IN THE COURT OF APPEAL
OF NEWFOUNDLAND AND LABRADOR

Citation: *John Doe (G.E.B. #25) v. The Roman Catholic Episcopal Corporation of St. John's*, 2020 NLCA 27
Date: July 28, 2020
Docket Number: 201801H0028 and 201801H0045

BETWEEN:

JOHN DOE (G.E.B. #25) — APPELLANT/ RESPONDENT BY CROSS-APPEAL

AND:

THE ROMAN CATHOLIC EPISCOPAL CORPORATION OF ST. JOHN'S — RESPONDENT/ APPELLANT BY CROSS-APPEAL

- AND -

BETWEEN:

JOHN DOE (G.E.B. #26) — APPELLANT/ RESPONDENT BY CROSS-APPEAL

AND:

THE ROMAN CATHOLIC EPISCOPAL CORPORATION OF ST. JOHN'S — RESPONDENT/ APPELLANT BY CROSS-APPEAL

- AND -

BETWEEN:

JOHN DOE (G.E.B. #33) APPELLANT/
RESPONDENT BY CROSS-APPEAL

AND:

THE ROMAN CATHOLIC EPISCOPAL
CORPORATION OF ST. JOHN'S RESPONDENT/
APPELLANT BY CROSS-APPEAL

- AND -

BETWEEN:

JOHN DOE (G.E.B. #50) APPELLANT/
RESPONDENT BY CROSS-APPEAL

AND:

THE ROMAN CATHOLIC EPISCOPAL
CORPORATION OF ST. JOHN'S RESPONDENT/
APPELLANT BY CROSS-APPEAL

Coram: Fry C.J.N.L., Hoegg and O'Brien JJ.A.

Court Appealed From: Supreme Court of Newfoundland and Labrador
General Division 199901T3223, 199901T3224,
199901T3231, and 199901T3241
(2018 NLSC 60)

Appeal Heard: March 21 and 22, 2019
Judgment Rendered: July 28, 2020

Reasons for Judgment: By the Court

Counsel for the Appellants/Respondents by Cross-Appeal:
Eugene Meehan Q.C., Thomas Slade, Geoffrey E. Budden and Paul Kennedy
Counsel for the Respondent/Appellant by Cross-Appeal: Mark R. Frederick, Susan Adam Metzler and Chris T. Blom

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INTRODUCTION

[1] In a suit filed in December 1999, four plaintiffs, G.E.B. #25, G.E.B. #26, G.E.B. #33 and G.E.B. #50 (the plaintiffs or the appellants), claimed against the Roman Catholic Episcopal Corporation of St. John's (the Diocese or Archdiocese) and the Christian Brothers Institute Inc. for damages resulting from the sexual abuse they suffered while they were boys living at Mount Cashel orphanage in St. John's during the 1950s.

[2] The judge accepted and it is not contested on this appeal that the plaintiffs received partial payment of their claims against the Christian Brothers after bankruptcy proceedings resulted in liquidation of their assets. The record does not disclose a Notice of Discontinuance or Satisfaction Piece in this regard, although counsel for the plaintiffs stated at a discovery proceeding that the action was discontinued. That said, the Christian Brothers Institute Inc. remained as a defendant on the Statement of Claim although they did not participate in the trial.

[3] The plaintiffs' suit was tried over approximately 35 days during 2016. The plaintiffs alleged that the Archdiocese was vicariously liable for the Brothers' sexual abuse of them, arguing that the Archdiocese had a sufficiently close relationship with the Brothers to justify it being found vicariously liable for their actions. As well, the plaintiffs alleged that the Archdiocese was vicariously liable for the negligence of one of its priests, Monsignor Ryan, who lived at the orphanage. The plaintiffs also alleged that Monsignor Ryan breached his fiduciary duty to them. Finally, the plaintiffs alleged that the Archdiocese was directly liable in negligence because it knew that the plaintiffs were being sexually abused at the orphanage but failed to act on that knowledge.

[4] The evidence in this case implicated five Brothers at Mount Cashel who were there during the 1950s when the plaintiffs were residents. The Archdiocese did not dispute that the Brothers had abused the plaintiffs, and the judge accepted the Archdiocese's acknowledgement in this regard. However, the Archdiocese did dispute that it was negligent or that it was vicariously liable for the Brothers' or Monsignor Ryan's actions or inaction. The Archdiocese also disputed the degree of causal connection between the sexual assaults and the damages claimed by the plaintiffs.

[5] In a written judgment filed March 16, 2018, the judge dismissed the plaintiffs' claims against the Archdiocese. Despite finding that the Archdiocese was not liable, the judge provisionally assessed damages respecting each of the four plaintiffs.

[6] The judge made several comments respecting the plaintiffs' claim against the Christian Brothers. At paragraph 2 of his decision, the judge stated that "the Christian Brothers appear to have acknowledged liability" and at paragraph 49 of his decision, he said that he had "no doubt about the Plaintiffs' description of the events [the sexual abuse] that happened to them personally". Also, at paragraph 189 he stated that "there would be little doubt about the imposition of liability on the Christian Brothers organization", and noted at paragraph 199 that "[t]he Christian Brothers organization, which would have been found vicariously liable, has liquidated its assets through bankruptcy proceedings…".

THE APPEAL AND CROSS-APPEAL

[7] The appellants appeal the judge's dismissal of their claims, saying that the judge made several errors in coming to his conclusions. They argue that the judge erred in dismissing their vicarious liability claims against the Archdiocese, and maintain that vicarious liability ought to have been imposed on the Archdiocese by two routes.

[8] First, they argue that the Archdiocese was so closely related to the Brothers at Mount Cashel that the imposition of vicarious liability on the Archdiocese is appropriate. In this regard they say that the judge failed to consider the relationship between the Archdiocese and the Brothers in light of the policy rationales for the doctrine of vicarious liability, and that the judge assessed the evidence in a piecemeal fashion. The appellants also argue that the judge failed to consider key pieces of evidence, and that he focused unduly on the Archdiocese's lack of involvement in the day-to-day operations of the orphanage while minimizing or discounting evidence respecting the Archdiocese's involvement and influence in other operational matters.

[9] Second, the appellants argue that the judge erred in failing to find the Archdiocese vicariously liable for the negligence of its priest, Monsignor Ryan, whom the Archdiocese assigned to live on the property to be the spiritual advisor to the appellants. The appellants say that Monsignor Ryan had been told about the Brothers' sexual abuse of the residents and that he failed to take action to have it addressed. The appellants also argue that Monsignor Ryan breached his fiduciary duty to them.

[10] Finally, the appellants also argue that the judge erred in dismissing their claim that the Archdiocese was directly negligent. They submit that the evidence showed the Archdiocese knew of sexual abuse at the orphanage by a civilian employee and by the Brothers, and that it was negligent in failing to address the situation.

[11] The Archdiocese says that the judge correctly dismissed the vicarious liability claims. The Archdiocese accepts that the Brothers sexually abused G.E.B. #25, G.E.B. #26, G.E.B. #33 and G.E.B. #50 while they were resident at Mount Cashel, but it denies that it is vicariously liable for the Brothers' wrongdoings. The basis for its denial is that the Brothers at Mount Cashel were separate from the Archdiocese, and that they acted independently from the Archdiocese in all respects involving the appellants and other residents of the orphanage. The Archdiocese also denies vicarious liability for the conduct of Monsignor Ryan, saying that he had no duty of care to the appellants, as the judge found, and that Monsignor Ryan cannot be shown to have breached such a duty of care in any event. The Archdiocese also rejects the appellants' claim that Monsignor Ryan breached a fiduciary duty to them. Finally, the Archdiocese maintains the judge correctly dismissed the appellants' direct negligence claim against it.

[12] On the cross-appeal, the Archdiocese appeals the judge's provisional assessment of general damages for three of the four appellants. They also appeal the provisional awards for economic loss, including pre-judgment interest, for two of the appellants.

[13] The Archdiocese argues that the judge made errors in his calculation of provisional general damages by failing to apply the proper tests and failing to account for other factors in the appellants' lives that may have contributed to their losses. The Archdiocese also argues that the judge erred in his causation analysis in determining the provisional awards for economic loss. Finally, the Archdiocese argues that the judge erred in his provisional awards of pre-judgment interest.

[14] The appellants argue that damage awards attract a high degree of judicial deference and that the judge's provisional award of damages was appropriate. They also argue that the judge made no errors in his analysis and assessment of the economic loss claims and pre-judgment interest associated with those claims.

ISSUES

[15] The issues on appeal are as follows:

(1) Did the judge err in dismissing the appellants' vicarious liability claim respecting the Brothers' sexual abuse of the appellants? This issue involves determining:

(a) whether the judge set out the correct legal standard of vicarious liability to be applied to the evidence;

(b) whether the judge erred in his application of the legal standard to the evidence; and

(c) whether the judge made other errors in the course of his analysis.

(2) Did the judge err in dismissing the appellants' vicarious liability claim respecting the conduct of Monsignor Ryan? This issue involves determining:

(a) whether the judge erred in finding that Monsignor Ryan had no duty of care to the appellants;

(b) whether the judge erred in finding that, if Monsignor Ryan had a duty of care to the appellants, he did not breach it; and

(c) whether Monsignor Ryan had a fiduciary duty to the appellants, and if so, whether he breached the duty.

(3) Did the judge err in dismissing the appellants' negligence claim against the Archdiocese?

[16] The issue on the cross-appeal is whether the judge erred in his provisional assessment of damages. This issue involves determining:

(a) whether the judge erred in calculating the provisional damages awards by applying the wrong tests and failing to take account of other factors in the appellants' lives which may have contributed to their losses;

(b) whether the judge erred in assessing the provisional awards for economic loss; and

(c) whether the judge erred in the manner in which he awarded pre-judgment interest on the provisional loss of income awards.

CONCLUSION ON GROUNDS OF APPEAL AND CROSS-APPEAL

[17] On Issue 1 of the appeal on liability, we allow the appeal. We conclude the judge erred in deciding that the Archdiocese was not vicariously liable for the Brothers' sexual abuse of the appellants. The judge made errors of law by inappropriately characterizing the requirements to be met for vicarious liability, by failing to globally assess the evidence, and by conflating the "closeness" and "connection" inquiries. He also made palpable and overriding errors by failing to consider relevant evidence in his analysis. Accordingly, we have set aside the judge's conclusion and determined that the Archdiocese is vicariously liable for the Brothers' abuse of the appellants.

[18] On Issue 2, we uphold the judge's finding that the Archdiocese is not vicariously liable for Monsignor Ryan's conduct. While we find the judge erred in deciding Monsignor Ryan owed no duty of care to the appellants, we conclude the judge did not err in finding there was no breach of duty. As a result, Monsignor Ryan was not negligent and the Archdiocese is not vicariously liable. We also find that the judge made no error in concluding that there was no breach of fiduciary duty by Monsignor Ryan.

[19] On Issue 3, we conclude the judge made no error in concluding the Archdiocese was not directly negligent.

[20] As the appellants were successful on Issue 1, in the result the appeal on liability is allowed.

[21] On the cross-appeal, with respect to the provisional awards for general damages, we conclude the judge applied the correct tests and properly took into account factors that contributed to the appellants' losses. Further, we find the judge properly assessed the provisional awards for economic loss. However, we find the judge erred in the manner in which he awarded pre-judgment interest on the provisional awards for loss of income.

[22] In the result, the cross-appeal is allowed on the issue of pre-judgment interest on the loss of income awards.

BACKGROUND

[23] The Roman Catholic community began establishing itself within the eastern part of Newfoundland during the late 18th century. The first chapel was built in the city of St. John's around this time and in 1784 the Pope officially recognized the territory of Newfoundland as a distinct region of the Church to be overseen by the Church in Quebec. In 1829 the first Roman Catholic Bishop of Newfoundland, Bishop Michael Fleming, was appointed to the Diocese of Newfoundland. (In 1856 the official name became the Diocese of St. John's, Newfoundland and in 1904 it became the Archdiocese of St. John's, Newfoundland.)

[24] During the 18th and 19th centuries, it was common for religious denominations to provide social services, especially services related to health and education, to the community. Dr. John Fitzgerald, an expert witness tendered by the Archdiocese, testified to this practice at trial. See also *J.W.D. Estate v. Newfoundland and Labrador*, 2010 NLTD 47, 298 Nfld. & P.E.I.R. 74 at paras. 4, 12 and 19.

[25] In the 1870s, a private non-sectarian organization called the Benevolent Irish Society (the "BIS") was interested in providing education to children through respective religious denominations and encouraged the Bishop to invite the Irish Christian Brothers to come to Newfoundland to teach in Roman Catholic schools. The Brothers had been established in Ireland early in the 19th century to educate poor and orphaned Roman Catholic boys. The Brothers were lay men who agreed to live together in a community under a set of rules established and enforced by Superiors of the organization. The Brothers were an Order of Pontifical Rite, meaning that they were generally answerable to the Vatican. The chain of command respecting the Brothers in this province went from the Brother Superior in Newfoundland and continued to the Brothers Superior in New Rochelle, New York and the province of Canada (as described in the Brothers' structure), and ultimately to the Vatican. This chain of command was qualified by the requirement that the Bishop, or later the Archbishop, as the authority for the Diocese of Newfoundland, would be required to approve the establishment of any religious order in the Diocese and that Canon Law would ultimately govern the order and its members.

[26] In 1875, the BIS asked the then Roman Catholic Bishop, Bishop Power, to approach the Christian Brothers in Ireland to come to Newfoundland for the purpose of educating Roman Catholic boys. Bishop Power wrote to a contact he had in Ireland and invited the Brothers to come and teach in Newfoundland.

[27] In accordance with Canon Law, the Bishop granted these Christian Brothers permission to come to the Diocese of Newfoundland to establish an educational institute. An agreement dated September 8, 1875 between Bishop Power and the Assistant to the Superior of the Christian Brothers in Ireland was signed. The Agreement stated:

> 8th September 1875
>
> Draft of agreement between the Right Rev Dr. Power of St. John's Newfoundland, and the Superior General of the Christian Brothers Institute in Ireland.
>
> 1. That an annual collection for the support of the Institute be taken up on the last Sunday in January in the Cathedral and other churches in St. John's.
>
> 2. That the Ecclesiastical Authorities on the Second last Sunday in January announce the collection and give it all reasonable sanction.
>
> 3. The Christian Brothers will be free to receive such other subscriptions and donations as the generosity of the public may suggest for the extension of the Institute in St. John's and Newfoundland.
>
> 4. The Brothers will not be obliged to receive or accept any government grant, or to place their schools under government inspection.
>
> 5. That the lease of land – little over four acres – selected by the Rev. Br. McDonnell, be transferred to the Institute, or should the Christian Brothers prefer it, a sufficient portion of the field at the rear of the Palace held in Fee will be given them.
>
> 6. That on the land so selected, a suitable dwelling house for the Institute be erected by the Bishop. The Bishop trusting to the well known generosity of the people for the necessary funds.
>
> 7. That as speedily as possible, a temporary dwelling house be secured by the Bishop for the Brothers, all necessary accommodations provided for them including an oratory; the Bishop being responsible for all rents and taxes in connection with such dwelling.
>
> 8. The Bishop will supply funds to render existing schools suitable for the reception of children according to the system of the Brothers in Ireland and will also undertake to supply all other necessary requisites
>
> 9. The Bishop will pay the expenses of each Brother from Ireland and supply them to the number of five at the rate of fifty pounds per annum for the support of each Br. until such time as the annual collection takes place.

9. [sic] The Brothers will be allowed the free exercise of the Rules and Religious observances in the same manner as in Ireland.

10. That in all things appertaining to such rules and observances they will be subject to their own Superior and to no other person.

11. That the schools under the management of the Christian Brothers be conducted by them with due efficiency both with regard to secular education and the Religious Instruction of the children.

12. That as soon as circumstances permit a community of not less than five Brothers will represent the Institute in St. John's.

[sgd.] Rt. Rev. T.J. Power, Bishop of St. John's

[sgd.] D.M. McDonnell, Assistant to Superior of Christian Brothers

9th Sept. 1875

[28] As a result of the agreement, the Brothers began teaching at St. Patrick's Hall School, one of the Roman Catholic schools funded by the BIS. By the 1890s, the Brothers were also teaching at St. Bonaventure's College and Holy Cross School.

[29] According to a brochure entered into evidence, written by J.B. Ashley and published at St. John's by Guardian Press Limited to commemorate the 75th anniversary of Christian Brothers coming to Newfoundland, Bishop Power had begun negotiations with the Superior General of the Christian Brothers in Dublin in 1892 respecting the feasibility of Brothers coming here to take charge of an orphanage. After Bishop Power passed away, Bishop Howley took over the effort. In the late 1890s, the Government of Newfoundland proposed financial assistance to religious denominations for the care of vagrant and otherwise disadvantaged children. At that time there was no orphanage for Roman Catholic boys. There had previously been a small Roman Catholic orphanage operated by a priest in the Topsail area, but it closed when the priest died. On September 14, 1897, Sir Robert Bond, Colonial Secretary, on behalf of the Government of Newfoundland, wrote to the then Roman Catholic Bishop Michael Howley, asking if the Diocese would be prepared to take charge of such Roman Catholic boys. On September 17, 1897, Bishop Howley responded to the Government via letter. Relevant sections of his reply are:

> "In reply, I have to say that ever since I assumed the Episcopal Government of the Diocese of St. John's the subject of opening such an institution for our children has been a constant matter of consideration with me, and notwithstanding the

> pressure of the times, I had fully determined, before the receipt of your very welcome letter, to open such an institution this fall. I had already made preliminary arrangements, having ordered bedsteads and other furniture, I had also entered into a correspondence with the Superior of Christian Brothers in Dublin with a view to securing a staff of Brothers, who are experts in the management of such work, from the far-famed Institution of Artane.
>
> …
>
> I guarantee to have the establishment carried out in such a manner as shall amply satisfy all the demands required by any Act of Parliament which may be enacted, to erect suitable buildings, and make the enterprise in every sense a complete success. Special attention shall be paid to the instruction of the boys in useful trades and technical and practical training in agriculture and farming shall be an object of primary consideration, with a view to settling the boys on the fertile tracts of the interior of the country."

[30] As Bishop Howley indicated, the Diocese had already begun preparations to open an "institution" for Roman Catholic boys in need and to have it staffed by Christian Brothers from Ireland. Also as indicated, Bishop Howley gave the Government his guarantee that suitable buildings would be erected and that the establishment would be carried out in such a manner as to make it in every sense a complete success. Government funding for denominational orphanages did not materialize at that time due to a change in government. Regardless, Bishop Howley continued with his plan and Christian Brothers arrived in St. John's between 1897 and 1898 to staff the institution. The institution was situated on property formerly owned by the family of Bishop Howley. Bishop Howley had announced at an organizational meeting in 1897 that the property would be used for the institution. The property consisted of Howley Cottage, a chapel dedicated to St. Raphael the Archangel which had been added to the cottage, and surrounding land. The institution was named Mount Cashel and it opened in the fall of 1898 with much fanfare, including a mass at St. Raphael's celebrated by Bishop Howley.

[31] In 1903, Bishop Howley arranged for the property, which had previously been conveyed to the Diocese, to be conveyed in trust to the Brothers for the express purpose of establishing "an Industrial Home and Orphanage". The conveyance contained a clause providing for ownership of the property to revert to the Diocese should the Brothers cease to operate the orphanage.

[32] Over time Mount Cashel expanded. New buildings were added, financed by parishioners through the Archdiocese and prominent business families. A residence for the Brothers was erected on site by 1907. St. Raphael's chapel

was extended and a priest's residence was attached in 1915. In 1925, St. Raphael's parish was formally established. Father Thomas Bride was appointed pastor of St. Raphael's and chaplain of Mount Cashel, and assigned to live on-site. In 1926, Mount Cashel was destroyed by fire. Insurance proceeds fell short of covering the loss, so the Archbishop called on Catholic Societies and generous parishioners to provide the funds to rebuild.

[33] In addition to the residents and later the Brothers, parishioners who lived in the area attended services at St. Raphael's. In 1952, Archbishop Skinner assigned Monsignor Ryan to minister to the spiritual and religious needs of the residents as well as to the parishioners of St. Raphael's. Monsignor Ryan lived in the priest's dwelling attached to the other orphanage buildings when the appellants lived at Mount Cashel.

[34] The exact nature of the relationship between the Archdiocese and the Brothers during the early half of the 20th century was in dispute at trial. Documentary evidence illuminating the issue was scanty; it is unclear whether helpful documentation was not found or whether it simply did not exist. Correspondence between the Archbishop and the Newfoundland Government which spoke to the relationship between the Archdiocese and the Brothers at Mount Cashel was introduced at trial, and there was evidence showing that operational funding for the orphanage came from several sources including the Archdiocese. At some point around 1952 the Government of Newfoundland, by then a provincial government within the Canadian confederation, began to provide grants to Mount Cashel based on the number of boys in residence.

[35] The appellants were residents of Mount Cashel for varying periods of time between the late 1940s and the late 1950s. Their claims relate to sexual abuse they suffered between 1951 and 1958 at the hands of five Brothers at Mount Cashel: Brothers Lasik, J.E. Murphy, Spollen, Collins, and Ford.

[36] In the 1980s, serious sexual abuse at Mount Cashel orphanage became known to the public. Allegations of cover ups and failure to take earlier complaints seriously were widespread, not only against the Archdiocese and the Brothers but also against the provincial Departments of Justice and Social Services. Eventually the Government of Newfoundland called a public inquiry into the abuse and cover-ups by the government departments. The *Royal Commission of Inquiry into the Response of the Criminal Justice System to Complaints,* commonly known as the Hughes Inquiry, was held in St. John's during 1989-1990, and the Commissioner, The Honorable S.H.S. Hughes Q.C., a retired Ontario Supreme Court judge, filed his report in 1991.

[37] Both criminal and civil proceedings followed the release of the Hughes Inquiry report, and several of the Brothers from Mount Cashel who had been identified as abusers during the 1970s and 1980s were prosecuted and convicted. Civil claims based on sexual abuse were filed by former residents of the orphanage. The civil claims that related to time periods which implicated the Government of Newfoundland's Departments of Justice and Social Services were settled against the Government of Newfoundland and Labrador in 1996. The plaintiffs in those cases assigned their claims against the Christian Brothers to the Government of Newfoundland and Labrador as part of the settlement. The civil claims made by the four appellants in this case arose before the Government of Newfoundland was implicated, and accordingly were not part of the 1996 settlement.

[38] Due in large part to the abuse revelations, Mount Cashel closed in 1989. Ownership of the orphanage and the property on which it was situated reverted to the Archdiocese in accordance with the original agreement. The orphanage was subsequently torn down and the property was sold to a commercial developer.

STANDARD OF REVIEW

[39] Simply put, questions of law are reviewed on the standard of correctness, and questions of fact are reviewed on the standard of palpable and overriding error. Questions of mixed fact and law are also reviewable on the standard of palpable and overriding error, although if such questions are based on an incorrect characterization of a legal standard or an extricable legal principle relating to the legal standard, the standard of review is correctness.

[40] This was explained in *Housen v. Nikolaisen*, 2002 SCC 33, [2002] 2 S.C.R. 235 at para. 36:

> To summarize, a finding of negligence by a trial judge involves applying a legal standard to a set of facts, and thus is a question of mixed fact and law. Matters of mixed fact and law lie along a spectrum. Where, for instance, an error with respect to a finding of negligence can be attributed to the application of an incorrect standard, a failure to consider a required element of a legal test, or similar error in principle, such an error can be characterized as an error of law, subject to a standard of correctness. Appellate courts must be cautious, however, in finding that a trial judge erred in law in his or her determination of negligence, as it is often difficult to extricate the legal questions from the factual. It is for this reason that these matters are referred to as questions of "mixed law and fact". Where the legal principle is not readily extricable, then the matter is one of "mixed law and fact" and is subject to a more stringent standard. The general rule, as stated in *Jaegli Enterprises*, [[1981] 2

> S.C.R. 2 (S.C.C.)] is that, where the issue on appeal involves the trial judge's interpretation of the evidence as a whole, it should not be overturned absent palpable and overriding error.

