physical abuse...should capture non-accidental physical contact with a child that could cause injury. It may consist of a series of relatively minor episodes over a period that cause the conduct to become serious, as well as serious, one-off conduct’ and then it continues because this is important to your Honour’s interpretation as well ‘The bill is...not intended to capture conduct that on its own would not amount to “serious physical abuse”, such as a one-off physical altercation between two minors, the reasonable restraint of a violent child, reasonable corporal punishment where a defence of lawful chastisement was available at law at the time of the incident, lawful medical treatments conducted under previous policies, and medical negligence claims. “Connected abuse” could include psychological abuse where a child is manipulated to feel complicit in the abuse, where a child is threatened to prevent them from reporting the abuse, or where a child is coerced into covering up the abuse. It would also include “grooming”, which is defined by the royal commission as “actions deliberately undertaken with the aim of befriending and establishing an emotional connection with a child to lower the child’s inhibitions in preparation for sexual activity with the child”. “Connected abuse” could also include minor physical abuse that does not meet the threshold of serious physical abuse, such as minor physical assaults.’

¹³ The Appellant contends that the transcript truncates the quotes read from the Second Reading Speech from the ellipses onwards at Black Vol 3 1037B-D. The underlined text denotes the missing text submitted to the Trial Judge but not recorded in the transcript.

We say that your Honour will draw great guidance from that Second Reading Speech, which in a context which reflects the seriousness of the issue that the Attorney-General was introducing the legislation provides a most fulsome description of how the provision should operate and the first defendant's contention that your Honour will not be assisted by it is not to be acted on and the first defendant's contention that criminal law notions of a higher level of gravity or borrowing from other statutory regimes that solve other statutory problems shouldn't be relied upon.'

125 The Trial Judge acknowledged the Appellant's written submissions directed to this topic and reliance on the Second Reading Speech at T 1037:24-28 Black Vol 3 1037L-O. However, the Trial Judge's reasons gave no consideration to the detailed terms of the Second Reading Speech in the statutory construction exercise. This omission is significant and the failure to refer to a material Second Reading Speech is not an orthodox approach in respect of the statutory construction of a provision such as s 6A of the *Limitation Act 1969* (NSW), which formed part of the Government's legislative response to the recommendations of the Commonwealth Royal Commission into Institutional Responses to Child Sexual Abuse. The context of the provision, its purpose, and the Parliamentary intention as to its operation, outlined in the Second Reading Speech, were directly relevant to the proper construction of the provision. Especially in the context where the provision was to be judicially considered for the first time.

126 In relation to the construction of the provision, of the phrase 'serious physical abuse' the Second Reading Speech explained:

'The key determinants of worse outcomes for survivors of child abuse are not the kind of abuse but include factors such as the frequency and duration of abuse, the co-occurrence of multiple forms of abuse, the developmental stage of the victim, and whether there was a close emotional relationship with the abuser. The definition in the bill is thus broad enough to cover the kinds of abuse associated with trauma, serious injury, and delayed disclosure, but not so broad as to cover trivial, accidental or other conduct that, on its own, is unlikely to cause trauma. To avoid being overly prescriptive, the bill does not exhaustively define what conduct constitutes "sexual abuse" or "serious physical abuse". Rather, the bill requires courts to determine whether or not abuse has occurred having regard to the circumstances of each individual case and the ordinary meaning of the terms. The term "child abuse" should be interpreted in a beneficial manner.' [emphasis]

127 Specific to the statutory notion of 'serious physical abuse', the Second Reading Speech expressly provided:

'"Serious physical abuse" should capture non-accidental physical contact with a child that could cause injury. It may consist of a series of relatively minor episodes over a period that cause the conduct to become serious, as well as serious, one-off conduct.

The bill is not intended to capture conduct that on its own would not amount to "serious physical abuse", such as a one-off physical altercation between two minors, the reasonable restraint of a violent child, reasonable corporal punishment where a defence of lawful chastisement was available at law at the time of the incident...' [emphasis]

128 The Trial Judge's reasons show that the construction of the provision was undertaken without reference to the Second Reading Speech. In doing so, the Trial Judge erroneously ignored an important permissible matter to be considered. As a result, the Trial Judge's construction erred in importing concepts into the provision that are inconsistent with both the parliamentary intention. An example of this error is evident at TJ [15] Red 147R-V:

'To ascertain its meaning, the expression must be considered as a whole, but the co-location of "serious" and "abuse" bespeak a high degree of misconduct. Moreover, by the use of the word "physical", the misconduct must consist of the infliction of injury to the person of the child concerned, other than of a sexual nature, without lawful justification.' [emphasis]

129 The apparent source of this error was derived by the Trial Judge from the approach to statutory construction propounded by Senior Counsel for the Respondent in closing submissions on Day 13 at T1019:4-13 Black Vol 3 1019C-H:

‘The approach or an aspect of the approach that we commend to your Honour is that the legislature must have had in mind that the concept of serious physical abuse would be on the same level of seriousness as child sexual abuse. That is to say we are dealing with concepts involving serious criminal offending towards minors. It would be very surprising if the legislature, in including as an alternative of serious physical abuse, did anything other than intend for that concept of serious physical abuse to only apply to offending, which we have said an approach would be, “which is more than substantial but perhaps less than grave”. Because that would be a harmonious construction of the phrase.’