[41] In *Housen*, the review standard of palpable and overriding error was explained as an error "clear to the mind to see" and one that had to have discredited the result. In *R. v. Clark*, 2005 SCC 2, [2005] 1 S.C.R. 6, the Supreme Court of Canada explained palpable and overriding error in further detail:

> [9] … Appellate courts may not interfere with the findings of fact made and the factual inferences drawn by the trial judge, unless they are clearly wrong, unsupported by the evidence or otherwise unreasonable. The imputed error must, moreover, be plainly identified. And it must be shown to have affected the result. "Palpable and overriding error" is a resonant and compendious expression of this well-established norm…

[42] A failure to consider relevant evidence can also constitute palpable and overriding error (*Rich v. Bromley Estate*, 2013 NLCA 24, 336 Nfld. & P.E.I.R. 107 at para. 17, leave to appeal to S.C.C. refused (2013), 355 Nfld. & P.E.I.R. 81 (note), and *Bussey v. White*, 2001 NFCA 7 at para. 7. See also *Madsen Estate v. Saylor*, 2007 SCC 18, [2007] 1 S.C.R. 838).

[43] The doctrines of negligence and vicarious liability are legal standards which must be correctly applied to a set of facts in order to determine whether liability ensues. In this case, if the legal standard the judge applied to the evidence is not correct, a question of law arises, and the review standard of correctness applies. If the judge erred in his application of the legal standard to the evidence, questions of mixed fact and law arise, for which the review standard of palpable and overriding error applies (*E.B. v. Order of the Oblates of Mary Immaculate in the Province of British Columbia*, 2005 SCC 60, [2005] 3 S.C.R. 45 at para. 23) unless the error is an extricable error of principle, in which case the review standard is correctness. If the judge failed to consider relevant evidence or made factual findings or drew inferences which are plainly wrong or unsupported by the evidence, he will have committed palpable and overriding error.

[44] If the judge is found to have made errors, the issue becomes whether the proper application of the correct legal standard to all of the evidence would warrant this Court imposing liability on the Archdiocese.

ANALYSIS: THE APPEAL

Issue 1: Did the judge err in concluding that the Archdiocese is not vicariously liable for the Brothers' sexual assaults of the appellants?

The Law

[45] The doctrine of vicarious liability developed primarily during the nineteenth century as a means to compensate those who suffered losses at the hands of individuals whose actions caused the losses but whose ability to compensate their victims was minimal or non-existent. It has been described as a strict liability doctrine, for it is imposed on parties who have not committed tortious conduct, and accordingly is counter-intuitive to the well-entrenched principles of tort law that usually hold a person liable for loss only when he or she causes it and then only if he or she is at fault.

[46] In *671122 Ontario Ltd. v. Sagaz Industries Canada Inc.*, 2001 SCC 59, [2001] 2 S.C.R. 983, Major J. explained the theory this way at paragraph 25:

> Vicarious liability is not a distinct tort. It is a theory that holds one person responsible for the misconduct of another because of the relationship between them. …

[47] In *Sagaz*, the Court referred to vicarious liability as having its basis in policy. Major J., writing for a unanimous Court, described the policy considerations as (1) a just and practical remedy for people who suffer harm as a consequence of wrongs perpetrated by an employee and (2) deterrence of future harm. With respect to a just and practical remedy for victims, he explained the policy incorporated the ability of an employer to bear the loss of compensating a victim, and also fairness, because fairness dictates that an employer who introduces an enterprise that carries risks into the community should bear the loss when those risks materialize. In other words, when "a person who employs others to advance his own economic interest should in fairness be placed under a corresponding liability for losses incurred in the course of the enterprise" (*Sagaz*, at para. 31). With respect to the policy of deterrence of future harm, Major J. said that "employers are often in a position to reduce accidents and intentional wrongs by efficient organization and supervision" (*Sagaz*, at para. 32). He related the policy of deterrence to the policy of fair compensation, saying "the introduction of the enterprise into the community with its attendant risk, in turn, implies the possibility of managing the risk to minimize the costs of the harm that may flow from it" (*Sagaz*, at para. 32).

[48] The common thread in vicarious liability cases is that it is relationship based, in that fairness dictates that liability ensues only if the relationship between an enterprise or entity and the wrongdoer is close enough to warrant it. The closeness of the relationship between the entity and the wrongdoer imports legal principle into the appropriateness of imposing vicarious liability, and provides a check on careless application of the doctrine. The doctrine of vicarious liability has been part of our common law for centuries. While resort to it is relatively rare, it can produce results that resonate intuitively with fairness and justice.

[49] As Major J. explained in *Sagaz,* use of the doctrine is relationship based. It was initially applied in the context of a master/servant, or employer/employee relationship. Over time, it has been extended to apply to many other relationships, like vehicle owner/driver, entity/volunteer, and so on. This Court specifically addressed the status of a wrongdoer within an entity in *Bromley*. This Court explained that the label attached to the wrongdoer, or the status of the wrongdoer *vis à vis* the entity, is not a determining factor in a vicarious liability consideration. Rather, what is determinative is whether the relationship between the entity and the wrongdoer is sufficiently close to justify the imposition of liability on the entity (*Bromley,* at paras. 117-120, *John Doe v. Bennett,* 2004 SCC 17, [2004] 1 S.C.R. 436 at para. 17, and *K.L.B. v. British Columbia,* 2003 SCC 51, [2003] 2 S.C.R. 403 at para. 19). In *K.L.B.*, the Court described the relationship issue as the first hurdle a plaintiff must overcome to establish vicarious liability.

[50] A few years prior to *K.L.B.* the doctrine of vicarious liability was developed in order to properly address compensation for wrongs perpetrated on children in institutional care. In *Bazley v. Curry,* [1999] 2 S.C.R. 534, the Supreme Court of Canada considered vicarious liability as a means of redress for the sexual assaults of residents in a home for emotionally troubled children. The assaults were committed by an employee of the home, which was operated by an entity called the Children's Foundation (the "Foundation").

[51] In *Bazley,* the plaintiff sued the employee as well as the home. There was no question that the employee had sexually abused the plaintiff (he had been criminally convicted for sexually abusing the plaintiff as well as several other victims). The question was whether the Foundation was vicariously liable for the employee's actions.

[52] The Foundation denied liability for the employee's actions, but was found vicariously liable at trial. A five-person panel of the British Columbia Court of

Appeal unanimously affirmed the trial judge's decision, although the affirmation was delivered in four different sets of reasons. The Foundation applied for leave to appeal to the Supreme Court of Canada. The Supreme Court granted leave, describing the four different appellate court decisions as "divergent in emphasis and detail" and having presented a "sophisticated and nuanced review of this difficult issue and the considerations which properly bear on it" (*Bazley*, at paras. 7-8).

[53] Ultimately the Supreme Court of Canada dismissed the Foundation's appeal, affirming the lower courts' rulings that the Foundation was vicariously liable for the employee's actions. In so doing, McLachlin J., writing for a unanimous Court, set out an analytical framework for determining vicarious liability in cases involving the sexual assault of children in institutional care.

[54] McLachlin J. stated the broad issue:

> [9] … May employers be held vicariously liable for their employees' sexual assaults on clients or persons within their care? …

and then looked for guidance to the traditional common law "*Salmond* test", found in the well-known text, J.W. Salmond, *Salmond's Law of Torts*, 10th ed. (London: Sweet & Maxwell, 1945). She described:

> [10] …employers are vicariously liable for (1) employee acts authorized by the employer; or (2) unauthorized acts so connected with authorized acts that they may be regarded as modes (albeit improper modes) of doing an authorized act. …

She took issue with the description of the second basis for vicarious liability in the *Salmond* test, saying its focus was on semantics, so she reformulated the analytical approach.

[55] McLachlin J. began by saying that courts grappling with vicarious liability claims respecting child abuse in institutional care should first look to whether there are precedents that would "unambiguously determine" whether vicarious liability exists in a given factual situation. If there are such precedents, courts need go no further than to apply those precedents to an instant case. But if prior cases are of no assistance, courts must go on to determine whether vicarious liability should be imposed in light of the broad policy rationales (*Bazley*, at para. 15).

[56] McLachlin J. described the policy rationales at paragraph 29 of *Bazley* as (1) the provision of a just and practical remedy for the harm and (2) deterrence of future harm, and elaborated on them as follows:

> [34] The policy grounds supporting the imposition of vicarious liability — fair compensation and deterrence — are related. The policy consideration of deterrence is linked to the policy consideration of fair compensation based on the employer's introduction or enhancement of a risk. The introduction of the enterprise into the community with its attendant risk, in turn, implies the possibility of managing the risk to minimize the costs of the harm that may flow from it.

In explaining why deterrence is a valid policy to ground liability, she quoted the trial judge in *Jacobi v. Griffiths*, [1995] B.C.W.L.D. 3081 at para. 69 (B.C. S.C.):

> If the scourge of sexual predation is to be stamped out, or at least controlled, there must be powerful motivation acting upon those who control institutions engaged in the care, protection and nurturing of children. That motivation will not in my view be sufficiently supplied by the likelihood of liability in negligence. …

[57] McLachlin J. went on to say that the two policy rationales can only be served where the wrongdoing is sufficiently close to the entity such that it can be said that the entity has introduced the risk of the wrong into the community and is thereby fairly and usefully charged with its management and minimization, and where there is a significant connection between the introduction of the risk and the wrong that accrues from it (*Bazley*, at paras. 37 and 41). She was careful to explain that the degree of connection between the entity's introduction of the risk of wrong and the wrong itself must be more than just opportunity, emphasizing that it is the strength of the causal link between the opportunity to perform the wrongful act and the wrongful act itself that matters:

> [40] … When the opportunity is nothing more than a but-for predicate, it provides no anchor for liability. When it plays a more specific role – for example, as permitting a peculiarly custody-based tort like embezzlement or child abuse – the opportunity provided by the employment situation becomes much more salient.

[58] At paragraph 41, McLachlin J. summarized the principles to guide courts in determining whether the wrongful act is sufficiently related to the conduct authorized by the employer, which *K.L.B.* later characterized as the second step in a vicarious liability analysis:

…

(1) They should openly confront the question of whether liability should lie against the employer, rather than obscuring the decision beneath semantic discussions of "scope of employment" and "mode of conduct".

(2) The fundamental question is whether the wrongful act is sufficiently related to conduct authorized by the employer to justify the imposition of vicarious liability. Vicarious liability is generally appropriate where there is a significant connection between the creation or enhancement of a risk and the wrong that accrues therefrom, even if unrelated to the employer's desires. Where this is so, vicarious liability will serve the policy considerations of provision of an adequate and just remedy and deterrence. Incidental connections to the employment enterprise, like time and place (without more), will not suffice. Once engaged in a particular business, it is fair that an employer be made to pay the generally foreseeable costs of that business. In contrast, to impose liability for costs unrelated to the risk would effectively make the employer an involuntary insurer.

(3) In determining the sufficiency of the connection between the employer's creation or enhancement of the risk and the wrong complained of, subsidiary factors may be considered. These may vary with the nature of the case. When related to intentional torts, the relevant factors may include, but are not limited to, the following:

(a) the opportunity that the enterprise afforded the employee to abuse his or her power;

(b) the extent to which the wrongful act may have furthered the employer's aims (and hence be more likely to have been committed by the employee);

(c) the extent to which the wrongful act was related to friction, confrontation or intimacy inherent in the employer's enterprise;

(d) the extent of power conferred on the employee in relation to the victim;

(e) the vulnerability of potential victims to wrongful exercise of the employee's power.

(Emphasis in original.)

[59] McLachlin J. elaborated on the subsidiary considerations listed in item (3) above. She gave examples of factors that could enhance the risk of a wrongdoer

sexually abusing a child in institutional care, such as the wrongdoer being permitted to be alone with the child for extended periods of time, the wrongdoer being expected to bathe or toilet the child (*Bazley*, at paras. 43-44), or the wrongdoer being placed in a positon of intimacy or power over the child. She noted that when and where wrongs occur could also influence the assessment. She then summarized the test:

> [46] In summary, the test for vicarious liability for an employee's sexual abuse of a client should focus on whether the employer's enterprise and empowerment of the employee materially increased the risk of the sexual assault and hence the harm. The test must not be applied mechanically, but with a sensitive view to the policy considerations that justify the imposition of vicarious liability — fair and efficient compensation for wrong and deterrence. This requires trial judges to investigate the employee's specific duties and determine whether they gave rise to special opportunities for wrongdoing. Because of the peculiar exercises of power and trust that pervade cases such as child abuse, special attention should be paid to the existence of a power or dependency relationship, which on its own often creates a considerable risk of wrongdoing.

[60] In the result, a unanimous Supreme Court imposed vicarious liability on the Foundation for its employee's tortious conduct.

[61] In *Bazley*, the wrongdoer was an employee of the entity. As a result, the principles set out in the decision are couched in employer/employee language. However, as noted in *Bromley* (at paragraph 46 above), it is not necessary that a wrongdoer be an employee in the traditional sense of drawing a pay cheque or following direct orders for liability to ensue. Similarly, in *Sagaz*, the Court explained that the issue was not whether the tortfeasor was an independent contractor but whether the tortfeasor was working on his own account or working on the account of *Sagaz.* The Court stated that "the total relationship of the parties" determined the issue (*Sagaz*, at para. 46). The result in *Sagaz* did not rest on the tortfeasor's classification as an independent contractor. Rather, *Sagaz* was not held vicariously liable because the independent contractor was truly working on his own account, and not that of *Sagaz.* Accordingly, wrongdoers who are authorized to carry out activities which benefit an entity, or who work on the account of an entity, whatever their titles or formal status, can attract liability to that entity.

[62] *Jacobi v. Griffiths*, [1999] 2 S.C.R. 570 (S.C.C.), was a companion case to *Bazley.* It involved vicarious liability claims by a brother and sister against a Boys and Girls Club for sexual abuse committed by an employee of the club. The employee had isolated the victims from the Club's group activities by

inviting the children to personal get-togethers away from the Club, and these personal get-togethers gave the employee opportunity, time and place to sexually assault the children. In a split decision, the Supreme Court of Canada ruled that the ultimate misconduct was too remote from the employer's enterprise to justify imposing vicarious liability.

[63] A few years later the Supreme Court of Canada had occasion to revisit vicarious liability for the sexual abuse of children, this time for children in the care of foster parents. In *K.L.B.* the Court ruled that vicarious liability was not established because the relationship between the Government and the foster parents was not sufficiently close and the policy of deterrence was not sufficiently engaged to justify its imposition. In so ruling, McLachlin C.J.C. stated this summary of the test:

> [19] To make out a successful claim for vicarious liability, plaintiffs must demonstrate at least two things. First, they must show that the relationship between the tortfeasor and the person against whom liability is sought is sufficiently close as to make a claim for vicarious liability appropriate. This was the issue in *671122 Ontario Ltd. v. Sagaz Industries Canada Inc.*, [2001] 2 S.C.R. 983, 2001 SCC 59, where the defendant argued that the tortfeasor was an independent contractor rather than an employee, and hence was not sufficiently connected to the employer to ground a claim for vicarious liability. Second, plaintiffs must demonstrate that the tort is sufficiently connected to the tortfeasor's assigned tasks that the tort can be regarded as a materialization of the risks created by the enterprise. This was the issue in *Bazley*, *supra*, which concerned whether sexual assaults on children by employees of a residential care institution were sufficiently closely connected to the enterprise to justify imposing vicarious liability. These two issues are of course related. A tort will only be sufficiently connected to an enterprise to constitute a materialization of the risks introduced by it if the tortfeasor is sufficiently closely related to the employer.
>
> (Emphasis added.)

[64] In *Bennett*, the Supreme Court of Canada upheld this Court's decision that a diocese was vicariously liable for sexual assaults perpetrated by one of its priests on young boys in his parish. McLachlin C.J.C. explained that vicarious liability can be imputed to a principal, in that case a diocese, which was not an employer in the traditional sense:

> [17] … The doctrine of vicarious liability imputes liability to the employer or principal of a tortfeasor, not on the basis of the fault of the employer or principal, but on the ground that as the person responsible for the activity or enterprise in question, the employer or principal should be held responsible for loss to third parties that result from the activity or enterprise.

She reiterated the policy rationales of the doctrine:

> [20] … Vicarious liability is based on the rationale that the person who puts a risky enterprise into the community may fairly be held responsible when those risks emerge and cause loss or injury to members of the public. Effective compensation is a goal. Deterrence is also a consideration. The hope is that holding the employer or principal liable will encourage such persons to take steps to reduce the risk of harm in the future. …

McLachlin C.J.C. also reiterated that the relationship between the tortfeasor and the entity must be sufficiently close, and the wrongful act sufficiently connected to the conduct authorized by the "employer or principal", to ensure that the twin policy goals are met.

[65] *Bromley* also concerned vicarious liability for sexual abuse. In *Bromley* the question was whether the Government of Newfoundland and Labrador, as the operator of a provincial detention home for boys, was vicariously liable for sexual assaults perpetrated by a volunteer priest on a boy while he was resident in the home. The priest had been authorized by the home to take the boy on overnight excursions where he had sexually abused him.

[66] The trial judge dismissed the boy's claim, saying that the priest was acting outside of the Government's mandate to run the home, and that the province could not be held liable for the priest's criminal acts. On appeal, this Court applied the law of vicarious liability set out by the Supreme Court of Canada in *K.L.B.* and *Bazley*, and ruled that the trial judge had erred in restricting his analysis to the narrow confines of the priest's status as a volunteer at the home, and more importantly, that the trial judge had erred by failing to appreciate that the priest was authorized by the home to take the boy on overnight outings and was thereby exercising delegated authority over him and specifically furthering the home's "reward for good behaviour" program. In the result, this Court determined that the close relationship between the priest and the Government detention home, evidenced by the priest exercising the Government's custodial powers in furtherance of its custodial policies, was sufficient to justify the imposition of vicarious liability on the province for the priest's sexual abuse of the boy.

[67] The Supreme Court of Canada addressed the doctrine of vicarious liability respecting abuse of children in institutional care in *Reference re Broome v. Prince Edward Island*, 2010 SCC 11, [2010] 1 S.C.R. 360. In a reference to the Prince Edward Island Court of Appeal, the parties sought determination of whether the province of Prince Edward Island had legal duties to children who

were resident in a privately-operated home. One of the questions posed was whether the province was vicariously liable for the acts or omissions of the Board of Trustees and staff of the home.

[68] The Prince Edward Island Court of Appeal ruled that the province was not vicariously liable. The Supreme Court of Canada agreed, saying that the appellants had not established a sufficiently close relationship between the province and the home to warrant a finding of vicarious liability. The Court stated that having legislative authority over children and placing them in the home did not give rise to vicarious liability. The Court highlighted the fact that the evidentiary record before them was quite limited and that as a consequence, the scope of the reference was limited.

[69] A precedent that bears on the issue of whether two or more entities are in a sufficiently close relationship with the wrongdoer that could justify the imposition of vicarious liability on both entities is *Blackwater v. Plint*, 2005 SCC 58, [2005] 3 S.C.R. 3. The plaintiff in *Blackwater* was resident in a home for aboriginal children when he was sexually assaulted by a worker employed there. The plaintiff sued the employee as well as the United Church of Canada, which operated the home, and the Government of Canada, which had the statutory mandate to care for aboriginal children pursuant to the *Indian Act*, S.C. 1951, c. 29. The trial judge held that both Canada and the United Church were vicariously liable for the sexual abuse of the plaintiff by the employee on the basis that both entities operated the home as partners, and apportioned liability 75% to Canada and 25% to the United Church.

[70] The Supreme Court of Canada upheld the trial judge's decision, ruling that there is no principled reason why two entities cannot both be held vicariously liable for the same wrong. Further, the Court upheld the unequal apportionment imposed by the trial judge, ruling that defendants may be more or less vicariously liable for a wrong, depending on their respective levels of supervision, direct contact, and control.

[71] A trial court decision from this jurisdiction also touches on the issues raised in this case. In *J.W.D. Estate* the question was whether vicarious liability ought to be imposed on the Government of Newfoundland and Labrador for a Christian Brother's sexual assault of residents of Mount Cashel which took place between the 1940s and the early 1960s, before the Government's Departments of Justice and Social Services were implicated in the abuse at Mount Cashel.

[72] In *J.W.D. Estate*, the trial judge found that the relationship between the Government and the Brothers was not close enough to justify imposing liability on the Government. In his decision, the judge referred to orphanages operating in the province, and in so doing, specifically commented on the relationship between the Archdiocese and Mount Cashel orphanage. At paragraph 15 he noted the Archbishop's references to Mount Cashel as "our institution" in correspondence between the Archdiocese and the Government. At paragraph 32 the judge stated, "Mount Cashel was privately operated and controlled by a non-governmental entity, namely the Christian Brothers organization and ultimately the Roman Catholic Church", and at paragraph 69 he stated, "[m]anagement at Mount Cashel was entirely within the mandate of the Christian Brothers and the Roman Catholic Church".

[73] This decision respecting vicarious liability of Newfoundland and Labrador for sexual abuse of boys by the Brothers at Mount Cashel is not authority for finding liability against the Archdiocese in this case. However, the court's statements that the Christian Brothers and the Roman Catholic Church were responsible for Mount Cashel orphanage and its operations during the same time period of time as the time period involved in this case are of some interest.

The Judge's Characterization of Vicarious Liability

[74] In this case, determining whether vicarious liability ought to be imposed on the Archdiocese required considering the closeness of its relationship with the Brothers at Mount Cashel, and the connection between the Brothers' assigned tasks and their sexual assaults of the appellants. The policies of fair compensation and deterrence will only be served if the close relationship and connection inquiries are positively determined.

[75] On review of the judge's decision, we conclude that he erred in his characterization of the doctrine of vicarious liability. His focus on the doctrine of vicarious liability as generally involving an employment relationship, his failure to identify the fundamental question to be answered, his focus on control of day-to-day operations at the orphanage, and his comparison of the Archdiocese's conduct with the Brothers' conduct characterized the doctrine in a limiting way. His limiting characterization effectively caused him to apply the wrong law to the evidence.

[76] The first step in determining whether vicarious liability ought to be imposed on an entity is setting out the legal standard for vicarious liability. The

judge described vicarious liability as liability without fault, found "where there is, generally, an employment relationship, or other relationship involving supervision and control over the tortfeasor" (para. 69). He noted the twin policies of compensation and deterrence that underlie the doctrine, and stated at paragraph 198:

> If one examines the policy reasons for imposing liability, the Supreme Court of Canada in the *Bazley* and *Jacobi* cases set out clear direction. It involves elements of control and direction of the enterprise, and the ability to pay damages. The first, involving control, raises the question of **who had most control** over the perpetrators, and therefore **had the most opportunity** to curb tortious behavior. …
>
> (Emphasis added.)

[77] The judge stated that the legal basis for vicarious liability had evolved from the *Salmond* test to the *Bazley* test and quoted *Bazley* respecting the principles to guide application of the doctrine to the evidence. He also discussed a number of cases where vicarious liability had been considered.

[78] The judge's description of vicarious liability is concerning. He referred to vicarious liability pertaining "generally" to employment relationships, although he acknowledged it could be imposed in other contexts. However, he emphasized the employment relationship and included the fact that the Archdiocese did not employ the Brothers or any orphanage staff in his reasons for dismissing the plaintiffs' claim. His comments in this regard suggest that he apparently considered an employment relationship to be fundamental to a finding of vicarious liability. An employment relationship is not fundamental to vicarious liability, as *Bromley* and *Bennett* tell us.

[79] The judge's reference to "relationships involving supervision and control over the tortfeasor" is also concerning. It is a limiting description. While it is so that an entity can be found vicariously liable for a wrongdoer's actions when an entity had *actually* exercised supervision and control over the wrongdoer, liability can also ensue when the entity is shown to have authority over the wrongdoer such that is had the *responsibility* to exercise supervision and control over the wrongdoer. This is how the policy of deterrence assists in determining whether vicarious liability ought to be imposed. Ascribing responsibility to the Archdiocese for the Brothers' wrongful conduct could give effect to the policy of deterrence, if the Archdiocese was in a position to reduce the wrongs by efficient organization and supervision (*Bazley,* at para. 32), and could have taken steps to reduce the risk of harm to the appellants (*Bennett,* at para. 20). The

judge's description of vicarious liability failed to take account of this policy and as will be seen, this failure caused him to focus on whether the Archdiocese was actually supervising and controlling the day-to-day activities of the Brothers at Mount Cashel, which in turn led him to conclude that the Archdiocese was not liable for the Brothers' wrongful conduct.

[80] As well, the judge did not identify the salient questions to be answered when applying the doctrine to the evidence. The first is whether the Archdiocese and the Brothers enjoyed a sufficiently close relationship as to make a claim for vicarious liability appropriate. The second is whether the Brothers' sexual assaults of the appellants were sufficiently related to the conduct authorized by the Archdiocese. The answers to these questions depended on whether the Archdiocese, through the establishment of Mount Cashel and delegating the care of the boys to the Brothers, had authority over how the Brothers cared for the boys and whether it maintained that authority throughout the course of its relationship with the Brothers during the time the appellants were resident there; and whether there was a significant connection between the Archdiocese's creation or enhancement of the risk of harm associated with the Brothers' care of the boys at the orphanage and its materialization.

[81] The judge's statements which compared levels of responsibility between an entity and a wrongdoer in a vicarious liability analysis are not correct. Determining closeness and connection in the context of the policies of compensation and deterrence does not require that an entity be found to be more or less at fault than a wrongdoer. In other words, it is not an "either/or" determination. In this case it was not a question of whether the Archdiocese had more control over the Brothers at Mount Cashel than the Brothers at Mount Cashel did over themselves. The issue was whether the relationship between the Archdiocese and the Brothers at Mount Cashel who committed the wrongs, as well as the connection between the Brothers' assigned tasks and the sexual assaults they committed, were sufficient to justify the imposition of vicarious liability.

[82] That said, there is support in the jurisprudence for comparing degrees of liability between two entities which may both be vicariously liable. However, this comparison goes to apportionment between entities who have each been found vicariously liable. Such a comparison does not go to imposition of vicarious liability. Apportionment of vicarious liability as between Canada and the United Church is what occurred in *Blackwater*, and could have occurred in

this case if the judge had found both the Christian Brothers Institute Inc. and the Archdiocese vicariously liable.

The Judge's Analysis of the Evidence

[83] The judge did not find a precedent in Canadian law "for the imposition of liability on a diocese in similar circumstances". To the extent that the judge's comment could be interpreted as meaning that such a precedent must involve a diocese in order to be applicable, that is not the case. A diocese is the same as any other entity for the purposes of applying the doctrine of vicarious liability. It is the closeness of the relationship between the entity – whether a diocese or not, and in this case the Archdiocese – and the wrongdoer – whether an employee or not, and in this case the Brothers at Mount Cashel – that determines whether it is appropriate to impose vicarious liability on the entity.

[84] We agree that there is no precedent that would conclusively decide this case. Precedents are almost always fact-based, and especially so when they involve human relationships and the behavior that informs them. It would therefore be rare to find a case with facts similar enough to this one that would qualify as a conclusive precedent providing an answer to the issues raised in this case. But that does not mean that there are no precedents which set out legal principles that are directly applicable to this case.

[85] The judge went on to consider the plaintiffs' arguments respecting the closeness of the relationship between the Archdiocese and the Brothers, first focusing on the argument that Mount Cashel orphanage was a joint venture. At paragraph 90, he acknowledged the relationship between the Archdiocese and the Brothers at Mount Cashel, saying: "There does not appear to be any doubt that the support of the diocese was critical to the establishment of Mount Cashel". However, he rejected the argument that Mount Cashel was a joint venture of the Archdiocese and the Brothers. He distinguished *Blackwater,* noting that in that case, Canada had a statutory duty to care for the resident aboriginal children and the United Church had significant operational control over the residential home. He said at paragraph 103:

> To apply the reasoning in *Blackwater* I would have to find there was close collaboration between the Archdiocese and the Brothers which would have been sufficient to create the relationship where a joint venture could be determined. In my view, the evidence presented did not disclose that kind of relationship.

He concluded at paragraph 106 that "… apart from involvement in the launching of the orphanage in the 1890's, the role of the Archdiocese was limited to a supportive one".

[86] The judge's characterization of the Archdiocese's role in the launching of Mount Cashel as "involvement" and thereafter as "supportive" seriously minimizes the relationship between the Archdiocese and the Brothers at Mount Cashel. There was ample evidence that the Archdiocese (formerly the Diocese) not only established Mount Cashel, but that it played an ongoing role in administering, servicing, operating, and financially supporting it.

[87] The role of the Diocese in launching Mount Cashel orphanage was central to its establishment. The Diocese took the initiative to establish an institution for disadvantaged boys of the Roman Catholic denomination, and Bishop Howley invited Christian Brothers to come from Ireland for the purpose of staffing it. The Brothers did not invite themselves to St. John's – they came to staff a denominational orphanage for these boys to fulfill the Diocese's social and religious objectives.

[88] Much was made by the Archdiocese of the BIS involvement in the Brothers coming to Mount Cashel. The evidence, composed of newspaper reports of meetings, suggests that the BIS, through the Bishop, was involved in encouraging Christian Brothers to come to Newfoundland to teach earlier in the 19th century. There was a newspaper article which referred to the BIS having invited the Bishop to chair the 1897 organizational meeting of Bishops, clergy, and prominent citizens at which Bishop Howley announced he would give over the Howley home and estate for the purpose of establishing an orphanage. However, there was no evidence of BIS involvement in the Brothers coming to Newfoundland to staff Mount Cashel or in the establishment of the orphanage. Neither does the evidence suggest that the Christian Brothers themselves, individually or through their Institute in Ireland, had the initiative, or the wherewithal, to come to St. John's to open an orphanage. In this regard, the Brothers who staffed Mount Cashel were no different in status than persons who staffed other denominational orphanages. The fact that the Archdiocese sought to staff its orphanage by inviting a group of Brothers from Ireland to do so does not permit the Archdiocese to divest itself of responsibility for the Brothers who once arrived, were furthering the Archdiocese's religious and social objectives. In short, the Archdiocese established Mount Cashel and assigned the task of caring for the resident boys to the Brothers who agreed to come here for that purpose.

[89] The Archdiocese argued that Canon Law fettered the authority of the Archdiocese over the Brothers at Mount Cashel, because the Christian Brothers were an Order of Pontifical Rite, which meant that they reported directly to the Vatican rather than to the Archdiocese, and that the Archbishop had no right of visitation at the orphanage and no authority to get involved in its operations. The judge found that while Canon Law does not determine civil law responsibility, it can define relationships within the Church. While he was satisfied that the Archbishop would have an obligation to intervene respecting an allegation of abuse, he accepted that because the Order of Christian Brothers was an Order of Pontifical Rite, the Archdiocese had no authority to get involved in Mount Cashel's operations.

[90] While the Brothers, as members of an Order of Pontifical Rite, reported through their chain of command to their Provinces and the Vatican, and not the Archdiocese, that does not mean that the Archdiocese had no authority over how the Brothers at Mount Cashel were carrying out the work the Archdiocese assigned to them to do at the orphanage. The Brothers' Provinces or the Vatican were not exercising authority over the work the Brothers were doing at Mount Cashel. Rather, the Superiors of their Order exercised authority over them with respect to matters involving their internal governance, routines, vows and general well-being. The visitation reports and the evidence of Father Morrissey, a Canon Law expert tendered by the Archdiocese, explain this. In any event, the internal structure of the Brothers' Order does not immunize the Archdiocese from responsibility for the Brothers' misconduct while they are carrying out work for the Archdiocese at the orphanage. The Archdiocese cannot simply install the Brothers and assign them work and then walk away, especially because the Archdiocese continued to exercise authority over the Brothers and take responsibility for the orphanage.

Piecemeal Assessment of the Evidence

[91] The appellants argue that the judge approached the evidence supporting their arguments respecting the closeness of the relationship between the Archdiocese and the Brothers as though each argument were the sole determinant of vicarious liability. They maintain this piecemeal approach to the evidence was in error.

[92] We agree that the judge erred by failing to assess the evidence as a whole when determining whether the legal standard of vicarious liability had been met. While it may be that any one of the factors the judge considered would not, on its own, establish vicarious liability, that was not the question. The question was

whether all of the evidence taken together, considered in light of the twin policies, established whether the Brothers' sexual assaults of the appellants were sufficiently related to their conduct authorized by the Archdiocese to justify the imposition of vicarious liability.

[93] The judge considered much of the evidence the plaintiffs argued to support their position that the ongoing relationship between the Archdiocese and the Brothers at Mount Cashel was sufficiently close to support a finding of vicarious liability. The plaintiffs maintained that the Archbishop was the ultimate Roman Catholic authority in the province and thereby had authority over the Brothers and the orphanage, that the public perceived that the Archdiocese controlled Mount Cashel, that the Archdiocese exercised authority over Mount Cashel by virtue of exercising significant control over its finances and fundraising and by acting on behalf of Mount Cashel in dealings with the government, that the Archdiocese was closely tied to Mount Cashel by virtue of its reversionary interest in the property on which it stood, and that internal church governance supported a close relationship between the Archdiocese and the Brothers at Mount Cashel.

[94] The judge discussed these relationship arguments and determined that none was a basis for the imposition of vicarious liability on the Archdiocese. Curiously, we note that the judge did not say that most of the factors he considered had no weight or no relevance. He simply said that each one on its own was not determinative of vicarious liability.

[95] The Supreme Court of Canada recently considered the piecemeal approach to evidence in *Salomon v. Matte-Thompson*, 2019 SCC 14. *Salomon* concerned a statement made by the Court of Appeal of Quebec in reversing the trial judge for assessing the trial evidence "through a distorting lens". At the Supreme Court of Canada, the appellant argued that the Quebec Court of Appeal had erred by employing the notion of a distorting lens as an analytical tool. In rejecting that argument, the Supreme Court explained that the appellate court had used the term as a metaphor to show why the trial judge's approach to assessing the evidence caused her to make errors. The metaphor was that the lens through which the trial judge had viewed the evidence was distorted in that it was narrow and had isolated the evidence into individual silos, which denied her the insight provided by a global assessment.

[96] The judge in this case similarly viewed the evidence through a narrow lens focusing on individual factors as though each one was determinative of the main issue which led to identifiable errors. For example, he characterized the

"public profile" evidence the plaintiffs submitted as highlighting the public persona of the Bishop, and said that "profile by itself is no indicator of liability" (para. 127). With respect to the evidence respecting the Archdiocese's control over finances and fundraising, he said "control of one aspect of its operation, by itself, is not one of the indicators of vicarious liability" (para. 144) and with respect to the Archdiocese's relations with government respecting the orphanage he said "involvement in negotiations on policy matters, by itself, is not evidence of exertion of control over operations by the Archdiocese" (para. 155). As well, the judge found that the Archdiocese's reversionary interest in the property "could not in any way have been an indicator of involvement or control over operations. By itself, property ownership would be irrelevant" (para. 158).

[97] Determining whether a legal standard, in this case vicarious liability, is met, involves consideration of all of the evidence taken together. When individual factors are assessed individually and determined on their own not to justify the imposition of vicarious liability, that will surely result in a finding of no liability, as the appellants argued in their factum.

[98] The requirement that the whole of the evidence must be considered when determining whether a legal standard is met is so fundamental to our legal system that it hardly needs mention. Nevertheless, brief reference to some authorities makes the point.

[99] In *Housen*, the Supreme Court stated at paragraph 36 that determining whether legal standards are met, in that case the legal standard of negligence, involves interpretation of the evidence as a whole. Likewise, determining whether the legal standard of vicarious liability is met involves interpretation of the evidence as a whole.

[100] The decision of the Supreme Court of Canada in *Sagaz* also pertains, and is especially pertinent because it concerned an independent contractor's status in the context of vicarious liability. In *Sagaz*, the Court quoted with approval McGuigan J.A. in *Wiebe Door Services Ltd. v. Minister of National Revenue*, [1986] 3 F.C. 553, 70 N.R. 214 (F.C.A.), saying that "<u>what must always occur is a search for the total relationship of the parties</u>" and that all of the factors weighing on the issue were to be considered together [emphasis added]:

> [46] In my opinion, there is no one conclusive test which can be universally applied to determine whether a person is an employee or an independent contractor. … Further, I agree with MacGuigan J.A. in *Wiebe Door*, at p. 563 … that what must always occur is a search for the total relationship of the parties:

> .... The most that can profitably be done is to examine all the possible factors which have been referred to in these cases as bearing on the nature of the relationship between the parties concerned. Clearly not all of these factors will be relevant in all cases, or have the same weight in all cases. Equally clearly no magic formula can be propounded for determining which factors should, in any given case, be treated as the determining ones.
>
> …
>
> [48] It bears repeating that the above factors constitute a non-exhaustive list, and there is no set formula as to their application. The relative weight of each will depend on the particular facts and circumstances of the case.

[101] The New Brunswick Court of Appeal's decision in *Chiasson v. Duguay Holdings Inc.*, 2015 NBCA 8, also referred to the principle that all of the evidence must be considered together when reaching a liability determination. *Chiasson* concerned whether the legal standard of negligence in a claim of personal injury was established. In upholding the trial judge's decision, the appellate court stated:

> [4] In determining a liability-related issue, the trial judge has to decide which version of the events is most plausible <u>having regard to the totality of the evidence</u>.
>
> (Emphasis added.)

[102] Likewise, in this case, the judge had to examine and weigh all of the factors bearing on the relationship between the Archdiocese and the Brothers, taken together, in reaching a determination. His failure to do so is an extricable error of principle.

<u>Control of Day-to-Day Operations at Mount Cashel</u>

[103] The judge then focused on day-to-day operations at the orphanage, calling it the key issue. He concluded that such operations were not the responsibility of the Archdiocese, saying:

> [192] … there was no pattern of involvement or control by the Archdiocese over the day-to-day operations of the orphanage. …
>
> [193] In the absence of evidence of control over operational matters, or the assumption of responsibility for the day-to-day affairs of the orphanage, there was nothing in the evidence which would give rise to the kind of relationship which would form the basis for vicarious liability. …

[104] In this case, the judge erred by focusing on who had control over the day-to-day activities at Mount Cashel to the exclusion of other relationship factors respecting the authority of the Archdiocese over the Brothers, and to the exclusion of the other responsibilities of running an orphanage.

[105] In *Sagaz,* the Supreme Court of Canada addressed how control impacts a finding of vicarious liability. The Court stated that the level of control will always be a factor, but it is only one of several factors. The Supreme Court in *K.L.B.* also commented on the control factor in the context of an entity's ability to directly supervise work being carried out on its behalf:

> [22] … Many skilled professionals … perform specialized work that is far beyond the abilities of their employers to supervise, and yet they may reasonably be perceived as acting "on account of" these employers. Control is simply one indication of whether a worker is acting on behalf of his or her employer…

[106] The judge's focus on whether the Archdiocese controlled the day-to-day operations of Mount Cashel raises two issues. One relates to whether the Archdiocese actually controlled the day-to-day operations at Mount Cashel. The other is the significance of control respecting only one aspect of running the orphanage – that being day-to-day activities. There is little doubt that only the Brothers controlled the day-to-day operations at Mount Cashel. But that is not determinative. Also very important is whether the Archdiocese was in a position to manage the risk posed by the conduct of the Brothers at Mount Cashel in relation to the care of their charges which was the mandate given to the Brothers by the Archdiocese when they came to Newfoundland. This inquiry goes to the heart of deterrence as one of the policy rationales underlying the doctrine, as McLachlan J. explained in *Bazley:*

> [33] … Beyond the narrow band of employer conduct that attracts direct liability in negligence lies a vast area where imaginative and efficient administration and supervision can reduce the risk that the employer has introduced into the community. Holding the employer vicariously liable for the wrongs of its employee may encourage the employer to take such steps, and hence, reduce the risk of future harm. A related consideration raised by Fleming is that by holding the employer liable, "the law furnishes an incentive to discipline servants guilty of wrongdoing" (p. 410).
>
> [34] The policy grounds supporting the imposition of vicarious liability — fair compensation and deterrence — are related. The policy consideration of deterrence is linked to the policy consideration of fair compensation based on the employer's introduction or enhancement of a risk. <u>The introduction of the enterprise into the</u>

> community with its attendant risk, in turn, implies the possibility of managing the risk to minimize the costs of the harm that may flow from it.
>
> (Emphasis added.)

[107] If the whole relationship is not to be considered, an entity could easily escape a determination of vicarious liability by walking away from or delegating the day-to-day operations and pleading "we were not there" or "we don't know anything about caring for children". Such a position would not accord with the law as set out in *Sagaz,* nor would it support the policy rationales of the doctrine.

[108] The second issue illustrates that the judge's focus on day-to-day operations at Mount Cashel ignores the other ways in which an entity exercises authority over those who are carrying out its objectives. Day-to-day operations at Mount Cashel were only a part of the overall operation of the orphanage. One would not expect the Archdiocese to have been involved in the day-to-day operations of Mount Cashel. The Archdiocese had many different responsibilities. It was not involved in the day-to-day operations of its individual parishes either, yet it could have been fixed with vicarious liability for wrongful deeds of its parish priests. Authority over the Brothers and the operation of Mount Cashel involved many different responsibilities carried out at many different levels, times and places. Control over day-to-day care of the residents, setting the curriculum, ordering food, and other activities the judge identified in paragraph 190, are only a part. Simply put, the Archdiocese's lack of involvement in the direct supervision of the care of the appellants at Mount Cashel and control of the day-to-day operations at the orphanage does not enable it to escape responsibility. Determining vicarious liability in a case such as this one involves a much broader analysis of the relationship between the Archdiocese and the Brothers than consideration of who was supervising day-to-day operations.

[109] Additionally, day-to-day operations and the day-to-day activities of the Brothers in caring for the appellants is more related to whether their sexual assaults of the appellants were connected with their legitimate tasks than to the closeness of their relationship with the Archdiocese. The judge never did consider the connection between the Brothers' assigned tasks and their sexual assaults of the appellants, although it was not necessary for him to go to this second stage of analysis after effectively finding that the relationship could not support the imposition of vicarious liability on the Archdiocese. Nevertheless, his references to day-to-day activities could be said to touch on this secondary

inquiry, thereby conflating the inquiry respecting the closeness of the relationship between the Archdiocese and the Brothers with the inquiry respecting whether the Brothers' sexual assaults of the boys were so connected to their assigned tasks that they could be regarded as a materialization of the risk that the Archdiocese had introduced to, and maintained, in the community. While there is overlap between the closeness and connection inquiries, the analyses are distinctly different (see *Bromley*, at paras. 113-114).

[110] The judge also failed to consider other evidence bearing on the closeness of the relationship between the Archdiocese and the Brothers at Mount Cashel in his analysis. The first is the guarantee Bishop Howley provided in his correspondence to Sir Robert Bond in 1897. Bishop Howley stated:

> I guarantee to have the establishment carried out in such a manner as shall amply satisfy all the demands required by any Act of Parliament which may be enacted, to erect suitable buildings, and make the enterprise in every sense a complete success.

Bishop Howley gave this guarantee to Sir Robert Bond in the context of discussions respecting proposed government funding for orphanages. The Archdiocese argues that Bishop Howley's guarantee was given on a promise of government funding, and because the funding did not materialize, the guarantee argument has no merit. It is clear from Bishop Howley's letter of reply that he had plans in place to establish, furnish and staff a denominational orphanage before Sir Robert Bond wrote him in September 1897. While it is so that the proposed funding did not materialize, that does not diminish the appellants' argument. The Bishop, as the ultimate authority in the Diocese, professed to Sir Robert Bond that he was in the process of establishing an orphanage (following the lead of his predecessor, Bishop Power) and that he had the authority and ability to ensure that it would be successfully operated into the future. His guarantee shows not only the Diocese's interest in establishing an orphanage, but also that Christian Brothers in Ireland had been approached to staff it and were regarded as fit to do so. Omitting consideration of Bishop Howley's guarantee as a relevant factor bearing on the closeness of the relationship between the Archdiocese and the Brothers at Mount Cashel is a palpable error in the judge's application of the doctrine of vicarious liability to the evidence.

[111] Secondly the judge failed to consider section 3 of Canon 1381, which governed school and religious teachings. Roman Catholic schooling and religious teaching were important objectives of the Archdiocese when Mount Cashel was established in 1898, and they continued to be important to the Archdiocese throughout the period leading up to Newfoundland's entry into

Confederation and well beyond, as Dr. Fitzgerald testified. Schooling and religion figured prominently in life at Mount Cashel, an institution that the Archdiocese introduced into the community to realize their objective of caring for poor and orphaned boys within the Roman Catholic faith.

[112] The judge quoted the first two sections of Canon 1381 in his decision, but omitted mention of the third section. The third section stated that the Bishop "for the sake of religion or morals [could] require that either teachers or books be removed from the school". This third section specifically empowered the Archdiocese to require that a Brother be removed from Mount Cashel, which comprised a school and a church, for moral misconduct. Accordingly, while the Archdiocese may not have actually fired any Brothers, it had the specific authority through Canon Law to require the removal of a Brother for the type of moral misconduct at issue in this case. The judge made a palpable error in failing to consider the Archbishop's specific power to expel Brothers in his analysis.

[113] Thirdly, the judge also failed to consider evidence respecting the Archdiocese's placement of one of its priests on site, which the plaintiffs argued showed a close relationship between the Archdiocese and the Brothers. The Archdiocese argues that St. Raphael's parish was a separate entity from the Brothers and the orphanage. We do not agree. St. Raphael's chapel was part of Mount Cashel from the beginning, and was established as a formal Roman Catholic parish in 1925. A priest, charged with responsibility for the religious and moral education of the resident boys, had been assigned to live on site since Father Bride was installed in 1925. St. Raphael's remained a parish throughout the time the appellants were resident at the orphanage, and until 1962 when the parish was relocated and became Mary Queen of Peace. We note that even after St. Raphael's parish relocated, a priest remained as chaplain in residence at Mount Cashel.

[114] The resident priest was part of life at Mount Cashel, although his residence, while joined to the orphanage buildings, had a separate entrance from the entrance to the orphanage. According to the evidence, he conducted daily masses and regular confessions for the residents. The appellants testified that their interactions on site with Monsignor Ryan, who was the resident priest when the appellants were at Mount Cashel, were limited. However, one of the appellants reached out to Monsignor Ryan for help, and another witness gave evidence that he reported his sexual abuse to Monsignor Ryan both inside and outside the confessional. There was also evidence of kindly interactions between Monsignor Ryan and the boys. The evidence also disclosed that the

Brothers were directly involved with St. Raphael's. In particular, Brothers were charged with taking care of the sacristy, the oratory, and the priests' house, and helping with the preparations for the priest to say mass.

[115] The fact that the Archdiocese placed Monsignor Ryan at Mount Cashel to provide spiritual direction to the residents within their denominational faith, and the fact that some of them looked to him for help, suggest that Monsignor Ryan, like Father Bride before him, was part of the orphanage community. To the extent that St. Raphael's parish could be considered separate from Mount Cashel, its presence on site, attached to the orphanage, the regular interaction between the priest and the appellants, and the interrelationship between the Brothers and the Church itself, is, at a minimum, suggestive of the orphanage being a joint venture between the Archdiocese and the Brothers.