130 With respect, the Trial Judge’s construction of the provision which imposes concepts of a ‘high degree of misconduct’ and the ‘infliction of injury to the person of the child’ at the threshold of a finding of ‘serious physical abuse’ is contrary to the parliamentary intention as evidenced in the Second Reading Speech.

131 It is unclear on the Trial Judge’s reasons whether the Trial Judge’s requirement of ‘infliction of injury to the person of the child’ was intended to encompass the consequential psychiatric harm that the expert psychiatric evidence accepted the Appellant had, in fact, suffered.

C3 Conflated notion of ‘serious physical abuse’ with ‘severe physical abuse’

132 Notwithstanding the statutory threshold requiring the Appellant to establish ‘serious physical abuse’, the Trial Judge erroneously conflated that statutory phrase with the different notion of a higher criminal standard requiring ‘severe physical abuse’. This is seen at TJ [224] Red 204W-205B where the Trial Judge said:

‘[224] As I have pointed out, for any claim on behalf of the plaintiff to be maintainable at all, it had to be based upon his establishing severe physical abuse at the hands of Sister Green and/or Sweeney. Only such a claim is subject to s 6A *Limitation Act*.’

and at [215] Red 202U-Y:

[215] Were I to assume that, from time to time, Sister Green found it necessary to administer to the plaintiff the type of smack I have found she administered to other pupils under her care, I would regard it as no more than lawful chastisement, being both moderate and reasonable and for a proper purpose. This being so, I repeat, I am not satisfied that the plaintiff has established severe physical abuse at the hands of Sister Green.

C4 Misapplication of the incorrect statutory criteria

133 Notwithstanding the above contention that the Trial Judge erred in his approach to statutory construction, his subsequent application of that erroneous statutory construction is itself affected by error. *Firstly*, the assaults of the Appellant so found could not be justified as lawful chastisement for reasons described above. *Secondly*, as to the consequential effect of the ‘physical discipline’, the Trial Judge accepted the agreed opinion of the medical experts that the alleged assaults upon the Appellant were a legal cause of his indivisible psychiatric injury, namely a diagnosis of PTSD: TJ [244]-[245] Red 209N-210F. On the basis of that finding, it is apparent that the Trial Judge accepted the Appellant had in fact suffered an actual injury as a result of those assaults. The resulting injury was regarded as more than trivial, as reflected in his Honour contingent assessment of general damages, including interest, in the sum of \$18074,500: TJ [246] Red 210N-O.

- 134 Even accepting the Trial Judge’s construction of s 6A of the *Limitation Act 1969* (NSW) as encompassing psychiatric injury within the meaning of “injury to the person of the child,” it remains unclear why the assaults found to have occurred against the Appellant do not satisfy the Trial Judge’s erroneous statutory construction.

PART 3 – RELIEF

- 135 The above errors by the Trial Judge demonstrate that the Trial Judge’s reasons, factual findings and ultimate conclusions cannot stand. The Trial Judge’s construction of s 6A of the *Limitation Act 1969* (NSW) was in error, but that error impacted the Trial Judge’s factual findings. This Court, as an intermediate appellate Court, despite its jurisdiction, is not in a practical position to undertake the type of fact finding that is required if this Court upholds the Appellant’s contentions of error. As the Trial Judge determined that the Plaintiff’s claim was statute barred, the Trial Judge’s factual findings are not *ratio decidendi* beyond whether the Trial Judge’s erroneous construction of ‘serious physical abuse’ was established, but those fact findings were impacted by the Trial Judge’s erroneous construction of s 6A. This is important because on correction of the erroneous construction of ‘serious physical abuse’ in s 6A, the Plaintiff’s case is not one, and never was one, where the Plaintiff needed to establish that the assaults by Sr Green and Mr Dixon were criminal in character, and that has the result that the doctrine of non-delegable duty operates against the School to encompass the assaults because the defence of lawful chastisement is not, and cannot, be established under the correct application of the legal principles that govern the defence of lawful chastisement. It would not be possible for this Court to endorse the Trial Judge’s assessment of damages because the Trial Judge’s fact finding as to what assaults occurred is occluded by the Trial Judge’s lack of fact finding on that topic and this Court could only view the damages assessment as being referable to some undefined different low grade of assault by Sr Green, which means any different finding as to the assault different to the Trial Judge’s (undisclosed) findings would make the damages assessed represent a different type of assault.
- 136 For the above reasons, this Court, in allowing the appeal, should order a new trial. The Respondents, as contradictors to this appeal, should be ordered to pay the costs of these appeal proceedings.

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