[116] Accordingly, in our view the judge erred in failing to recognize that the Archdiocese's establishment of a parish and placement of a priest on site was relevant evidence in determining the closeness of the relationship between the Archdiocese and the Brothers at Mount Cashel.

[117] The judge also stated that the Archdiocese and the Brothers were separate corporate entities. The Brothers at Mount Cashel during the 1950s were neither incorporated nor part of an incorporated entity. The Christian Brothers were not incorporated in Canada until 1962, beyond the time period relevant to this case. In any event, even if the Brothers at Mount Cashel had been part of an incorporated entity during the 1950s, that would not necessarily permit the Archdiocese to escape the imposition of vicarious liability. It is the Archdiocese's relationship with the Brothers at Mount Cashel who sexually assaulted the appellants which is at issue, not whether the Archdiocese and the Brothers at Mount Cashel could be regarded as separate corporate entities.

Summary

[118] In summary, the judge erred in law in failing to apply the correct law of vicarious liability to the evidence. He also erred in failing to globally assess the evidence when applying the doctrine to the evidence and by conflating the closeness and connection inquiries. The latter errors are extricable errors of principle. The errors, being subject to the correctness standard of review, are so fundamental to the determination of the ultimate issue that they undermine the judge's decision not to impose vicarious liability on the Archdiocese for the Brothers' wrongdoing. As well, the judge's failure to consider Bishop Howley's guarantee, section 3 of Canon 1381, and the placement of a parish and a priest

on site as factors important to the analysis are palpable errors and overriding in the sense that they could well make a difference to the outcome of an analysis. Accordingly, the judge's decision not to impose vicarious liability on the Archdiocese for the Brothers' sexual abuse of the appellants must be set aside.

Should a New Trial be Ordered?

[119] The question that now arises is whether a new trial should be ordered or whether this Court can properly determine whether the Archdiocese is vicariously liable for the Brothers' wrongdoing.

[120] The question of whether an appellate court can finally decide a civil case after finding error was considered by the Supreme Court of Canada in *Madsen Estate*. In that case, the issue was whether a trial judge had failed to consider evidence respecting whether a daughter was beneficially entitled to assets in bank accounts she held jointly with her father when he died. The Supreme Court of Canada determined that the trial judge had failed to consider evidence relevant to the issue, so the question then became whether to order a new trial so that the evidence that had not been considered could be considered, or whether the Supreme Court ought to finally decide the case. The Supreme Court determined that it was both practical and fair to consider the import of the unconsidered evidence and finally decide the case, and provided its rationale for doing so:

> [24] It is well established that where the circumstances warrant, appellate courts have the jurisdiction to make a fresh assessment of the evidence on the record: *Hollis v. Dow Corning Corp.*, [1995] 4 S.C.R. 634, at para. 33; *Prudential Trust Co. v. Forseth*, [1960] S.C.R. 210, at pp. 216-17. Having regard to the circumstances of the present appeal, I think it is both feasible on a practical level and within the interests of justice for this Court to consider the evidence not considered by the trial judge and make a final determination rather than sending the case back to trial.

[121] This Court came to the same conclusion in *Matchim v. BGI Atlantic Inc.*, 2010 NLCA 9, 294 Nfld. & P.E.I.R. 46, after finding that the trial judge had erred in his treatment of the evidence. Green C.J.N.L. identified the factors for consideration:

> [99] The two basic considerations, therefore, that an appellate court must address when deciding whether to decide a case on the existing record rather than sending it back for retrial are: practicality and justice, or fairness, to the parties.

[122] In this case, we are of the view that the appropriate course of action is for this Court to decide whether the Archdiocese is vicariously liable for the Brothers' sexual assaults of the appellants. Deciding the matter does not require this Court to assess the credibility of witnesses or make findings of fact on the basis of conflicting evidence. The evidentiary record in the case is solid, and it is not controversial. The controversy in this case relates to how the evidence should be interpreted, and whether it supports or does not support the imposition of vicarious liability on the Archdiocese. This Court is well positioned to apply the correct legal standard for vicarious liability to the evidence and arguments made by the parties.

[123] As a practical consideration, this litigation was commenced over 20 years ago. Insofar as a decision from this Court could expedite a conclusion to this ongoing litigation, we believe it would benefit all parties, namely, the Archdiocese and the appellants who are advanced in age.

[124] Accordingly, in our view, it is fair and just for this Court to conduct its own assessment of the evidence in light of the twin policies and determine whether vicarious liability ought to be imposed on the Archdiocese.

Is the Archdiocese Vicariously Liable for the Brothers' Sexual Assaults of the Appellants?

[125] This fundamental question is answered by two inquiries undertaken in consideration of the totality of the evidence in light of the twin policies. The first is whether the closeness of the relationship between the Archdiocese and the Brothers at Mount Cashel is sufficient to justify imposing vicarious liability on the Archdiocese. Consideration of this inquiry is informed by determining whether the Archdiocese created and maintained an ongoing relationship of authority over the Brothers. The second inquiry is whether the Brothers' sexual assaults of the appellants were sufficiently connected to the Brothers' assigned task of caring for the appellants such that the assaults can be regarded as a materialization of the risks created by the Archdiocese (*Bazley*, at para. 41, and *K.L.B.*, at para. 19). If these two inquiries are answered positively, vicarious liability can and should be imposed on the Archdiocese. If not, vicarious liability should not result.

The Relationship Between the Archdiocese and the Brothers at Mount Cashel

[126] For the reasons that follow, we conclude that the relationship between the Archdiocese and the Brothers at Mount Cashel was sufficiently close to justify imposing vicarious liability on the Archdiocese for the Brothers' sexual assaults of the appellants.

[127] We restate that the Diocese invited Christian Brothers from Ireland to come to St. John's to staff its denominational orphanage for poor and orphaned boys. The Brothers did not invite themselves here, nor is there any evidence supporting the notion that they had an independent idea to come to St. John's to open an orphanage. In this regard, the Diocese (through Bishop Power, Bishop Howley's predecessor) had been communicating with the Brother Superior of the Christian Brothers in Dublin on and off since 1892, and by 1897, Bishop Howley had a plan in place for Brothers to come to staff an orphanage. The evidence suggests that Brother Slatterly came in 1897, and Brothers Ennis, Murray and Brennan arrived the following year.

The 1875 Agreement

[128] The Archdiocese says the 1875 agreement applied to the Brothers who came to staff Mount Cashel, and contends that it shows the Brothers were independent of the Archdiocese.

[129] The 1875 agreement was executed for the purpose of setting out the terms on which Christian Brothers would come to Newfoundland from Ireland to teach in Roman Catholic schools. The agreement stipulates that the Diocese would pay for the Brothers' passage, provide accommodation and a stipend for them on their arrival, and provide suitable buildings for the educational institution.

[130] The 1875 agreement does shed light on the relationship between the Archdiocese and the Brothers at Mount Cashel. It sets out the responsibilities of the Archdiocese respecting the Brothers, which included payment of their travel expenses, provision for their lodging, and compensation for them until the annual collection from parishes materialized. These provisions alone show a close relationship between the Archdiocese and the Brothers, if not a relationship akin to that of master/servant.

[131] Clauses 9 and 10 of the 1875 agreement provide that the Brothers were free to exercise the "Rules and Religious observances [of their Order] in the same manner as in Ireland", and that in all things appertaining thereto, they are

"subject only to their own Superior and no other person". The Archdiocese argues that this agreement shows that the Brothers were independent of the Archdiocese.

[132] Dr. Fitzgerald testified that these rules and observances pertained to the Brothers' modes of dress, their fraternization within and outside the Order, their obedience to their Superiors, their internal structure, and matters of daily routine within the brotherhood. We agree with this interpretation, and observe that these brotherhood matters do not touch on how the Brothers carried out their work at the orphanage. Neither does the 1875 agreement say anything about how the Brothers who came to staff Mount Cashel were to relate to or interact with the Archdiocese respecting caring for the resident boys which was the task the Archdiocese assigned to the Brothers in furtherance of its objectives. Instead of showing the Brothers' independence from the Archdiocese, we see the 1875 agreement as an acknowledgement of responsibility by the Archdiocese for the Brothers, who had come to a far-away land to further the Archdiocese's objective of caring for poor and orphaned boys. In our view, the 1875 agreement is supportive of a close, if not protective, relationship between the Archdiocese and the Brothers at Mount Cashel, and lends weight to the imposition of vicarious liability.

[133] The Archdiocese made much of the fact that Superiors within the Order of Christian Brothers governed the Brothers, not the Archdiocese. According to Brother A.E. Murphy's evidence, the Christian Brothers Institute Inc. did not operate in Newfoundland and did not have any governing role respecting Mount Cashel and there was no other corporate body governing the Brothers at Mount Cashel orphanage during the time when the appellants lived at the orphanage. Archbishop Currie agreed with this evidence. Mount Cashel was not privately owned or operated at that time by any corporation, or governed by any board of directors or trustees like the orphanage in *Broome.*

[134] Brother A.E. Murphy and Dr. Fitzgerald explained the internal governance of Christian Brothers by their provinces which undertook requisite visitations and filed reports in this regard. Visitations concerned issues the Brothers might have with their vows, their financial well-being, and other matters internal to the Order. We agree that these issues would have been beyond Archdiocesan control. But that does not matter, because these internal matters are not relevant to the vicarious liability analysis; they do not touch on the relationship between the Archdiocese and the Brothers respecting the Archdiocese's establishment of and an ongoing relationship with Mount Cashel,

or how the care of orphanage residents which the Archdiocese entrusted to the Brothers was to be carried out.

[135] The report of Father Morrissey dated January 23, 2016 distinguishes between a work belonging to an institute of Christian Brothers and a work belonging to a diocese. In respect of the latter, he says:

> … When a diocesan work is entrusted to a religious institute, the diocesan bishop and the competent superior of the institute are to draw up a written agreement which, among other things, is to define expressly and accurately those things which pertain to the work to be accomplished, the members to be devoted to it, and financial matters.

While the evidence does not disclose a contract between the Brothers at Mount Cashel and the Archdiocese respecting the "work to be accomplished" in caring for the boys at Mount Cashel, that does not mean that the Brothers were not carrying out the Archdiocesan work. We also note that in this respect the Archdiocese was no different than the dioceses or superior authorities of other religious denominations which entrusted employees, volunteers, or other individuals to take care of the residents in their denominational orphanages. The Archdiocese cannot divest itself of civil responsibility for an institution it established, staffed with Brothers to whom it entrusted the care of its residents, and continued to be involved with, on the basis that it did not set the internal governance rules respecting the Order of Christian Brothers.

[136] In short, the small group of individual Brothers at Mount Cashel, installed there initially and added to and subtracted from over time, was introduced into the community by the Archdiocese and entrusted with caring for the resident boys, and operated under the auspices of the Archdiocese to further the Archdiocese's social and religious objectives.

[137] Several other factors have been argued to bear directly on the closeness of the relationship between the Archdiocese and the Brothers at Mount Cashel and thereby go to whether it is appropriate to impose vicarious liability on the Archdiocese.

Authority of the Archdiocese

[138] The appellants contend that the Brothers and Mount Cashel were always subject to the authority of the Archdiocese. The Archdiocese argues this was not the case because the Brothers ran their own operation independently of the Archdiocese. The judge characterized the Archdiocese's ongoing relationship with the Brothers at Mount Cashel as involvement, and said its "involvement

with matters internal to [Mount Cashel's] operation was limited to aspects of the curriculum relating to religious instruction, and the delivery of certain religious ritual services to the residents and the Brothers" (para. 122), and that Canon Law supported nothing more.

[139] It was not in dispute that the Archbishop was the ultimate authority in the Archdiocese. This authority emanated from Archdiocesan authority over all parishes and institutions that could reasonably be regarded as part of the Archdiocese and from Canon Law. As well, Father Doyle (an expert witness called by the appellants) was of the view that the Archdiocese could exercise authority over the Brothers with respect to major issues presenting in the Archdiocese, which would include the Brothers' sexual abuse of the appellants at Mount Cashel. Monsignor Puddester, Vicar General of the Archdiocese at the time of the trial, seemed to agree. Father O'Keefe's evidence was that while the Archbishop had some authority over the Brothers at Mount Cashel, it was limited. Father Morrissey's and Archbishop Currie's evidence on this point was qualified; while they agreed that the Archdiocese would have to act on knowledge of abuse at Mount Cashel, they said that this duty would be discharged by reporting the abuse to the Brother Superior.

[140] The Archdiocese argues that the dismissal of a civilian employee by Brother Carroll, who was the Superior at Mount Cashel during the time the appellants were resident there, shows that the Brothers did the hiring and firing at Mount Cashel and therefore operated the orphanage independently of the Archdiocese.

[141] The dismissal of the civilian employee related to a report that the employee at Mount Cashel was sexually abusing one of the appellants. The report was made by a former civilian employee of Mount Cashel to Father O'Keefe, the Archbishop's secretary, at the Palace, the Archbishop's residence and the offices of the Archdiocese. The former employee also reported to Father O'Keefe that the Brothers had been told of the matter and that it had been reported to the police. Father O'Keefe documented the report, and shortly thereafter Monsignor Murphy, the administrator of the Archdiocese acting in the stead of Archbishop who was away at the time, sent for Brother Carroll. The three men met and discussed the matter. Brother Carroll denied the allegation of abuse but did promise to further investigate. Three days later Brother Carroll advised Father O'Keefe by telephone that the boy involved had recanted his story, but that he (Brother Carroll) had dismissed the civilian employee anyway on the ground that his character was so low that it could cause Mount Cashel

harm. The record shows that the dismissed employee was subsequently convicted of sexual charges respecting two of the appellants.

[142] While the evidence shows that Brother Carroll did fire the civilian employee, it also shows that the Archdiocese did not decline to act when the abuse was reported. On the contrary, the Archdiocese did act by summoning Brother Carroll to the Palace and directing him to further investigate the matter. The Archdiocese's actions show that it had authority over the Brothers, and that it exercised that authority. While Brother Carroll did the actual firing of the civilian employee, it was the intervention of the Archdiocese that caused him to do so.

[143] In our view the evidence shows that the Archdiocese was the ultimate authority of the Catholic Church and that it exercised a degree of authority over the Brothers at Mount Cashel.

Public Perception

[144] The appellants argue that the public perceived that the Archdiocese controlled Mount Cashel and that this perception showed that the relationship between the Archdiocese and the Brothers at Mount Cashel was close if not interconnected. The appellants refer to Bishop Howley's public role in the establishment of Mount Cashel and other evidence which they contend shows that the Archdiocese was regarded by the public and government officials as having authority over Mount Cashel.

[145] We agree that public perception can be a legitimate consideration in an analysis respecting whether vicarious liability ought to be imposed. Evidence of entities or wrongdoers holding themselves out to the public as being closely related to other persons or entities can indicate a close relationship between the two, and thereby could contribute weight to an ultimate determination of vicarious liability. Whether it does depends on how the entity and wrongdoers represent themselves to the public and how the public reasonably regards those representations. Reasonable regard involves both subjective and objective evaluation. Such evaluation must take account of the fact that members of the public do not usually have the ability to look behind the public profile of wrongdoers or entities to ascertain their formal relationship. Evaluation must also take care to differentiate between loose associations and the nature and degree of closeness which could reasonably support a finding of vicarious liability.

[146] In this case, the appellants perceived that the Archdiocese was closely involved with Mount Cashel. One of the appellants testified that he did not see a distinction between a Brother and a priest when he was a boy living at Mount Cashel. As far as he was concerned, both were authoritarian religious figures to him. Another appellant testified that he saw Monsignor Ryan as the "head priest" of Mount Cashel. Another witness testified that he viewed the orphanage as a Catholic institution, and saw the church and Mount Cashel "as one unit".

[147] The civilian abuse incident also bears on the public's perception of a close relationship between the Brothers and the Archdiocese. The former employee who reported the matter to the Palace did so because he perceived that the Archdiocese had the authority to do something about it. As it turned out, he was correct. In our view, the incident shows that members of the public correctly perceived the Archdiocese as having authority over the Brothers.

[148] The judge acknowledged some of the documentary evidence respecting orphanage events showed that the Archdiocese was happy and proud that the Brothers were part of its church history and apostolates for Catholic education. The Archdiocese and the Brothers publicly showed they were proud affiliates of each other – until the abuse scandal broke.

[149] It is also clear, as will be discussed below, that the provincial government perceived Mount Cashel as being under the auspices of the Archdiocese. On matters involving Mount Cashel orphanage, and Roman Catholic orphanages generally, government officials were not communicating with the Brother Superior – they were communicating with the Archbishop.

[150] We also note the obiter comments of the judge in *J.W.D. Estate* respecting his view that the evidence in that case showed that Mount Cashel was the responsibility of the Roman Catholic Church and the Christian Brothers.

[151] We conclude that the public perceived a close relationship between the Archdiocese and the Brothers of Mount Cashel, and that this public perception lends inferential support to the imposition of vicarious liability on the Archdiocese.

Requests for Permission and Fundraising

[152] The appellants argue that the Archdiocese controlled the Brothers' ability to fundraise at Mount Cashel, and that this control shows Archdiocesan authority over the orphanage. They identify eight different requests from the Brothers to the Archdiocese, made between 1951 and 1957, for permission to

raise funds for Mount Cashel by holding raffles, fairs, and concerts. Of particular note is the request from Brother Warren dated November 11, 1951 for approval to hold the annual Christmas raffle. Other evidence indicates this request was made annually. The Archdiocese granted some of these requests, and denied others.

[153] The Archdiocese argues that these requests were effectively courteous information provided to the Archdiocese to facilitate the co-ordination of fundraising within the Roman Catholic community so as not to overload it with demands for money.

[154] We agree that the Archdiocese was likely legitimately concerned about overloading its people with requests for money. However, a request for permission is not a courteous notice. A request for permission clearly connotes granting authority, and is counter to the notion of courteous information. The Brothers' requests for permission to fundraise show that the Archdiocese had the authority to grant or deny permission. If the Brothers were operating Mount Cashel completely on their own, they would not have needed to seek permission for the fundraising, especially for fundraising like the Christmas raffle which generated one-fifth of the orphanage's annual revenue. The necessity for permission shows that the Archdiocese exercised financial and administrative authority over Mount Cashel as an institution operating under its auspices.

[155] The Brothers also sought permission from the Archdiocese to establish a Sea Cadets corps at Mount Cashel. Again, the requirement for permission to do so shows the Archdiocese's authority over orphanage programming and activity, and supports a close and controlling relationship between the Archdiocese and the Brothers. If the Brothers were truly operating Mount Cashel independently of the Archdiocese, they would not have needed to seek permission to establish the Cadet corps.

[156] The various requests for permission support the fact that the Archdiocese had financial authority and control over the Brothers at Mount Cashel. They show a close relationship between the two, and support a finding of vicarious liability.

Government Relations

[157] Shortly after Newfoundland's entry into confederation with Canada in 1949, the Government of Newfoundland began to contribute to the costs of caring for wards of the province who resided in denominational orphanages.

Documentary evidence in this case includes various pieces of correspondence between government officials and Archbishop Skinner in the 1950s pertaining to whether and how much government would pay for the care of wards who were resident in Roman Catholic orphanages. It shows that government's communications in this regard during the early and mid-1950s were almost exclusively with the Archdiocese, although later in the decade the Brother Superior at Mount Cashel communicated occasionally with government officials respecting government funding.

[158] The correspondence, especially the several letters between Archbishop Skinner and Dr. H.L. Pottle, Minister of Public Welfare and/or Mr. H. Cramm, Director of Child Welfare on behalf of the Government of Newfoundland, written between 1952 and 1954, shows that government officials communicated with Archbishop Skinner about admission policies. The government officials were concerned about supporting poor and orphaned Roman Catholic children in the province and keeping orphaned children from large Roman Catholic families together insofar as possible. In regard to these admissions and child welfare policies, government officials communicated with the Archbishop. The correspondence clearly indicates that it was the Archdiocese that was directly involved in these child welfare matters and that Archbishop Skinner was the conduit of this policy information to the parish priests in his Archdiocese so that they could disseminate it among parishioners and thereby facilitate admissions in accordance with the policies. There is no suggestion in the evidence that the Brothers at Mount Cashel were setting child welfare policies. Neither is there any suggestion that the Brothers were determining who and on what basis boys would be admitted to Mount Cashel. The fact that the Archdiocese's authority in regard to admissions and other child welfare policies may have also applied to another Roman Catholic orphanage does not detract from its direct application to the Brothers at Mount Cashel.

[159] The documentary evidence referenced above supports the fact that the Archdiocese had authority over government funding and child welfare policies for Mount Cashel orphanage.

[160] In sum, the Archdiocese was the interface between the Brothers at Mount Cashel and the Government in regard to any and all matters which concerned admissions and child welfare policies. Accordingly, this interface shows a close and controlling relationship between the Archdiocese and the Brothers at Mount Cashel, and thereby supports the imposition of vicarious liability on the Archdiocese.

Reversionary Property Interest

[161] In 1903, approximately five years after Mount Cashel was established, the Diocese conveyed the Howley estate property in trust to the Brothers for use as an industrial home and orphanage for poor boys. The conveyance provided that the property would revert to the Diocese should it cease to be used for that purpose. The judge rejected the plaintiffs' argument that this arrangement was relevant to the relationship between the Archdiocese and the Brothers at Mount Cashel and indicative of Archdiocesan control over Mount Cashel.

[162] We are of the view that this property arrangement is far from irrelevant to the relationship between the Archdiocese and the Brothers at Mount Cashel. At a minimum, it is evidence of a direct contractual relationship between the two in furtherance of the Archdiocese's objective to care for and educate poor and orphaned Roman Catholic boys. While we agree with the judge that not every property interest would indicate a close relationship justifying the imposition of vicarious liability, this particular property interest was tied to a specific objective of the Archdiocese, which the Brothers agreed to further by caring for the orphanage residents. The reversionary interest controlled the Brothers' use of the property, for if they ceased to carry out the Archdiocese's objective, the Brothers would no longer have claim to the property. We see this arrangement as showing a close and controlling relationship between the Archdiocese and the Brothers at Mount Cashel. It is therefore a factor supporting the imposition of vicarious liability.

The School Conflict

[163] Dr. Fitzgerald and Brother A.E. Murphy testified to a conflict which erupted in the early 1960s between the Archdiocese and the Christian Brothers who were teaching within the St. John's Roman Catholic School Board. The Archdiocese argues that the outcome of this conflict supports its position that the Brothers at Mount Cashel were independent of the Archdiocese.

[164] The conflict concerned whether Christian Brothers or Jesuit priests would teach in a new school planned for St. John's by the Board. The Christian Brothers took umbrage with the Archdiocese's stated preference for Jesuit priests to teach at the new school. The Brothers maintained that they had provided stellar education for Roman Catholic boys in St. John's for many decades and they ought to be able to continue to do so by teaching at the new school. In the end, it was decided that the Brothers would teach at the new school, which was named after Brother Rice, the founder of the Christian

Brothers from Waterford, Ireland, and that the Jesuit priests would teach at another new school, Gonzaga High School.

[165] We do not see this situation as showing that the Brothers at Mount Cashel operated Mount Cashel independently of the Archdiocese. First, we observe that the teaching Brothers involved in the school conflict were not the Brothers at Mount Cashel orphanage who sexually assaulted the appellants, and observe that Mount Cashel orphanage was very different from the schools where the teaching Brothers worked.

[166] Secondly, the school conflict says nothing about how the Brothers at Mount Cashel would carry out the Archdiocese's objectives of caring for the boys at the orphanage or the Archdiocese's ability to exercise authority over the Brothers in that regard. The school conflict was simply a power struggle over which religious Order would teach in the new school.

[167] In any event, the resolution of the school conflict involved the Vatican, and it appears, according to Brother A.E. Murphy, that the Vatican resolved it. While we agree with the Archdiocese that this conflict and its resolution shows strength and willfulness on the part of the teaching Brothers, and supports the fact that their status as members of a Pontifical Rite affected their relationship with the Archdiocese, we do not see it as supportive of the argument that the Archdiocese did not have authority over how the Brothers at Mount Cashel were to care for the boys or that Mount Cashel was not administered, controlled, or otherwise the responsibility of the Archdiocese. Neither do we see this argument as supportive of the notion that the Archdiocese had no ability to supervise or oversee the Brothers' work caring for the appellants.

Admissions to Mount Cashel

[168] The appellants contend that the Archdiocese through its parish priests facilitated admission of boys to the orphanage, and that this arrangement shows a close relationship between the Archdiocese and the Brothers. One of the appellants testified that his admission to Mount Cashel was facilitated by his parish priest, and another witness also testified to this practice. Correspondence between government officials and the Archbishop (as referenced above) shows the involvement of the Archdiocese in setting admissions policy and that the Archdiocese communicated this information to parish priests to enable them to facilitate admissions to the orphanage. Moreover, minutes of a meeting among the Archbishop, Dr. Pottle, and Mr. Clancy, the Deputy Director of Child Welfare, on April 28, 1952 make clear that arrangements for admissions to

orphanages were made between parish priests and family. Dr. Fitzgerald's evidence also touched on this practice.

[169] The judge referenced only the appellants' evidence in regard to this issue, saying "only one [of the four] testified that a priest was instrumental in his admission to Mount Cashel" (para. 163). Such reasoning is hardly determinative, given that the appellants were of tender years when admitted to Mount Cashel and that their evidence respecting how they came to be there was far from conclusive.

[170] In any event, because all of the appellants did not say they were admitted to Mount Cashel through their parish priests does not mean that the Archdiocese did not have influence or involvement in admissions. Other evidence clearly suggests that it did. There was no evidence that the Brothers were soliciting applications for admission to Mount Cashel. Neither were the Brothers at Mount Cashel interacting with parishioners in the community like parish priests were.

[171] All told, the involvement of the Archdiocese and its parish priests in admissions to Mount Cashel is well supported in the evidence and is a factor showing a close relationship between the Archdiocese and the Brothers at Mount Cashel.

St. Raphael's Parish on Site

[172] The building of St. Raphael's chapel on site in 1898 and Bishop Howley's direct involvement and celebratory mass at the official opening show a close relationship between the Brothers and the Archdiocese from the beginning. The formal establishment of St. Raphael's as a parish in 1925 and the installation of a parish priest on site, who was assigned as the spiritual director for the orphanage, demonstrates a close relationship between the Archdiocese and the Brothers at Mount Cashel. St. Raphael's chapel continued as a place of worship for the residents and the Brothers, in keeping with the denominational objective that Roman Catholicism be practiced as a faith and inform the culture of the orphanage.

[173] The evidence did not disclose that the Archdiocese sought permission from the Brothers to establish the parish on site, or that the Brothers tolerated the parish on sufferance. The Archdiocese put St. Raphael's on site, and Brothers were assigned duties in the chapel. In particular, they maintained the priest's residence and the oratory, and prepared the sacristy for the priest to say

mass. The evidence was also that the Sunday collections were split between the Archdiocese, to help pay the priest's stipend, and the orphanage. This arrangement worked to the benefit of both the orphanage and the Archdiocese, and shows regular Archdiocesan financial support for Mount Cashel from the Sunday collections, which were doubtless the contributions of local parishioners as opposed to the orphanage residents. The arrangement between the parish and the Brothers shows not just a close, but an integrated, relationship between the Archdiocese and the Brothers at Mount Cashel.

Canon 1381(3)

[174] Canon 1381(3) gave specific authority to the Archdiocese over education and morals and specifically empowered the Archdiocese to require a Brother from Mount Cashel to be removed for moral misconduct. As discussed above in connection with the judge's failure to consider it, Canon 1381(3) shows that the Archdiocese had specific authority over the conduct of the Brothers at Mount Cashel and support a finding of vicarious liability.

Bishop Howley's Guarantee

[175] Also as discussed above, Bishop Howley's guarantee to Sir Robert Bond shows that the Archdiocese had authority over the Brothers by introducing them into the community and by professing assurance for the future success of the orphanage. The guarantee supports the kind of close relationship between the Archdiocese and the Brothers at Mount Cashel that gives weight to the imposition of vicarious liability.

Acknowledgement that Mount Cashel was one of the Archdiocese's Institutions

[176] On April 27, 1953 Bishop O'Neil, the Bishop of Harbour Grace, in consultation with the Archbishop Skinner, the Archbishop of St. John's, had occasion to write government officials in connection with the child welfare policy of keeping families together. In his letter, he wrote "[h]owever, while we are most anxious to cooperate with your department in the matter of orphan care, we would not consider it advisable for Government officials to have the entrée to our institutions whenever they feel like it."

[177] A further example of the Archdiocese's acknowledgement that Mount Cashel was one of its institutions is found in Archbishop Skinner's correspondence of June 15, 1953 to the Minister, Dr. H.L. Pottle, where he states "… it is the present practice in our orphanages …".

[178] On December 24, 1956, Brother Carroll wrote to the Archbishop enclosing a donation for the Archdiocese's Social Welfare and Education Fund. In his letter he referred to himself as "Superior of one of Your Grace's Institutions".

[179] We also note the judge's comment in *J.W.D. Estate* to the Archbishop's reference to Mount Cashel as "our institution".

[180] These incidental expressions support the fact that Mount Cashel was acknowledged by both the Brothers and clergy to be under the authority and control of the Archdiocese.

Conclusion on the Relationship Between the Archdiocese and the Brothers at Mount Cashel

[181] In summary, the Archdiocese established Mount Cashel orphanage to provide care for boys within its religion and culture, and staffed it with Brothers to whom it assigned the task of caring for the resident boys, including the appellants. The evidence shows that this close relationship continued up to and including the 1950s when the appellants were resident. Through these years the Archdiocese had authority over the Brothers with respect to their care of the boys in accordance with the Archdiocese's mandate, had a significant hand in the overall administration and operation of Mount Cashel, exercised authority and control over fundraising, set admissions and child welfare policy, facilitated admissions, and ensured that the Roman Catholic faith informed the education and religious training of the residents.

[182] The Archdiocese operated a parish on site and installed a priest there for which both it and the orphanage shared in its maintenance and benefitted, financially and otherwise. The Archdiocese spoke for the Brothers at Mount Cashel to government, and presented the orphanage to the wider community as one of its institutions. It took public credit for the successes of Mount Cashel, and shared in its glories. As well, the Brothers themselves acknowledged the Archdiocese's authority over fundraising and extra-curricular programming, and regarded the orphanage as one of the Archbishop's institutions.

[183] Something more must be said about the relationship between the Archdiocese and the Brothers at Mount Cashel. It is not only that the Archdiocese exercised a measure of authority and control over the Brothers, but it had the authority and responsibility to exercise much more oversight over how the Brothers were caring for the appellants. This point is not a new concept. It

is well made in the jurisprudence, and as already noted, goes directly to the policy of deterrence which underlies the doctrine.

[184] The Archdiocese was in a position to reduce risk to the appellants but did not do so. It had the ability, through a Diocesan contract or otherwise to set up oversight systems to provide a check on how the Brothers were caring for the appellants. The Brothers were engaged by the Archdiocese to perform services in an orphanage it established and continued to administer and financially support for the benefit of the Archdiocese's objectives. The Archdiocese cannot divest itself of responsibility for the Brothers' wrongdoing by setting up a situation involving risk, perpetuating that risk, and then saying that Church structure denied them authority over how the Brothers carried out their work at the orphanage. This is especially so because the internal governance of the Brothers did not determine how the Brothers were to carry out the Archdiocese's objectives, and also because the Archdiocese continued to exercise much supervision and control over several aspects of running the orphanage and controlling the Brothers. In this regard, the words of Wilkinson J. in *Jacobi,* to the effect that oversight by entities responsible for the institutional care of vulnerable children is required if abuse of these children is ever to be curtailed, are appropriate.

[185] In summary, and considering the whole of the evidence, we conclude that the Brothers at Mount Cashel were working on the account of the Archdiocese when they were caring for the appellants, and that the relationship between the Brothers and the Archdiocese was sufficiently close to make the imposition of vicarious liability on the Archdiocese appropriate.

Connection Between the Brothers' Assigned Tasks and their Wrongdoings

[186] While the relationship between the Archdiocese and the Brothers at Mount Cashel is sufficiently close to justify imposition of vicarious liability on the Archdiocese, before liability can be imposed it must be determined if the tasks assigned to the Brothers were sufficiently connected to their sexual assaults of the appellants to justify doing so. Put another way, were the Brothers' sexual assaults of the appellants a materialization of the risk the Archdiocese placed in the community? (See *Bazley*, at para. 31, and *K.L.B.,* at paras. 18-20.)

[187] The factors going to this line of inquiry were identified in *Bazley* at paragraph 41:

(a) the opportunity that the enterprise afforded the employee to abuse his or her power;

(b) the extent to which the wrongful act may have furthered the employer's aims (and hence be more likely to have been committed by the employee);

(c) the extent to which the wrongful act was related to friction, confrontation or intimacy inherent in the employer's enterprise;

(d) the extent of power conferred on the employee in relation to the victim;

(e) the vulnerability of potential victims to wrongful exercise of the employee's power.

Opportunity

[188] If the Archdiocese had not invited the Brothers to St. John's to staff Mount Cashel, there would have been no opportunity for them to sexually abuse the appellants. However, opportunity is not to be evaluated on this simple "but for" basis because not all opportunities present the same degree of risk. That said, the opportunity for sexual abuse of children being cared for in a residential environment 24 hours a day is significant, for advantage can be taken while the children are showering or sleeping, where caregivers have the ability to isolate a child from others within the institution, and where activities take place away from the watchful eyes of any supervising authority. Such was the situation at Mount Cashel when the appellants lived there.

[189] Risk of harm to orphanage residents was recognized by the Archdiocese in the early 1950s. In correspondence between Archbishop Skinner and Dr. Pottle dated July 15, 1953, the Archbishop inquired of Dr. Pottle whether parents could legally sue the orphanage if their child, who was passed over to the orphanage for care, were injured while there. Dr. Pottle's curt reply of July 24, 1953 and Mr. Cramm's additional reply in November of that year made it clear that the government would not be providing the Archdiocese with the requested legal advice.

The Extent to Which the Wrongs May have Furthered the Archdiocese's Aims

[190] The Archdiocese's aims were to provide care and education for poor and orphaned Roman Catholic boys within the Roman Catholic faith and culture. These laudable objectives of the Archdiocese cannot be said to have been endorsed or encouraged in any way by the wrongful conduct of the Brothers.

There is no support in the record for such a finding and the appellants do not suggest it. Accordingly, the extent to which the sexual abuse could be said to have furthered the Archdiocese's aims weighs against a finding of vicarious liability.

The Association Between the Sexual Assaults and Friction, Confrontation and Intimacy

[191] In *Bazley*, McLachlin J. explained that when an employer's enterprise or objectives incidentally create a situation of friction and confrontation, such friction and confrontation may increase the chance of intentional misconduct and thereby give rise to the imposition of vicarious liability. It can also bring out the worst in people and thereby result in an increased risk of wrongful conduct. Support for the imposition of vicarious liability on this basis builds on the logic of risk and accident rather than implied authority. Orphanage rules, their enforcement, and potential resulting discipline easily give rise to friction and confrontation, and the evidence shows that this occurred at Mount Cashel. This is not to say that rules and discipline were unnecessary. However, the evidence discloses that physical discipline sometimes escalated into sexual abuse.

[192] The association between intimacy and the sexual assaults is much stronger. Intimate activities inherent in a 24-hour day institutional environment, like sleeping, bathing, and showering, are closely related to physical contact, and can provide opportunity for sexual abuse, as the evidence showed. As well, this environment naturally engaged the need for physical and social contact, and sometimes counseling and solace, which puts emotional intimacy in play.

[193] In short, living conditions at Mount Cashel exposed the intimate aspects of the appellants' physical and emotional lives, thereby giving opportunity and advantage to those Brothers who wished to abuse the boys in their care.

Power of the Brothers in Relation to the Appellants

[194] The Brothers exercised virtually full authority over the appellants. While the public may have appreciated the Archdiocese's authority over the Brothers and the orphanage, the appellants were hardly aware of an authority outside of the orphanage from whom they could seek help. Two of the appellants had no parents, and the other two had no family who could support them outside of the orphanage. When the appellants were at Mount Cashel, they left the site only with permission from the Brothers, and the evidence showed that such

permission could be easily or arbitrarily withheld. The boys were dependent on the Brothers for their every need and want.

[195] The evidence shows that the Brothers regulated and controlled all aspects of the appellants' daily lives. The ability of the appellants to partake in special activities like movie night as well as regular daily activities was entirely at the pleasure of the Brothers. As well, Father Doyle's report explains that the religious teachings of the Roman Catholic faith supported a culture of no complaint against religious officials.

[196] The Archdiocese vested the Brothers with power over the appellants within a structure requiring obedience to and respect for the Brothers. This set-up was ripe for the Brothers to exercise their unchecked power and authority over the appellants.

Vulnerability

[197] The extent of the Brothers' power over the appellants overlaps with their vulnerability. As minors, they were vulnerable; as boys with no viable alternative living arrangements and no effective means to complain, they were vulnerable; and as residents isolated from the broader community, they were vulnerable. Archbishop Currie, the Archdiocese's witness, acknowledged that they were vulnerable. Furthermore, the Archdiocese states in its factum at paragraph 24(e) that at least one of the appellants confirmed that "there was no one to turn to if a boy felt hard done by".

[198] Contrasting the appellants' circumstances with school boys who lived outside the orphanage is illustrative. School boys living at home were under the disciplinary code of teachers only during school hours. When school was over for the day, they went home to parents or caregivers who could take care of their needs. The family circumstances of the appellants did not provide refuge – that's why they were at Mount Cashel in the first place. Those who may have had a parent had little to no way to reach out to him or her. And, even if they could, parents could also have been reluctant to complain given both their dependency on Mount Cashel to shelter their children and the teachings of their faith, as Father Doyle's report explains. There is no doubt that the circumstances of the appellants enabled certain Brothers to take advantage of the appellants' vulnerability.

[199] The Archdiocese's delegation to the Brothers of unfettered power over the vulnerable child appellants warrants special attention in considering a power and

dependency relationship in the context of vicarious liability (*Bazley*, at para. 46). This circumstance weighs heavily in favor of ascribing responsibility for the sexual abuse of the appellants to the Archdiocese.

Conclusion on the Connection Between the Brothers' Assigned Tasks and their Wrongdoings

[200] Consideration of the secondary factors leads to the conclusion that there was a strong connection between the risk of harm the Archdiocese introduced in the community and the materialization of that risk. The Archdiocese exercised its authority over the Brothers and the orphanage in many ways, but it also provided the Brothers staffing Mount Cashel with the power, environment and tools to carry out their wrongdoing virtually undetected, while they were supposed to be carrying out the Archdiocese's legitimate objectives of caring for and educating the appellants. The link between the Archdiocese's introduction and perpetuation of the risk of harm and its manifestation is strong. The Brothers' sexual assaults of the appellants at Mount Cashel can fairly be regarded as sufficiently connected with the Brothers' assigned tasks in caring for the appellants and running Mount Cashel orphanage to justify the imposition of vicarious liability.

Disposition on Vicarious Liability for the Brothers' Wrongdoings

[201] In our view, the total relationship between the Brothers at Mount Cashel and the Archdiocese shows that the Brothers were working on the account of the Archdiocese's social and religious mandate. Their relationship was sufficiently close, and the connection between the Brothers' assigned tasks and their wrongdoing was sufficiently close, to justify the imposition of vicarious liability on the Archdiocese. Doing so in the circumstances of this case upholds the policy objectives of the doctrine.

[202] In the result, we allow the appeal respecting the Archdiocese's vicarious liability for the conduct of the five Mount Cashel Brothers who sexually assaulted the appellants, and accordingly impose vicarious liability on the Archdiocese for the wrongful conduct of the Brothers.

Issue 2: Is the Archdiocese liable for Monsignor Ryan's conduct?

[203] The Archdiocese assigned Monsignor Ryan to be the chaplain at Mount Cashel and he lived there, working in that capacity, from 1952 to 1964. His title was Spiritual Director of Mount Cashel Orphanage.

[204] The evidence at trial was that boys living at Mount Cashel told Monsignor Ryan that they had been sexually abused by Brothers and by a civilian employee. Most of these sexual abuse disclosures were made to Monsignor Ryan in confession. One witness testified that he told Monsignor Ryan about the abuse outside of confession.

[205] There were no allegations that Monsignor Ryan had ever sexually abused or otherwise mistreated the appellants, or any boys at Mount Cashel. The evidence at trial was clear that he did not.

[206] At trial, the appellants made two arguments relating to Monsignor Ryan's conduct. First they alleged he was negligent because he failed to act after he was told about the sexual abuse, and that the Archdiocese was vicariously liable for his negligence. Second, the appellants argued there was a fiduciary relationship between them and Monsignor Ryan and that he breached his fiduciary duty by failing to act when he was advised of the sexual abuse.

[207] The judge rejected these arguments.

[208] He concluded Monsignor Ryan was not negligent and, consequently, the Archdiocese was not vicariously liable. The judge reached this conclusion after considering the requirements for negligence, noting the appellants had to prove there was a duty of care owed by Monsignor Ryan to them and that this duty of care was breached. The judge concluded there was no duty of care in this circumstance. He further held that if a duty of care did exist, the appellants did not prove there was a breach of the duty.

[209] In light of these findings, the judge did not go on to consider the requirement of causation. That is, he did not assess whether Monsignor Ryan's alleged negligence caused the appellants' damages.

[210] Regarding vicarious liability, the judge decided the Archdiocese would have been vicariously liable if Monsignor Ryan had been negligent. However, as he found the appellants had not proved that Monsignor Ryan was negligent, the judge concluded there was no vicarious liability.

[211] The judge also rejected the argument that Monsignor Ryan had breached a fiduciary duty by failing to act when he was told of the sexual abuse. He found no fiduciary relationship existed between the appellants and Monsignor Ryan and, as a result, there was no breach of fiduciary duty.

[212] The appellants appeal the judge's conclusions that Monsignor Ryan was not negligent and that the Archdiocese was, consequently, not vicariously liable. Specifically, they appeal the judge's determinations that there was no duty of care and no breach of duty in negligence. They also appeal his determination that there was no breach of fiduciary duty.

[213] For this ground of appeal, the issues are:

> (a) Did the judge err in deciding Monsignor Ryan was not negligent and, as a result, that the Archdiocese was not vicariously liable?
>
> Specifically:
>
> (i) Did the judge err in finding Monsignor Ryan had no duty of care to the appellants in negligence?
>
> (ii) Did the judge err in finding that, if a duty of care existed, Monsignor Ryan did not breach this duty?
>
> (b) Did the judge err in finding there was no fiduciary relationship between the appellants and Monsignor Ryan, and therefore no breach of a fiduciary duty?

[214] For the reasons that follow, we conclude that the judge erred in finding that Monsignor Ryan owed no duty of care to the appellants. However, while a duty of care existed, the judge made no error in finding that the evidence did not establish a breach of duty. As a result, the judge did not err in concluding that Monsignor Ryan was not negligent.

[215] We also conclude that the judge made no error in finding there was no breach of fiduciary duty by Monsignor Ryan.

[216] Accordingly, we dismiss this ground of appeal. As Monsignor Ryan was not negligent and did not breach a fiduciary duty, there is no basis upon which the Archdiocese could be liable for his conduct.

Negligence and Vicarious Liability

[217] The appellants must establish that the judge erred in finding that Monsignor Ryan was not negligent. The judge outlined three requirements the appellants had to meet in order to successfully establish Monsignor Ryan's negligence and the Archdiocese's resulting vicarious liability.

[218] The first and second of these related to whether the Archdiocese would be vicariously liable for Monsignor Ryan's negligence. The third involved the requirements to be met to prove his negligence. The judge stated:

> [201] The Plaintiffs submit that an alternate source of liability on the part of the Archdiocese is grounded in the knowledge of Msgr. F. Ryan, the priest assigned to be the Chaplain at Mount Cashel from 1952 until 1964. That encompasses the period within which the Plaintiffs were abused by the Brothers. It is submitted that he was negligent in his failure to intervene to prevent the abuses when he received knowledge. There is no suggestion that he was complicit in the abuse itself. However, it is alleged that his knowledge led to a duty to act, and a failure to do so amounted to negligence.
>
> [202] If Msgr. Ryan is a source of liability for the Archdiocese, it would be on the basis of the principles of vicarious liability, discussed above. In order to find that the Archdiocese is vicariously liable, the Plaintiffs must prove three elements:
>
> 1. First, that the relationship between Msgr. Ryan and the Defendant is sufficiently close as to make a claim for vicarious liability appropriate;
>
> 2. Second, it must be demonstrated that any tort committed is sufficiently connected to the tasks assigned that it can be regarded as a materialization of the risks created by the Defendant's activities; (*K.L.B.* at para.19), and,
>
> 3. Third, that Msgr. Ryan was negligent, and his negligence was the cause of the damages suffered by the Plaintiffs. To find negligence on his part I must be satisfied:
>
>   a) That he owed a duty of care to the Plaintiffs;
>
>   b) That he breached that duty of care; and,
>
>   c) That [the] breach was the cause of the damages suffered by the Plaintiffs.

[219] The judge found that the appellants met the first and second requirements set out above, relating to vicarious liability.

[220] First, he was satisfied the relationship between Monsignor Ryan and the Archdiocese was sufficiently close such that the Archdiocese could be vicariously liable if Monsignor Ryan was negligent in failing to act.

[221] Second, the judge found that if Monsignor Ryan had acted negligently, his actions were sufficiently connected to his role and duties as a priest such that vicarious liability could be imposed on the Archdiocese.

[222] The judge stated in this regard:

> [203] As for the first element, it has already been decided that a priest is an employee of a diocese for the purposes of considering vicarious liability. See *Bennett* at paragraph 32 of the Supreme Court decision, where a diocese and bishop were found vicariously liable for the sexual assaults of a priest assigned to a parish. Without detailed analysis, I am satisfied that the relationship between Msgr. Ryan and the Archdiocese is sufficiently close that vicarious liability may be imposed. As a priest of the Archdiocese, he was subject to direction and assignment by the Archbishop and carried out the mission of the Archdiocese at the parish housed at Mount Cashel. On this basis, I find that Msgr. Ryan was effectively an employee, and if he was negligent in a manner that caused the Plaintiffs harm, the first element of vicarious liability is made out.
>
> [204] As for the second element, I am also satisfied that if a tort was committed by Msgr. Ryan, it would have been in his role as a chaplain or parish priest, as assigned by the Archbishop. All the allegations relate to information received by him in his role as a priest/confessor. If negligence arose from these circumstances, then the second element of vicarious liability is made out.

[223] There was no appeal of the judge's conclusion that the Archdiocese would be vicariously liable for Monsignor's Ryan's negligence, if negligence was established. Therefore, this finding need not be further considered. The appeal proceeded on the basis that, if Monsignor Ryan was negligent, the Archdiocese would be responsible to the appellants by operation of the principle of vicarious liability.

Was Monsignor Ryan Negligent?

[224] The main focus, at trial and on appeal, was on the third requirement the judge outlined above, relating to whether Monsignor Ryan was negligent in failing to act when told of the sexual abuse. The judge noted this as the key issue.

> [205] The third element in this case is the most important and will be controversial. Msgr. Ryan is not accused of committing a tortious act of sexual abuse. The Plaintiffs say he was negligent in not stopping it once he became aware of it, and therefore contributed to the damages suffered [*sic*] by the Brothers who committed the tortious acts. …

[225] The judge reviewed the evidence presented at trial, and assessed whether Monsignor Ryan owed a duty of care to the appellants and whether he had breached any duty owed. He concluded that there was no duty of care and no breach of duty in these circumstances.

Determining Whether a Duty of Care Exists: the *Anns*/*Cooper* Test

[226] In *Rankin (Rankin's Garage & Sales) v. J.J.*, 2018 SCC 19, [2018] 1 S.C.R. 587, the Supreme Court of Canada summarized the test to establish a duty of care in negligence.

[227] The Court traced the development of the duty of care requirement from its beginnings in *Donoghue v. Stevenson*, [1932] A.C. 562 (U.K. H.L.), to the test set out in *Anns v. Merton London Borough Council*, [1978] A.C. 728 (U.K. H.L.). This test, affirmed and clarified by the Supreme Court in *Cooper v. Hobart*, 2001 SCC 79, [2001] 3 S.C.R. 537, and other cases, has become known as the *Anns*/*Cooper* test. The Court in *Rankin's Garage* stated:

> [16] ... *Donoghue v. Stevenson*, [1932] A.C. 562 (H.L.), revolutionized tort law by defining a principled approach to the development of the tort of negligence. Lord Atkin's famous achievement in this regard was his articulation of the "neighbour principle", under which parties owe a duty of care to those whom they ought reasonably to have in contemplation as being at risk when they act: *Stewart v. Pettie*, [1995] 1 S.C.R. 131, at para. 25.
>
> [17] The modern law of negligence remains based on the foundations set out in *Donoghue*. It is still the case today that "[t]he law takes no cognizance of carelessness in the abstract": *Donoghue*, at p. 618, per Lord Macmillan. Unless a duty of care is found, no liability will follow. Similarly, the neighbour principle continues to animate the *Anns*/*Cooper* test that Canadian courts use to determine whether a duty of care exists.

[228] The *Anns*/*Cooper* test has two stages. In the first stage, issues of foreseeability of harm and the proximity of the relationship in question are considered to determine whether a duty of care exists.

[229] In *Rankin's Garage* the Court observed at paragraph 19 that, to prove the existence of a duty of care, a plaintiff must "establish that the harm was a reasonably foreseeable consequence of the defendant's conduct in the context of a proximate relationship". If this is established by the plaintiff, a *prima facie* duty of care is said to exist. If not, there is no duty of care:

> [18] … If it is necessary to determine whether a novel duty exists, the first stage of the *Anns*/*Cooper* test asks whether there is a relationship of proximity in which the failure to take reasonable care might foreseeably cause loss or harm to the plaintiff: *R. v. Imperial Tobacco Canada Ltd.*, 2011 SCC 42, [2011] 3 S.C.R. 45, at para. 39; see also *Childs v. Desormeaux*, 2006 SCC 18, [2006] 1 S.C.R. 643, at para. 12; *Cooper*, at para. 30. Once foreseeability and proximity are made out, a *prima facie* duty of care is established.

> [19] Whether or not a duty of care exists is a question of law and I proceed on that basis: *Galaske v. O'Donnell*, [1994] 1 S.C.R. 670, at p. 690. The plaintiff bears the legal burden of establishing a cause of action, and thus the existence of a *prima facie* duty of care: *Childs*, at para. 13. In order to meet this burden, the plaintiff must provide a sufficient factual basis to establish that the harm was a reasonably foreseeable consequence of the defendant's conduct in the context of a proximate relationship. In the absence of such evidence, the claim may fail: see, e.g., *Childs*, at para. 30.

[230] The second stage of the *Anns*/*Cooper* test is considered when a *prima facie* duty of care has been found to exist. In the second stage, a court can consider whether, for policy reasons, a *prima facie* duty of care should be negated, and therefore should not be recognized.

[231] The Supreme Court in *Rankin's Garage* indicated that in this second stage the defendant has the burden to show that there are "residual policy reasons" why a *prima facie* duty of care should not be recognized or acknowledged.

> [20] Once the plaintiff has demonstrated that a *prima facie* duty of care exists, the evidentiary burden then shifts to the defendant to establish that there are residual policy reasons why this duty should not be recognized: *Childs*, at para. 13; *Imperial Tobacco*, at para. 39.

[232] In *Broome*, Cromwell J. succinctly summarized the two part analytical approach in the *Anns*/*Cooper* test (referred to in that decision as the *Anns/Kamloops* test) in the following terms:

> [14] The first step under the *Anns/Kamloops* test is to ask whether the relationship between the appellants and the respondents discloses sufficient foreseeability and proximity to establish a *prima facie* duty of care. If it does, the analysis moves to the second step which is concerned with whether there are residual policy considerations, transcending the relationship between the parties, that negate the existence of such a duty.

Duty of Care Relating to a Failure to Act (Nonfeasance)

[233] Before further considering the *Anns*/*Cooper* test in the context of the facts of this case, we note that the claim against Monsignor Ryan in negligence is based on an allegation that he failed to act when advised of incidents of sexual abuse.

[234] As such, the alleged negligence is premised on Monsignor Ryan's nonfeasance, his failure to take action. This differs from an allegation of negligence based on misfeasance, where a defendant's overt act causes

foreseeable harm (for example, when a driver's inattentiveness causes a motor vehicle accident or an electrician's careless work results in a fire).

[235] In *Childs v. Desormeaux*, 2006 SCC 18, [2006] 1 S.C.R. 643, the Supreme Court discussed factors to be considered when a duty of care is alleged to arise from a defendant's nonfeasance. The Court identified circumstances where there is a positive duty to act.

[236] Regarding the possible imposition of a duty of care arising from nonfeasance, the Court stated that, in such cases "[i]n the absence of an overt act on the part of the defendant, the nature of the relationship must be examined to determine whether there is a nexus between the parties" (*Childs*, at para. 31).

[237] The Court in *Childs* identified situations where, in a claim based on nonfeasance, a positive duty is said to flow from the presence of a "special link or proximity". The Court noted that these situations "function not as strict legal categories, but rather to elucidate factors that can lead to positive duties to act" and "bring parties who would otherwise be legal strangers into proximity and impose positive duties on defendants that would not otherwise exist" (*Childs*, at para. 34).

[238] One of the situations identified by the Court, where there is a positive duty to act, involves "paternalistic relationships of supervision and control, such as those of parent-child or teacher-student", including circumstances where there is "special vulnerability of the plaintiffs and the formal position of power of the defendants" (*Childs*, at para. 36).

The Judge's Duty of Care Analysis

[239] In *Rankin's Garage* at paragraph 18, the Court indicated that the *Anns/Cooper* test is used when "it is necessary to determine whether a novel duty exists". Therefore, a preliminary point is whether the present case involves the determination of a "novel duty", thereby necessitating an *Anns/Cooper* analysis.

[240] At trial, the judge and parties proceeded on the basis that it was appropriate, and necessary, to use the *Anns/Cooper* test to decide whether Monsignor Ryan owed a duty of care to the appellants.

[241] It was not argued in this appeal that the judge erred in using the *Anns/Cooper* test to determine whether a duty of care existed. There was no suggestion that a duty of care had already been recognized in a prior, similar

case, thereby making it unnecessary to conduct an *Anns/Cooper* analysis in this case. The appellants submitted that the judge, in using *Anns/Cooper*, "correctly sets out the test for identifying a duty of care". The appellants' argument was that the judge erred in his application of the test, particularly regarding proximity and foreseeability. Accordingly, the appeal's focus was on reviewing the judge's application of the test to the facts of this case.

[242] The judge noted the requirements of the *Anns*/*Cooper* test, and stated that to "define a duty of care, two concepts must be addressed: proximity and foreseeability, and the existence of any mitigating circumstances" (para. 226).

[243] In the first stage of the *Anns*/*Cooper* analysis, the judge found the requirements of proximity and foreseeability were not met, and he concluded as a result that no *prima facie* duty of care existed.

[244] As for the second stage of *Anns*/*Cooper*, regarding the possible negation of a *prima facie* duty of care for policy reasons, the judge noted that this was not argued and was not applicable to this case. Therefore no policy analysis was undertaken. The duty of care analysis was limited to considering proximity and foreseeability under the first stage of *Anns*/*Cooper*.

[245] The appellants assert that the judge erred in his analysis of proximity and foreseeability, and in his conclusion that there was no duty of care.

Did the Judge Err in Concluding There was No Duty of Care?

[246] Whether or not a duty of care exists is a question of law (*Rankin's Garage*, at para. 19). As such, any finding that a duty of care did or did not exist is reviewable on a correctness standard. The judge determined that no duty of care existed in this case because he found the requirements of proximity and foreseeability were not met. The judge's determination will be reviewed, on a correctness standard, beginning with his analysis of proximity.

Proximity

[247] In *Broome*, Cromwell J. considered the requirement that a sufficiently proximate relationship must exist to establish a duty of care. He noted that factors, including "physical closeness, expectations, representations, reliance …", may be relevant in determining legal proximity.

> [16] The question of whether there is sufficient proximity is concerned with whether the relationship between the plaintiff and defendant is sufficiently close and

> direct to give rise to a legal duty of care, considering such factors as physical closeness, expectations, representations, reliance and the property or other interests involved: *Hill v. Hamilton-Wentworth Regional Police Services Board*, 2007 SCC 41, [2007] 3 S.C.R. 129, at paras. 23-24 and 29.

These factors had also been previously identified by the Supreme Court in *Cooper v. Hobart,* at paragraph 34.

[248] The judge applied these factors in his proximity analysis. With regard to the factor of "physical closeness", the judge determined that Monsignor Ryan was proximate in the physical sense, because he lived at Mount Cashel as chaplain. However he found this was insufficient, and that Monsignor Ryan's relationship with the appellants was not sufficiently proximate to satisfy the legal requirements to create a duty of care in negligence.

> [230] Msgr. Ryan was proximate in one sense. He was the chaplain at Mount Cashel. He was not, however, in the same position of trust and care-giving as the Brothers. His only contact with the boys was during religious services. He had no responsibility for their care. His living quarters were physically separate from the orphanage, and neither he nor the boys had access to each other's living area.

[249] Regarding the factor of "expectations", noted in *Broome*, the judge noted that the boys at Mount Cashel saw Monsignor Ryan as someone who they expected, or at least hoped, might be able to help them.

> [232] On the issue of expectations of the boys, they clearly saw him as someone who might have been able to help them. It is understandable that they would have related their experiences of abuse in the confessional. …

[250] With respect to the factors of "representations" and "reliance", discussed in *Broome,* the judge noted that there was evidence from one witness that he had informed Monsignor Ryan about having been sexually abused and that the witness "indicated Msgr. Ryan promised to follow up with the Superior" (para. 218).

[251] Despite the presence of some of the factors set out in *Broome* which might be considered to be possible indicia of proximity, the judge ultimately concluded that the relationship between Monsignor Ryan was not sufficiently proximate to create a duty of care.

[252] The judge's conclusion on proximity was based on his assessment that Monsignor Ryan was not "in the same position of trust and care-giving as the Brothers" (para. 230), and that Monsignor Ryan's role was limited to religious

duties and he "would not have had any role in any aspect of governance of the orphanage" (para. 231). He stated:

> [231] He was not given any authority over the boys, nor did he have any responsibility for their education, care or discipline. He had no formal relationship with the Superior of the orphanage. He undoubtedly collaborated with the Superior on matters of religious services but would not have had any role in any aspect of governance of the orphanage.

[253] We conclude that the judge erred in his analysis and conclusion on proximity. It is certainly true that the Brothers were in a more direct role in terms of the boys' care-giving, and had greater authority over their day-to-day lives. However this does not mean Monsignor Ryan did not also have a duty of care. The issue of whether Monsignor Ryan's relationship with the boys was sufficiently proximate is not determined by comparing his role with that of the Brothers. Further, there is no requirement that Monsignor Ryan have responsibility for governance of the orphanage for a duty of care to arise.

[254] To determine whether a relationship of legal proximity existed that was sufficient to support a duty of care in negligence, it is necessary to assess the circumstances of Monsignor Ryan's relationship with the boys and his responsibilities to them.

[255] As chaplain at Mount Cashel, Monsignor Ryan had specific responsibilities and duties with respect to the boys. His official duties included attending to the boys' religious and spiritual development, for example through their participation in mass and confession. The appellants testified that they attended mass each morning and confession each week, on Saturday. Monsignor Ryan was the regular officiant on these daily and weekly occasions.

[256] The judge characterized Monsignor Ryan's function as being restricted to religious activities, but this ignores the context of his role and responsibilities as chaplain in residence at Mount Cashel. It is clear from the evidence that his role went well beyond saying mass and hearing confessions. Mount Cashel was not a secular institution. It was a place where religion was the central organizing principle. The appellants testified that religion was omnipresent. For this reason, Monsignor Ryan was assigned by the Archbishop to live and work at Mount Cashel and be present in the boys' lives. His role was adjunct to and directly associated with the Archdiocese's objectives relating to the orphanage's operations. As the judge noted at paragraph 203 of the judgment, Monsignor Ryan "carried out the mission of the Archdiocese at the parish housed at Mount Cashel".

[257] Monsignor Ryan played an important role as resident priest and Spiritual Director of Mount Cashel Orphanage. His connection to Mount Cashel was not fleeting or casual. He was a constant presence there from 1952 to 1964. While he did not live directly among the boys, his residence was on site at the orphanage. Throughout his 12 years in residence there, he would have been familiar with the boys' daily routines and would have come to have known many of them, and many of the Brothers. His responsibilities went beyond formal religious instruction and extended to promoting the boys' overall well-being.

[258] The judge compared the Brothers' relationship with the boys with Monsignor Ryan's relationship with them, and concluded no duty of care arose because the Brothers had more significant interaction with and more control and authority over the boys. In this regard, the judge noted that the Brothers were responsible for many parts of the boys' everyday lives, including providing their meals, their education, addressing health concerns, and so on. Monsignor Ryan was not engaged in these quotidian aspects of the boys' lives and he did not participate in the boys' daily routine to the same extent as the Brothers.

[259] However this does not mean that Monsignor Ryan's relationship with the boys was not sufficiently proximate to create a duty of care. It does not mean that Monsignor Ryan would not be expected to act when told by boys that they were being sexually abused. Whether Monsignor Ryan had a duty of care cannot be determined by comparing his interactions with the boys, and his responsibilities, to those of the Brothers. Proximity is not purely a mathematical calculation where only one entity, the one with greater control or authority, can have a duty of care. The Brothers undoubtedly had a duty of care in this context and so did Monsignor Ryan, having been directly told, in his official capacity as resident chaplain at Mount Cashel, of sexual abuse allegations.

[260] The judge found that "Msgr. Ryan had no duties *vis à vis* the care of the boys and the management of the orphanage" (para. 235). However, as resident priest in a religious institution, he did have global responsibilities for the boys' spiritual and religious care, and their general well-being. As well, there is no need to establish that he was involved in the management of the orphanage for a duty of care to exist.

[261] It also does not follow, as the judge posits at paragraph 235 of the judgment, that, "[a]s an agent of the Archdiocese, Msgr. Ryan would have had to be placed in a position of authority over the children, and perhaps the Brothers, for any knowledge to have triggered a duty of care". This, in our view,

takes too narrow a view of proximity. Both the Brothers and Monsignor Ryan had their respective responsibilities to the boys. Both played different, significant and complementary roles in their lives. There was no evidence that, in his role as spiritual leader, Monsignor Ryan would have been prohibited from taking action when apprised of sexual abuse allegations.

[262] Further the context of Mount Cashel orphanage in the 1950s, where Monsignor Ryan and the boys lived, is relevant. The appellants testified that, while at Mount Cashel, contact with their respective families or anyone else outside the orphanage was limited. They testified that their days were spent mainly at Mount Cashel. Mount Cashel was their home and life was generally restricted to its confines. Until they were in senior grades, residents would have attended school exclusively within the orphanage. The evidence was that there was little opportunity to leave or interact with the outside world, and few reasons to do so.

[263] The particular, isolated nature of the everyday life at Mount Cashel in the 1950s is a contextual factor to be considered when determining whether the relationship between the appellants and Monsignor Ryan was sufficiently proximate such that a duty of care existed at the time disclosures of sexual abuse were made to him. Physical isolation meant limited access to those who the boys might otherwise seek out to disclose their circumstances or request assistance.

[264] The evidence was that the boys did not have unfettered access to Monsignor Ryan. Some appellants testified that they were not encouraged to contact him or approach him at will. However, the evidence was also clear that the residents understood who Monsignor Ryan was, that they were aware of his role as the resident priest at Mount Cashel, and that they knew he was not one of the Brothers who were perpetrating the abuse. They also understood that they would normally see him at daily mass and weekly confession, where most of the disclosures of sexual abuse were made.

[265] We conclude that the judge erred in requiring that Monsignor Ryan needed to be "placed in a position of authority over the children, and perhaps the Brothers, for any knowledge to have triggered a duty of care" (para. 235). As chaplain and Spiritual Director of Mount Cashel Orphanage, Monsignor Ryan would have had, in his own right, responsibilities for the boys' well-being. We cannot agree with the proposition that, in this context, his duties would be strictly limited to saying mass and hearing confession, or that his responsibilities would be so restrictive as to permit him to ignore allegations of sexual abuse.

[266] Such a result would be tantamount to concluding that these allegations of sexual abuse were not Monsignor Ryan's concern because they did not fall within the limited category of formal religious instruction. It would be to conclude that these allegations were none of his business as the long-serving, resident priest at Mount Cashel in the period the abuse occurred. In our view, the factual context of this case provides a sufficiently proximate relationship between Monsignor Ryan and the appellants that these disclosures would certainly have been Monsignor Ryan's business and concern.

[267] Monsignor Ryan's lesser authority over the boys in comparison with the Brothers, or his lack of direct authority over the Brothers or over the management of Mount Cashel, does not mean that he had no duty of care to act in light of sexual abuse disclosures. Authority alone does not create the duty of care in this context. Although he was not involved in the day-to-day governance of Mount Cashel, he did have responsibilities for the boys' overall well-being and it cannot be said that Monsignor Ryan's role was so minor, irrelevant or fleeting that a proximate relationship with the appellants was precluded.

[268] Based on the unique factual circumstances in this case and Monsignor Ryan's specific role as chaplain at Mount Cashel, we find the relationship between Monsignor Ryan and the appellants was, in the language of *Broome*, "sufficiently close and direct to give rise to a legal duty of care, considering such factors as physical closeness, expectations, representations, reliance …" (*Broome*, at para. 16).

[269] Further, and mindful of the considerations set out by the Supreme Court in *Childs*, we conclude that the nature of the relationship between Monsignor Ryan and the appellants created the necessary "nexus between the parties", to create the "special link or proximity" required to impose a positive duty to act (*Childs*, at paras. 31 and 34).

[270] The nature of Monsignor Ryan's relationship with the appellants in the context of Mount Cashel in the 1950s, his pastoral and religious role, his responsibilities arising from his position as resident chaplain at Mount Cashel, and, significantly, the specific context of the interactions with the boys and the sexual abuse disclosures made to him, created a relationship of sufficient proximity to ground a duty of care in negligence.

[271] However, proximity alone does not create a duty of care. Foreseeability must also be considered.

Foreseeability

[272] In *Hill v. Hamilton-Wentworth Regional Police Services Board*, 2007 SCC 41, [2007] 3 S.C.R. 129, the Supreme Court stated that the question to be determined when assessing foreseeability is "whether it was reasonably foreseeable that the actions of the alleged wrongdoer would cause harm to the victim". The Court also noted, at paragraph 22, Lord Atkin's statement on foreseeability in *Donoghue v. Stevenson*, that one "must take reasonable care to avoid acts or omissions which you can reasonably foresee would be likely to injure your neighbour".

[273] The judge found that, mainly due to the positive reputation of the Brothers at the time the abuse occurred, it "would not have been foreseeable that these acts could have taken place". He concluded that foreseeability was not established:

> [241] The second part of finding a duty is whether there was foreseeability. In the context of Mount Cashel in the 1950's it must be considered that no allegations of sexual abuse had ever come forward. …
>
> …
>
> [244] … Foreseeability by definition is the subjective view of the observer. Sexual abuse involving religious individuals had never come to light before. Dr. Fitzgerald testified that the Christian Brothers during the first half of the 20th century were considered stellar educators. Their reputation was unblemished. The first publicly disclosed incident of sexual abuse did not come to light until the 1960's, and that could have been considered an isolated incident at that time.
>
> …
>
> [246] Even if proximity was evident, on the issue of foreseeability the evidence falls short. Even the Plaintiffs, in their testimony, were of the view that no one would believe them if they disclosed because of the stellar reputation of the Brothers.

[274] The judge summarized his conclusion on foreseeability at paragraph 265 of the judgment, holding that it "would have been unthinkable" that the Brothers could have been sexually abusing boys at Mount Cashel. As a result, he found these acts would not have been foreseeable by Monsignor Ryan.

> [265] On the question of foreseeability … the misconduct with which we are concerned would have been unthinkable. Therefore, any disclosure made to the priest would have been assessed as to its credibility on the basis of what he knew at the time. At that time, in my view, it would not have been foreseeable that these acts could have taken place.

[275] For the reasons that follow, we conclude that the judge made two errors in his analysis and conclusion on foreseeability.

[276] The first relates to whether a subjective or objective standard is used in assessing reasonable foreseeability. The judge indicated that a subjective test is applied, stating "[f]oreseeability by definition is the subjective view of the observer" (para. 244).

[277] However, with respect, this is not the standard. The Supreme Court confirmed in *Rankin's Garage* that the test is objective, stating at paragraph 53 that "[w]hether or not something is 'reasonably foreseeable' is an objective test", and that the "analysis is focused on whether someone in the defendant's position ought reasonably to have foreseen the harm rather than whether the specific defendant did".

[278] The focus in this case, then, should not have been on Monsignor Ryan, but rather on whether a reasonable person in Monsignor Ryan's circumstances at Mount Cashel, in light of the disclosures regarding sexual abuse, "ought reasonably to have foreseen the harm" (*Rankin's Garage*, at para. 53), if no action was taken.

[279] The judge's statement that "foreseeability by definition is the subjective view of the observer", is arguably ambiguous in terms of whether he meant the "observer" to be Monsignor Ryan or a reasonable person in Monsignor Ryan's position. However, it is apparent from the judgment that the judge was applying a subjective standard of foreseeability, focusing on what Monsignor Ryan would have believed, rather than an objective, reasonable person standard.

[280] The judge's focus on whether disclosures of sexual abuse were understood and believed by Monsignor Ryan illustrates this application of a subjective, rather than objective standard. The judge stated that he believed that disclosures of sexual abuse were made, noting: "… I do not doubt that the disclosures were made. I found the testimony and the written statements believable and accept that Msgr. Ryan was told" (para. 267).

[281] However, the judge also indicated that he was not persuaded that Monsignor Ryan understood or believed the disclosures. He observed that these disclosures "may have either not been believed or may have been misunderstood by the confessor" (i.e. Monsignor Ryan). He concluded on this point: "Consequently, while I believe their testimony, I am not persuaded that the priest would have fully understood or believed what had been said" (para. 268).

[282] Applying an objective test of reasonable foreseeability, the question to be considered is not what Monsignor Ryan would have understood or believed. It is whether a reasonable person in his situation ought to have foreseen harm if no action was taken. The judge makes no reference to what a reasonable person ought to have foreseen. We conclude that the judge erred in this regard.

[283] The second error in the judge's approach is that the focus was on whether the abuse was foreseeable. However, when assessing foreseeability, the Supreme Court has indicated that the focus must be on whether harm or injury to the plaintiff was foreseeable. It is the foreseeability of harm resulting from a failure to act which must be considered, not whether people would have believed the Brothers were sexually assaulting the boys.

[284] In *Deloitte & Touche v. Livent Inc. (Receiver of)*, 2017 SCC 63, [2017] 2 S.C.R. 855, the Supreme Court stated that the main issue to be determined in this context is whether injury or harm to a plaintiff is reasonably foreseeable.

> [32] Assessing reasonable foreseeability in the *prima facie* duty of care analysis entails asking whether an injury to the plaintiff was a reasonably foreseeable consequence of the defendant's negligence (*Cooper*, at para. 30).

[285] The key question is whether, on an objective analysis, a person in Monsignor Ryan's situation ought to have reasonably foreseen that future harm might result from a failure to act. Ultimately this question was not addressed because the judge's focus was on foreseeability of the particular abuse disclosed to Monsignor Ryan, not foreseeability of harm from a general failure to act.

[286] The judge emphasized that it would not have been foreseeable that the specific acts had occurred. But *Deloitte & Touche* compels a different question - whether it ought to have been foreseeable to a reasonable person in Monsignor Ryan's circumstances that there was a risk of future harm to the boys if no action was taken. These are not the same and cannot be conflated.

[287] Further, even with regard to Monsignor Ryan's own understanding and beliefs, the judge's finding that Monsignor Ryan may not have understood or believed the disclosures of sexual abuse might be regarded as speculative, and unsubstantiated by the evidence. While there was evidence about the Brothers' positive reputation, described in the judgment as "stellar", there was no evidence regarding Monsignor Ryan's state of mind, beliefs or understanding of the sexual abuse disclosures. As the judge noted, unfortunately we do not have the benefit of Monsignor Ryan's testimony (para. 217).

[288] Also, while the evidence was that the Brothers enjoyed a good reputation with the general public, the public did not have the same knowledge that Monsignor Ryan had about multiple allegations of sexual abuse. The public did not view matters through the same lens as a chaplain living and working at Mount Cashel, to whom these allegations had been made about the Brothers.

[289] The judge also noted that some of the witnesses expressed uncertainty as to whether their allegations of sexual abuse would be believed, given the power imbalance that existed and the Brothers' positive reputation. However, this is not determinative. What matters is not whether the boys thought they would or would not be believed, but whether a reasonable person, in the position of chaplain and priest at the orphanage, advised of sexual abuse by the boys, ought to have foreseen harm from inaction.

[290] As well, the judge noted the evidence from one witness who testified that when he told Monsignor Ryan that he had been sexually abused, Monsignor Ryan said he would follow up with the Superior at Mount Cashel. The judge noted this evidence, as follows: "At that time, he said, the priest promised to speak to the Superior about the situation" (para. 212). There is no indication that the judge did not accept or believe this evidence. However, Monsignor Ryan's promise to speak to the Superior about the abuse would be unnecessary, and would make no sense, if it is assumed he did not understand or believe that a boy had been sexually abused by a Brother.

[291] In summary, in our respectful view, the judge erred in his analysis of foreseeability in two respects. First, he applied a subjective standard when the appropriate standard is objective (*Rankin's Garage*, at para. 53). Second, he did not address the primary question of foreseeability of future harm (*Deloitte & Touche*, at para. 32).

[292] Applying a correctness standard of review *(Rankin's Garage*, at para. 19), we find that that the judge erred in his analysis, and, consequently, in concluding that the foreseeability requirement was not met.

[293] The foreseeability analysis in this case should have been focused on whether an individual serving as resident chaplain at Mount Cashel, to whom direct disclosures of abuse were made, ought to have reasonably foreseen harm resulting to the boys in future if no action was taken. If so, then the harm was foreseeable. In this case, we would conclude that it was.

[294] In the result, we have determined that the requirements of both proximity and foreseeability have been met in this case. As such, we conclude that a *prima facie* duty of care has been established pursuant to the first stage of the *Anns*/*Cooper* test.

Should the Prima Facie Duty of Care be Negated for Policy Reasons?

[295] In the second stage of the *Anns*/*Cooper* test we consider whether, for policy reasons, a *prima facie* duty of care should be negated, and should not be recognized.

[296] In *Broome*, Cromwell J. indicated at paragraph 14 that the second stage of the test is "concerned with whether there are residual policy considerations, transcending the relationship between the parties, that negate the existence of such a duty".

[297] The Supreme Court in *Rankin's Garage* stated at paragraph 20 that when a *prima facie* duty of care is established, and the second stage of *Anns*/*Cooper* is engaged, "the evidentiary burden then shifts to the defendant to establish that there are residual policy reasons why this duty should not be recognized".

[298] As discussed above, the judge found no *prima facie* duty of care, and no policy analysis was undertaken under the second stage of *Anns*/*Cooper*. He noted that the Archdiocese made no argument that a *prima facie* duty of care should be negated for policy reasons.

[299] Similarly, on appeal the Archdiocese did not argue that there was any policy reason to displace a *prima facie* duty, if one was found to exist. We conclude that the *prima facie* duty of care is not displaced.

[300] We make one further observation. Although there was no argument directly on the issue, we note that most of the disclosures of sexual abuse were made to Monsignor Ryan in the context of confession. Therefore, the confidential nature associated with the so-called "seal of the confessional" might have been advanced as a possible residual policy issue in this context, potentially negating any duty of care to act on disclosures made in the confessional.

[301] However, in our view, it is inappropriate to consider this issue at this time for a number of reasons. First, the issue was not argued on appeal. Second, and because it was not argued, there was no evidence or submissions "to establish

that there are residual policy reasons why this duty should not be recognized" (*Rankin's Garage*, at para. 20).

[302] Third, as discussed further below, the judge made a finding that, despite the fact that most of the disclosures were made in confession, the evidence was that, in these circumstances, "notwithstanding the seal of the confessional" it was possible to have "found a way to bring the issue outside the confines of the confessional" (para. 269). The judge's conclusion relating to the seal of the confessional was not appealed. We were not asked to review it. As such, we need not consider the matter further nor make a determination on this point.

[303] Fourth, and significantly, while most of the sexual abuse disclosures were made in the context of confession, the evidence indicates that some were made outside confession where there would be no issue regarding the seal of the confessional.

[304] Accordingly, we conclude that the second stage of *Anns*/*Cooper* has no application to the present matter. A *prima facie* duty of care exists and has not been negated for policy reasons.

The Judge's Breach of Duty Analysis

[305] Although he found no duty of care, the judge went on to consider whether, if a duty of care did exist, there was a breach of that duty. He concluded, based on the evidence at trial, that there was no breach.

[306] The judge identified four requirements the appellants would have to prove to establish a breach of duty: first, that Monsignor Ryan was informed of the sexual abuse; second, that he understood the disclosures and believed they were credible; third, that he could have addressed the disclosures notwithstanding that they were made in confession; and fourth, that having understood the disclosures, Monsignor Ryan did nothing about them (para. 266). The judge outlined these requirements as follows:

> [266] In respect of the evidence, there were a number of weaknesses undermining the Plaintiffs submission of liability on the part of Msgr. Ryan. Assuming the existence of a duty of care, in order to prove on a balance of probabilities that there was a breach of that duty the Plaintiffs had the burden to prove:
>
> 1. That the priest had been informed of the abuse by disclosures in the confessional;

2. That the priest would have understood what was being communicated, and believed that the disclosures were credible;

3. That he could have addressed the disclosures, notwithstanding the seal of the confessional; and

4. That the priest, having understood the disclosures, did nothing about them.

[307] He found that the appellants satisfied two of the requirements listed above. First, he accepted that the disclosures regarding sexual abuse were actually made to Monsignor Ryan, stating:

> [267] On the first issue, I do not doubt that the disclosures were made. I found the testimony and the written statements believable and accept that Msgr. Ryan was told.

[308] Second, he concluded that while some of the disclosures of sexual abuse were made in confession, that did not preclude Monsignor Ryan from acting on the information:

> [269] The seal of the confessional was an important consideration. …the seal was a religious belief and does not necessarily bind the civil law. The evidence of both Canon Law experts was to the effect that a priest could have found a way to bring the issue outside the confines of the confessional. In addition, we are dealing with children at the time, who, even if aware of the confidential nature of confession, could not be bound therefore by any implicit acceptance of privacy. I would not accept the seal of the confessional as a defence.

[309] These findings were not appealed and need not be further considered.

[310] The judge concluded that the remaining two requirements listed above were not satisfied. These were that Monsignor Ryan understood and believed the disclosures of sexual abuse, and that it was proved that Monsignor Ryan failed to act in light of the disclosures.

[311] On the first of these, relating to Monsignor Ryan's understanding and belief of the disclosures, the judge stated that it was important to consider the subjective belief of Monsignor Ryan. He noted that the appellants must prove that "the priest would have understood what was being communicated, and believed that the disclosures were credible" (para. 266).

[312] While the judge believed the disclosures of sexual abuse had been made by the boys, he was not persuaded that the disclosures would have been understood or believed by Monsignor Ryan. He stated:

> [268] … I am left with some doubt about whether the priest received the messages as told by the boys. … Those disclosures may have either not been believed or may have been misunderstood by the confessor. Several of the witnesses, including the Plaintiffs, confirmed in their testimony that they were not even certain how to describe what had happened to them. All of them also indicated that it was unlikely they would be believed. The question of believing their disclosures must also be considered in the context of the times. The reputation of the Brothers was such that no one would have considered this kind of abuse was possible. Consequently, while I believe their testimony, I am not persuaded that the priest would have fully understood or believed what had been said.

[313] This issue has already been considered above, in the discussion on whether a duty of care existed. For the reasons provided above, the judge erred in using a subjective test and addressing the wrong legal question. As noted above, the fact that the Brothers enjoyed a good reputation in the community, or that the boys themselves thought it would be unlikely they would be believed, is not determinative. The question is not whether Monsignor Ryan understood the disclosures (there was no evidence he did not understand them) or whether he believed them to be true, but whether a reasonable person in this circumstance, being apprised of sexual abuse, would have foreseen harm in not acting.

[314] This issue relates mainly to whether a duty of care existed, not whether there was a breach of duty. As it has already been considered above, the issue need not be addressed further, except to note that it does not provide a basis to conclude there was no breach of duty.

[315] Finally, the judge found that the evidence at trial did not prove on a balance of probabilities that Monsignor Ryan failed to act when told of the sexual abuse. As a result of this finding, the judge concluded there was no breach of duty.

The Judge did not Explicitly Identify the Standard of Care

[316] Before assessing the judge's conclusion that there was no breach of duty, we note that the judgment does not explicitly define what, exactly, was Monsignor Ryan's duty of care. There is no definitive statement setting out the standard of care against which Monsignor Ryan's conduct was to be measured.

[317] The judge observed that Monsignor Ryan's duty would have been to "act" or "take action" when told of the abuse. This action would have involved at least disclosing or reporting the allegations of abuse to the Brother Superior at Mount Cashel, and possibly taking further action and advising the Archbishop in the event the Superior did not act.

[318] This would have been a duty at common law because a statutory duty to report the abuse of children did not exist in this province until created by legislation, well after the 1950s.

[319] The judge noted:

> [234] It might be said that becoming aware of the sexual assaults being committed by the Christian Brothers against [a] child would have raised a duty to do something about it, given that in his role as chaplain he would have had the ability to broach the issue with those in authority. …
>
> …
>
> [253] … [Notwithstanding that disclosures were made in confession, the witnesses] all felt, however, that with knowledge, Msgr. Ryan could have found a way to communicate with the Superior of the orphanage, and barring action, report to the Archbishop.
>
> …
>
> [299] Even if I accept this evidence as sufficient to raise a duty to intervene, we have no evidence whether the priest followed up with the Superior of the orphanage. …

[320] On appeal, neither party provided submissions as to what standard of care Monsignor Ryan had to meet and neither party alleged that the judge had erred in respect of the standard of care. The main issue was whether the evidence established that Monsignor Ryan failed to act, and whether the judge erred in his analysis of the evidence.

[321] We consider next whether the judge erred in his breach of duty analysis in two respects: first, in the burden of proof he applied when assessing claims involving historical sexual assaults; and second, in his assessment of the evidence and his conclusion that the evidence did not establish a breach of duty by Monsignor Ryan.

> Did the Judge Err Regarding the Applicable Burden of Proof in Historic Claims?

[322] The appellants submitted on appeal that the judge required them to meet "an impossible burden to prove the historic sexual assaults". Presumably this refers to the judge's determination that negligence had to be established on a balance of probabilities, through the evidence presented at trial, notwithstanding that witnesses or documentary evidence might no longer be readily available due to the significant passage of time.

[323] The judge recognized the challenges in bringing or defending an historic claim.

> [51] The Defendant has submitted that the court consider the difficulty of dealing with evidence of an historical nature. The passage of time itself had imposed serious prejudice in responding to the claims of the Plaintiffs. …
>
> …
>
> [53] Another factor was the prejudice caused by the loss of evidence and the unavailability of witnesses. The difficulty of recall and memory after so many years was an obstacle to important details relevant to establishing or defending the cause of action.

[324] Both parties requested that the judge interpret the historic evidence in a manner most favourable to their respective positions.

> [59] Both sides have asked the court to scrutinize the historical record from their perspective. The Defendants have argued that caution should be exercised when considering incomplete evidence, testimony where memories have faded, and documents for which the authors are not available to testify as to their significance or context. On the other hand, the Plaintiffs have asked the court to draw conclusions from that same evidence, and in doing so undertake an analysis that may border on speculation. Neither approach is helpful.

[325] The judge rejected these requests. Instead, he determined that the civil burden of proof applies in claims arising from historical sexual assaults, notwithstanding that evidence may have been lost or witnesses may no longer be available to testify.

[326] Citing the Supreme Court of Canada decision in *F.H. v. McDougall*, 2008 SCC 53, [2008] 3 S.C.R. 41, the judge noted that the burden of proof in civil claims, including in the context of evidence submitted relating to historic sexual assaults, remained that of proof on a balance of probabilities.

> [60] In examining this issue, I find that there is nothing new in the concepts raised by the Defendant respecting historical evidence. The test was and still is proof on the balance of probabilities, and the Plaintiffs must meet that standard. …
>
> [61] In *F.H. v. McDougall*, 2008 SCC 53 the Supreme Court of Canada addressed the standard of proof in civil cases. Justice Rothstein stated quite clearly that no matter the nature of the evidence, the civil standard must be applied. He said, at paragraph 40:
>
> > 40. … I think it is time to say, once and for all in Canada, that there is only one civil standard of proof at common law and that is proof on a balance of

> probabilities. Of course, context is all important and a judge should not be unmindful, where appropriate, of inherent probabilities or improbabilities or the seriousness of the allegations or consequences. However, these considerations do not change the standard of proof.

[327] The *McDougall* case, like the present case, also dealt with a civil claim arising out of historic sexual assaults against a child in an institutional, educational setting. In the late 1960s, McDougall was an Oblate Brother at a residential school in British Columbia operated by a religious organization, the Oblates of Mary Immaculate. It was alleged that, during his time at the school, he sexually abused the plaintiff, who was then a young student at the school.

[328] The Supreme Court confirmed in *McDougall* that the standard of proof for civil liability remains immutable, even in the context of assessing "evidence of events that are alleged to have occurred many years before."

> [46] Similarly, evidence must always be sufficiently clear, convincing and cogent to satisfy the balance of probabilities test. … In serious cases, like the present, judges may be faced with evidence of events that are alleged to have occurred many years before, where there is little other evidence than that of the plaintiff and defendant. As difficult as the task may be, the judge must make a decision. If a responsible judge finds for the plaintiff, it must be accepted that the evidence was sufficiently clear, convincing and cogent to that judge that the plaintiff satisfied the balance of probabilities test.

[329] We cannot accept the appellants' submission on appeal that the judge established "an impossible burden to prove the historic sexual assaults". The burden of proof was not impossible to meet. Rather it was the civil burden confirmed in *McDougall*. The judge acknowledged the difficulty in assessing evidence relating to events that had occurred many decades previously. He reiterated that the civil burden of proof on a balance of probabilities, confirmed by the Supreme Court in *McDougall*, would have to be satisfied before liability could be imposed. He concluded that "the normal civil burden of proof" had to be met, "no more, no less".

> [65] … Where the evidential record is not complete, the court either is put in the position of speculating or must consider the credibility of the propositions put forth based on the scanty evidence presented. The overarching principle, however, is that the Plaintiffs have the burden of proving their case on the balance of probabilities. That requires more than speculative assertions but does not require them to meet a higher standard of proof.

> [66] … In this case, the presentation of evidence, both documentary and *viva voce*, of historical events will simply have to meet the normal civil burden of proof, no more, no less.

[330] The judge did not deviate from or relax the established civil burden of proof because the claims involved historic events. Had he done so, he would have erred. Rather he followed *McDougall*, and was correct to do so. We conclude that the judge made no error in his analysis and application of the burden of proof in this respect.

The Evidence at Trial Regarding Breach of Duty

[331] Five witnesses testified at trial about their interactions with and disclosures to Monsignor Ryan. Four of these were the appellants and one was a non-party witness who was a resident at Mount Cashel in the same time period as the appellants.

[332] Two of the four appellants testified that they made no disclosures about sexual abuse to Monsignor Ryan at any time, either in confession or otherwise.

> [207] The first of the Plaintiffs to testify, G.E.B. # 26 …, said that the priest was housed in separate quarters … In respect of the sexual abuse he suffered, he said he did not disclose to Msgr. Ryan, as he felt no one would believe it.
>
> …
>
> [209] The third of the Plaintiffs to testify, G.E.B. # 33 …, did not indicate any disclosure of abuse in the confessional. …

[333] The judge noted that one of the appellants testified that he spoke to Monsignor Ryan in confession about the conduct of the Brothers, but that this related to harsh physical discipline and physical mistreatment.

> [208] The second of the Plaintiffs to testify, G.E.B. # 50 … said he thought Msgr. Ryan was the "head priest", and he resided in his own quarters to which the students did not have access. … He attended confession weekly, and said he told Msgr. Ryan about the physical abuse. He said the physical discipline was too harsh, and thought perhaps something could be done about it. …

[334] One appellant testified that he told Monsignor Ryan, in confession, about sexual abuse.

> [210] The fourth Plaintiff, G.E.B. #25 … said that Msgr. Ryan was there for mass and confessions. He said he did not remember the priest being around the boys, or anywhere at Mount Cashel, other than in the chapel. He testified he did confess the

> incidents of sexual abuse by a civilian employee, an electrician, and one of the Brothers. He said Msgr. Ryan did not react but concluded the confession in the normal way. He said he understood confession was completely private and confidential.

[335] The non-party witness testified that he spoke to Monsignor Ryan, in confession and outside confession, about sexual abuse by the Brothers. He also testified that, shortly after one of these discussions with Monsignor Ryan, two offending Brothers left Mount Cashel.

> [211] The testimony of a non-plaintiff witness … was a little more detailed. He was a resident at Mount Cashel during this same period. While he said he was sexually abused by Brother Lasik, he was not a party to the proceeding.
>
> [212] [The witness] testified that he told Msgr. Ryan on three occasions about Lasik's conduct. On one occasion the priest responded that he had to go to confession, where he told him the same thing. He said it was possible he was told to confess because the priest thought he was lying, not because he believed the story about sexual abuse. At that time, he said, the priest promised to speak to the Superior about the situation. He testified that on another occasion he spoke to Msgr. Ryan and a brother, T.I. Murphy, about his loss of faith because of the abuse. Shortly after that, he said, two of the abusing Brothers left the orphanage.

[336] Written statements were also admitted into evidence without objection from three other individuals, who were not parties in this action but were residents at Mount Cashel in the same time period as the appellants. These statements indicated that the individuals had told Monsignor Ryan, in confession, about having been sexually assaulted.

> [213] In addition to this testimony, the written statements of three individuals were submitted into evidence. All three had been residents of Mount Cashel in the mid-1950's, the period with which we are concerned in this case. All three statements referred to disclosure of sexual assault in the confessional to Msgr. Ryan.

Did the Judge Err in Assessing the Evidence and Finding No Breach of Duty?

[337] The standard of review to be applied to a determination as to whether there was a breach of duty, was considered by the Supreme Court of Canada in *Galaske v. O'Donnell*, [1994] 1 S.C.R. 670 (S.C.C.). The Court indicated that a determination of this type was a question of mixed law and fact (at 690):

> The definition of the standard of care is a mixed question of law and fact. It will usually be for the trial judge to determine, in light of the circumstances of the case,

> which would constitute reasonable conduct on the part of the legendary reasonable man placed in the same circumstances. …

[338] The Supreme Court in *Housen* provided further guidance on the standard of review. The Court noted that where the issue on appeal involves a trial judge's interpretation of the evidence as a whole, the appropriate standard of review is palpable and overriding error.

> [36] … The general rule ... is that, where the issue on appeal involves the trial judge's interpretation of the evidence as a whole, it should not be overturned absent palpable and overriding error.

[339] Referencing its earlier decision on standards of review in *Housen*, the Supreme Court in *Salomon*, with Wagner C.J.C. writing for the majority, reiterated at paragraph 32 that the guiding principle is that, "absent a palpable and overriding error, an appellate court must defer to the conclusions reached by the trial judge."

[340] The Court in *Salomon* further observed that a palpable and overriding error must be obvious and determinative of the outcome. To better illustrate what a palpable and overriding error entails, the Court referenced metaphors used by the Quebec Court of Appeal in *J.G. v. Nadeau*, 2016 QCCA 167, to the effect that a palpable and overriding error is not obscure or difficult to locate (not a "needle in a haystack"), but is direct and apparent (a "beam in the eye"), and that "it is impossible to confuse these … notions" (*Salomon*, at para. 33).

The Judge's Assessment of the Evidence

[341] The Supreme Court in *Housen*, *Salomon*, and other authorities has indicated that a palpable and overriding error must be identified before an appellate court can disturb a judge's finding in these circumstances. Having considered the judge's finding on this standard of review we conclude, for the reasons that follow, that the judge made no palpable and overriding error in assessing the evidence and concluding that there was no breach of duty.

[342] In order to determine whether Monsignor Ryan breached a duty of care, the judge carefully considered the evidence of the four appellants and one non-party witness who testified, as well as the written statements from the three former residents of Mount Cashel. He summarized the evidence as follows:

> [219] We do know, from the testimony of [the non-party witness], and one of the written statements, that shortly after these disclosures, two of the offending Brothers, Lasik and Ford, left Mount Cashel. Again, we do not know the circumstances of their

> leaving, and there was no evidence that it was related to any action by Msgr. Ryan, or just happenstance. The difficulty is that there just is insufficient evidence to draw a conclusion.
>
> [220] … Of the five witnesses (four Plaintiffs and [the non-party witness]) only two reported sexual abuse to the priest during confession. That was G.E.B. #25 … and [the non-party witness]. The former testified that he mentioned this in confession only once. [The non-party witness] testified that he told Msgr. Ryan three times, once in confession.
>
> [221] One other, G.E.B. # 50 …, reported only harsh discipline, but did not testify about any sexual abuse. The other two, G.E.B. # 26 … and G.E.B. # 33 … testified that they did not communicate any abuse, sexual or otherwise, to the priest either in confession or outside.

[343] The judge noted that a determination as to whether there was a breach of duty must be based on the evidence, and not on speculation or conjecture.

> [218] … while the Plaintiffs conceded that these utterances are not determinative of whether sufficient notice was provided to assess the question of negligence, there being the establishment of a duty of care and breach of that duty, there remains the issue that we do not know if anything was done as a follow-up. Most of the statements included the assertion that there was nothing done as a result of the disclosure, notwithstanding that several indicated Msgr. Ryan promised to follow up with the Superior. However, there is no evidence either way. The Plaintiffs are suggesting that the court speculate about the actions of Msgr. Ryan.

[344] The judge concluded there was no breach of duty because the evidence at trial did not establish, on a balance of probabilities, that Monsignor Ryan failed to act in light of disclosures made to him about sexual abuse. He held that, in the absence of evidence to satisfy the civil burden, speculation as to what Monsignor Ryan may or may not have done is insufficient to ground liability. He rejected the suggestion that the court should "speculate about the actions" of Monsignor Ryan (para. 218).

[345] The judge also noted the evidence of the non-party witness who testified that two Brothers left Mount Cashel after the witness had advised Monsignor Ryan of sexual abuse by these Brothers. The judge observed that "there was also evidence that shortly following the disclosure of one of them, the offending Brothers were removed from the orphanage" (para. 270).

[346] Notwithstanding the timing of these events (that is, after the witness told Monsignor Ryan of the abuse two offending Brothers left the orphanage), the judge found there was insufficient evidence to conclude there was a direct,

causal connection between the disclosure made to Monsignor Ryan and the Brothers' departure from the orphanage shortly thereafter:

> [292] …There is also no evidence that nothing was done, and some, albeit weak, evidence that something may have been done by the priest, in that the offending Brothers were removed from the orphanage shortly after the disclosure. I accept that contemporaneous connection may not prove a causal connection. However, it would only be speculation to say Msgr. Ryan did nothing.

[347] Overall, the judge found that the evidence at trial simply did not establish that Monsignor Ryan failed to act. As such he concluded, at paragraph 270, that it would be inappropriate and speculative to reach a conclusion that Monsignor Ryan breached the duty of care without sufficient evidence to support this conclusion:

> [270] Finally, it is not clear what happened as a result of these disclosures. While the witnesses said it appeared nothing was done in response to their disclosures, there was also evidence that shortly following the disclosure of one of them, the offending Brothers were removed from the orphanage. This does not prove that Msgr. Ryan was responsible for this action. But there was also no evidence whatsoever that nothing was done. It would be speculative to decide either way. …

[348] He reiterated his conclusion that, in the absence of evidence, "[s]peculation is not sufficient to satisfy the legal burden imposed on the Plaintiffs":

> [299] Even if I accept this evidence as sufficient to raise a duty to intervene, we have no evidence whether the priest followed up with the Superior of the orphanage. One witness … said that shortly after he disclosed, the offending Brothers left the orphanage. This could mean nothing, or it could mean that the priest did, in fact, intervene. We just do not know, and it would be speculation to conclude one way or the other. Speculation is not sufficient to satisfy the legal burden imposed on the Plaintiffs, and therefore, in the absence of any malfeasance, or nonfeasance, there is nothing for which the Archdiocese can be vicariously liable.

[349] The judge concluded that the evidence did not establish that Monsignor Ryan failed to act on the information provided to him about the sexual abuse of boys at Mount Cashel, stating:

> [251] For breach of a duty, there must be evidence of either malfeasance or nonfeasance. As noted above, there is no evidence that nothing was done, and perhaps some evidence that might suggest something was done. There is evidence of a promise to speak to the Superior about the issue. There is no evidence that he did, but also no evidence to the contrary. But we have evidence that the offending Brothers

> left at about that time. We do not know if there is a connection between Msgr. Ryan's promise and their departure. The evidence just is not before the court.

[350] These excerpts from the judgment, set out above, reveal a considered assessment of the evidence on the breach of duty issue. There was no real argument on appeal that the judge had erred by misapprehending the evidence or by improperly assessing or weighing conflicting evidence regarding Monsignor Ryan's actions. There was no conflicting evidence to reconcile. Rather, in the judge's assessment, there was insufficient evidence on which to conclude that Monsignor Ryan had breached the duty of care.

Did the Judge Make a Palpable and Overriding Error in Not Drawing an Inference from the Evidence

[351] While the appellants' position was not framed in these precise terms, they are effectively arguing that the judge erred by not drawing an inference, from the evidence, that Monsignor Ryan did not act when told of the allegations of sexual abuse.

[352] For this argument to succeed, it must be shown that the judge made a palpable and overriding error. In *Nelson (City) v. Mowatt*, 2017 SCC 8, [2017] 1 S.C.R. 138 at para. 38, the Supreme Court reiterated the principle set out in *Housen*, that the "standard of palpable and overriding error applies with respect to the underlying facts relied upon by the trial judge to draw an inference, and to the inference-drawing process itself" (*Nelson (City)*, at para. 38). Similarly, in *Fontaine v. British Columbia (Official Administrator)* (1997), [1998] 1 S.C.R. 424 at para. 34 (S.C.C.), the Court stated that the "finding of facts and the drawing of evidentiary conclusions from those facts is the province of the trial judge, and an appellate court must not interfere with a trial judge's conclusions on matters of fact unless there is palpable or overriding error".

[353] In *H.L. v. Canada (Attorney General)*, 2005 SCC 25, [2005] 1 S.C.R. 401 at para. 89, the Supreme Court indicated that "only where the trial judge is shown to have committed a palpable and overriding error or made findings of fact that are clearly wrong, unreasonable, or unsupported by the evidence" would it be appropriate for an appellate court to "make their own findings and draw their own inferences". (See also *Modern Cleaning Concept Inc. v. Comité paritaire de l'entretien d'édifices publics de la région de Québec*, 2019 SCC 28 at para. 69.)

[354] As discussed above, there was little evidence about Monsignor Ryan's response to the sexual abuse disclosures. One witness provided evidence that

might possibly suggest that Monsignor Ryan acted in response to the sexual abuse disclosure, resulting in two Brothers leaving Mount Cashel. That witness, a non-party, testified that he told Monsignor Ryan about the abuse and the two offending Brothers left Mount Cashel shortly thereafter. This may have been interpreted as support for the conclusion that Monsignor Ryan had taken action. However, the judge did not infer from this any link between Monsignor Ryan being told of the abuse and the Brothers' departure. He held that it would be conjecture to conclude that Monsignor Ryan took action and spoke to the Superior, and that the two Brothers left the orphanage as a result of Monsignor Ryan's intervention. Such a conclusion, the judge determined, would be speculative at best, amounting to guesswork.

[355] The judge found that it would also be speculative to infer from the evidence that Monsignor Ryan took no action. There must be a proper evidentiary basis from which to draw an inference. Otherwise conclusions reached from the inference-drawing process may be regarded as speculative or conjecture.

[356] Having regard to all the evidence, the judge concluded the evidence did not support drawing an inference that Monsignor Ryan failed to act when told of sexual abuse. In this circumstance, the judge found that the evidence did not establish a breach of duty.

[357] As the Supreme Court noted at paragraph 33 of *Salomon*, citing *Nelson (City),* simply because "an alternative factual finding could be reached based on a different ascription of weight does not mean that a palpable and overriding error has been made".

[358] Similarly, in *H.L.*, the Supreme Court stated that appellate review in this context involves determining whether the trial judge's factual inferences are "reasonably supported by the evidence". If so, "the reviewing court cannot reweigh the evidence by substituting, for the reasonable inference preferred by the trial judge, an equally — or even more — persuasive inference of its own" (*H.L.*, at para. 74) [emphasis in original]. Similarly, absent a palpable and overriding error, a judge's decision not to draw an inference, in circumstances where the judge determines that an inference is not warranted or is not supported by the evidence, also attracts appellate deference.

[359] The judge's decision reveals a careful assessment of the evidence on this issue. He concluded, based on his review of the evidence, that the burden of proof on a balance of probabilities was not satisfied. That is, the evidence was not "sufficiently clear, convincing and cogent to satisfy the balance of

probabilities test" (*McDougall*, at para. 46). As a result, he found no breach of duty.

> [252] As a consequence, with very weak evidence on either the knowledge to be imputed to Msgr. Ryan, and whether he acted on that knowledge, the Plaintiffs have not met their burden of proof on this issue. …

[360] The judge summarized the evidence relating to Monsignor Ryan by concluding that "there is no evidence that nothing was done, and perhaps some evidence that might suggest something was done" (para. 251). He summarized his conclusion on liability, noting: "If a breach of a duty was dependent on evidence of failure to report or remedy the situation, then there is no evidence of such a breach" (para. 270).

[361] We conclude that the judge did not err in this regard. The judge was entitled, based on the evidence, to reach the conclusion that he reached. His conclusion that a breach of duty was not established was "reasonably supported by the evidence". No palpable and overriding error has been shown regarding the judge's analysis of the evidence or his ultimate finding.

[362] As such no appellate intervention is warranted. Intervention in this circumstance would be contrary to the guidance provided by the Supreme Court regarding the proper role of an appellate court. There being no palpable and overriding error, appellate restraint and deference is appropriate.

[363] Before leaving the analysis on negligence, we note that causation must also be proved for the appellants' claims to succeed. A causation analysis in this case would involve assessing the causal link between Monsignor Ryan's alleged failure to act when told of sexual abuse and the damages incurred by the appellants.

[364] In a causation analysis, the circumstances of each appellant would need to be considered individually, as each would have been different. For example, one appellant's claim was based on one incident of abuse. That appellant testified that he told Monsignor Ryan about the abuse in confession. There were no subsequent incidents of sexual abuse relating to that appellant, which means the abuse giving rise to the claim occurred before Monsignor Ryan was told about it. In that situation, it would need to be considered whether Monsignor Ryan's alleged failure to act caused damages for abuse which had already occurred before the disclosure was made to him. Of course, evidence from other witnesses would also need to be considered regarding any disclosures of abuse to Monsignor Ryan that may have preceded the incident related to this appellant.

As well, individual causation analyses would be required for each of the other appellants.

[365] There was no analysis or findings relating to causation in the judgment. A causation analysis may have been considered unnecessary by the judge given that he found no duty of care and no breach of duty. There is no indication that causation was conceded or resolved at trial. However the issue was not referenced as a ground of appeal, it was not addressed by either party in their written or oral submissions, and this Court was not asked to consider it. As such, we make no determination on causation. An appropriate causation analysis would be required if a breach of duty was established.

[366] We next consider whether the judge erred in deciding there was no breach of a fiduciary duty by Monsignor Ryan.

Was there a Fiduciary Relationship Between Monsignor Ryan and the Appellants? If so, was there a Breach of Fiduciary Duty?

[367] The appellants claimed that Monsignor Ryan's responsibilities to them as a priest hearing confessions, as well as his general role as chaplain at Mount Cashel, created a fiduciary relationship. They argued that Monsignor Ryan breached his fiduciary duty by failing to act when he was told of sexual abuse.

[368] The judge dismissed this argument, finding that no fiduciary relationship existed between Monsignor Ryan and the appellants. Having found no fiduciary relationship, the judge did not consider whether there was a breach of fiduciary duty. The appellants appeal the judge's findings in this regard.

[369] The Supreme Court in *Sun Indalex Finance, LLC v. United Steelworkers,* 2013 SCC 6, [2013] 1 S.C.R. 271 at para. 62, indicated that the "first stage of a fiduciary duty analysis is to determine whether and when fiduciary obligations arise."

[370] In *Blackwater*, McLachlin C.J.C. described a fiduciary duty in the following terms:

> [57] A fiduciary duty is a trust-like duty, involving duties of loyalty and an obligation to act in a disinterested manner that puts the recipient's interest ahead of all other interests: *K.L.B. v. British Columbia*, [2003] 2 S.C.R. 403, 2003 SCC 51 (S.C.C.), para.49.

[371] The Supreme Court in *Professional Institute of the Public Service of Canada v. Canada (Attorney General)*, 2012 SCC 71, [2012] 3 S.C.R. 660,

described two types of fiduciary relationships. The first are those specific relationships that have been recognized as fiduciary because of the nature and character of the relationship. These are referred to as *per se* fiduciary relationships.

[372] Examples of *per se* fiduciary relationships include relationships between a solicitor and client (see for example *Galambos v. Perez*, 2009 SCC 48, [2009] 3 S.C.R. 247); a doctor and patient (see for example *McInerney v. MacDonald*, [1992] 2 S.C.R. 138 (S.C.C.), *Norberg v. Wynrib*, [1992] 2 S.C.R. 226 (S.C.C.), and *Cuthbertson v. Rasouli*, 2013 SCC 53, [2013] 3 S.C.R. 341); an executor and beneficiaries of an estate (see for example *Cowper-Smith v. Morgan*, 2017 SCC 61, [2017] 2 S.C.R. 754); and, directly relevant to this case, a priest and penitent.

[373] The other category includes relationships (which are not *per se* fiduciary) where a fiduciary duty is nonetheless found to exist in a specific context, because of the particular circumstances of a relationship. These are referred to as *ad hoc* fiduciary relationships.

[374] While the argument was not framed in these precise terms, the appellants appear to be arguing that the judge erred in concluding that their relationship with Monsignor Ryan was neither a *per se* nor an *ad hoc* fiduciary relationship.

[375] First, the appellants submit that the relationship between a priest and penitent is *per se* fiduciary. As disclosures of sexual abuse were made to Monsignor Ryan in the context of confession, the argument is that a *per se* fiduciary relationship was created.

[376] Second, it is more generally argued that Monsignor Ryan's role as chaplain at Mount Cashel should have been recognized as having created an *ad hoc* fiduciary relationship with the appellants.

[377] These arguments will be considered separately, beginning with the argument that a *per se* fiduciary relationship existed.

[378] For the reasons that follow we conclude that, even if a fiduciary relationship existed, no breach of a fiduciary duty has been established.

<u>*Per se* Fiduciary Relationship</u>

[379] The judge concluded there was no fiduciary relationship. He did not distinguish between a *per se* and *ad hoc* fiduciary relationship, and he did not

directly address the argument that a relationship of priest and penitent is a *per se* fiduciary one.

[380] There is authority for the proposition that a priest/penitent relationship is a *per se* fiduciary relationship. For example, in *McInerney*, at 149, the Supreme Court references "a confessor and his penitent" as falling within this category. Similarly, in *Lac Minerals Ltd. v. International Corona Resources Ltd.*, [1989] 2 S.C.R. 574 at 606, the Supreme Court noted "priest and penitent" as an example in this respect.

[381] In this case, there would be a presumption that a *per se* fiduciary relationship was created between the appellants and Monsignor Ryan arising from the fact that Monsignor Ryan heard their confessions. As such, it is necessary to examine whether there was a breach of fiduciary duty in this circumstance.

[382] In doing so, it is useful to consider the observation of Cromwell J. in *Galambos*, that "not every legal claim arising out of a *per se* fiduciary relationship … will give rise to a claim for a breach of fiduciary duty". Cromwell J. noted:

> [36] Certain categories of relationships are considered to give rise to fiduciary obligations because of their inherent purpose or their presumed factual or legal incidents: *Lac Minerals Ltd. v. International Corona Resources Ltd.*, [1989] 2 S.C.R. 574, *per* La Forest J., at p. 646. These categories are sometimes called *per se* fiduciary relationships. … It is important to remember, however, that not every legal claim arising out of a *per se* fiduciary relationship, such as that between a solicitor and client, will give rise to a claim for a breach of fiduciary duty.

[383] Assuming the existence of a *per se* fiduciary relationship (arising from the priest/penitent relationship) it is important to consider the specific circumstances to determine if there has been a breach of fiduciary duty flowing from this relationship.

[384] In this regard, the evidence at trial is significant. The evidence indicates that all four of the appellants regularly attended confession with Monsignor Ryan, generally once weekly. As discussed above, three of the four appellants did not make disclosures about sexual abuse. Two of the appellants testified that they never told Monsignor Ryan about the sexual abuse, either during confession or otherwise. One of the appellants testified that he told Monsignor Ryan, during confession, about physical abuse.

[385] Assuming a *per se* fiduciary duty arose from the relationship between Monsignor Ryan as priest and the appellants as penitents, it is difficult to see how a breach of fiduciary duty occurred with respect to the appellants who made no sexual abuse disclosure during confession.

[386] In these circumstances where no disclosure of sexual abuse was made to him, it has not been established how Monsignor Ryan betrayed the penitents' trust or loyalty or acted in a way that breached a "trust-like duty, involving duties of loyalty and an obligation to act in a disinterested manner that puts the recipient's interest ahead of all other interests" (*Blackwater*, at para. 57). The evidence does not support the conclusion that there was a breach of fiduciary duty in this context. There was no evidence of a breach of the trust inherent in a fiduciary relationship. A fiduciary duty should not be confused with a duty of care in negligence in this regard.

[387] One of the appellants testified that he did tell Monsignor Ryan, during confession, about sexual abuse. The argument is that Monsignor Ryan breached his fiduciary duty in that instance, presumably by failing to act in light of the disclosure.

[388] In our view this argument cannot succeed for two reasons.

[389] First, the breach of fiduciary duty claim is premised on Monsignor Ryan's alleged nonfeasance, and that he failed to act when told of the sexual abuse. However, as discussed above, the judge made no error in concluding that the evidence at trial did not establish this.

[390] Second, it is alleged that there was a *per se* fiduciary relationship created by the priest/penitent relationship, and that a vulnerable penitent came to harm. Therefore, the argument is that Monsignor Ryan breached his fiduciary duty. However, the fact a vulnerable person in a fiduciary relationship has been harmed does not automatically amount to a breach of fiduciary duty. What is also required is evidence of misconduct by the fiduciary in abusing or betraying the fiduciary relationship.

[391] The law of fiduciaries is aimed at constraining and responding to a fiduciary's misconduct. As observed by Cromwell J. in *Galambos*, it is focused on protecting the vulnerable party "against abuse of power" by the fiduciary and monitoring "the abuse of a loyalty reposed" in the fiduciary.

> [67] An important focus of fiduciary law is the protection of one party against abuse of power by another in certain types of relationships or in particular

> circumstances. However, to assert that the protection of the vulnerable is the role of fiduciary law puts the matter too broadly. The law seeks to protect the vulnerable in many contexts and through many different doctrines. As La Forest J. noted in *Hodgkinson*, at p. 406: "[W]hereas undue influence focuses on the sufficiency of consent and unconscionability looks at the reasonableness of a given transaction, the fiduciary principle monitors the abuse of a loyalty reposed" [emphasis in original].

[392] Instances of a breach of a "loyalty reposed" can be readily seen, for example, when a physician exploits the vulnerability of a patient (see *Norberg*) or an executor misappropriates estate funds (see *Cowper-Smith)*. In cases where a breach is established, a court can intervene (see for example *Cowper-Smith*, at para. 41).

[393] However, there is no evidence that Monsignor Ryan took advantage of the priest/penitent relationship or otherwise abused his power, or the trust and loyalty of the appellants.

[394] Therefore, no breach of a *per se* fiduciary relationship has been established.

Ad hoc Fiduciary Relationship

[395] The judge appears to have focused exclusively on whether an *ad hoc* fiduciary relationship was created by Monsignor Ryan's general role as chaplain at Mount Cashel. He concluded no such fiduciary relationship existed.

> [224] … The Plaintiffs argue that by placing Msgr. Ryan at Mount Cashel, he was placed in a special relationship with the residents. The Plaintiffs used the words "fiduciary relationship" to describe the relationship, however, I do not accept that this was made out. …

[396] The judge concluded that Monsignor Ryan had no fiduciary duty because he "was not placed in a position of trust, although as chaplain, he would have had some responsibility to act in a manner that was in the spiritual interest of the boys" (para. 225).

[397] The appellants argue that the judge erred in finding no *ad hoc* fiduciary relationship arising from Monsignor Ryan's role as resident chaplain at Mount Cashel. We conclude that it is not necessary to determine whether an *ad hoc* fiduciary relationship was created in these circumstances. That is because, even if an *ad hoc* fiduciary relationship existed, no breach of fiduciary duty was established.

[398] For the same reasons provided above in finding no breach of a *per se* fiduciary duty, the evidence at trial does not establish a breach of fiduciary duty arising from an *ad hoc* fiduciary relationship. Again, no evidence was provided which could substantiate an abuse of power, trust or loyalty by Monsignor Ryan, necessary to prove a breach of fiduciary duty.

[399] Additionally, the argument that Monsignor Ryan breached an *ad hoc* fiduciary duty is also based on his alleged failure to act when advised of sexual assault. However, as discussed above, the judge made no error in concluding that the evidence at trial did not establish this. Therefore, no breach of fiduciary duty was established.

[400] As a result, even if an *ad hoc* fiduciary duty existed, we find no breach of fiduciary duty by Monsignor Ryan in the present circumstances.

Summary and Disposition on this Ground of Appeal

[401] The appellants argued that the judge erred in finding that Monsignor Ryan did not breach a fiduciary duty and in concluding that he was not negligent.

[402] Regarding the alleged breach of fiduciary duty, the judge found that no fiduciary relationship existed, and therefore did not consider whether Monsignor Ryan breached a fiduciary duty. We conclude that a *per se* fiduciary relationship is presumed based on the priest/penitent interaction, and an *ad hoc* fiduciary relationship may have arisen from Monsignor Ryan's role as chaplain.

[403] However in either case, even if a fiduciary relationship existed, the evidence discloses no basis to conclude there was a breach of fiduciary duty. The onus of proving a breach of either a *per se* or an *ad hoc* fiduciary duty is on the appellants. In our view, this onus has not been discharged.

[404] Regarding the alleged negligence, we conclude Monsignor Ryan owed a duty of care to the appellants and that the judge erred in finding there was no duty of care. However, we also conclude the judge did not err in finding there was no breach of duty. This is because it was not proved on a balance of probabilities that the duty of care was breached.

[405] As a result we find no error in the judge's conclusion that, as the requirements for establishing negligence were not satisfied, Monsignor Ryan was not negligent.

[406] Because the judge found no negligence, he also found no vicarious liability:

> [271] Accordingly, I find no tortious conduct on the part of Msgr. Ryan, and hence no vicarious liability on the part of the Archdiocese.

[407] We agree with this conclusion. As Monsignor Ryan's negligence was not established, the Archdiocese cannot be vicariously liable for Monsignor Ryan's conduct.

[408] Accordingly we dismiss this ground of appeal.

Issue 3: Did the judge err in concluding that the Archdiocese was not directly negligent?

[409] The appellants argued that the judge erred by not finding "direct negligence" with respect to the Archdiocese. The appellants claimed that the Archdiocese knew about the sexual abuse, by a civilian employee and by the Brothers at Mount Cashel, and that the Archdiocese was directly negligent in failing to take action in light of this knowledge.

[410] In order for the Archdiocese to be found negligent in these circumstances, it must be proved that it had knowledge of the sexual abuse and breached its duty of care to the appellants by failing to take appropriate action in light of this knowledge.

[411] The appellants' claim of direct negligence was based primarily on the allegation that the Archdiocese received direct information that a civilian employee had abused a boy at Mount Cashel, and that it had failed to act upon this information. The appellants argue that the Archdiocese was thereby negligent in failing to take appropriate action.

[412] As discussed earlier in this judgment, the evidence at trial was that a former civilian employee of Mount Cashel went to the Archbishop's residence to report sexual abuse. He reported that another civilian employee had sexually abused one of the boys at Mount Cashel, and that the police had been made aware of this. As the Archbishop was away at the time, the report was made to Father O'Keefe, the Archbishop's secretary, who documented the allegation.

[413] Father O'Keefe advised Monsignor Murphy, the administrator of the Archdiocese. Monsignor Murphy, shortly thereafter, sent for Brother Carroll, the Superior at Mount Cashel, to meet and discuss the matter, and Father O'Keefe, Monsignor Murphy and Brother Carroll met. Several days later Brother Carroll

advised Father O'Keefe that the civilian employee in question had been removed and would have no further involvement with Mount Cashel.

[414] The judge dismissed the appellants' claim that the Archdiocese was negligent in this context. He found that, based on the evidence, there was no breach of duty by the Archdiocese. In reaching this conclusion, the judge considered the testimony of various witnesses regarding the proper response by the Archdiocese to an allegation of sexual abuse.

[415] The judge was satisfied that "on this one incident where the office of the Archbishop became aware of one case of abuse, it was handled appropriately" (para. 290). He concluded at paragraph 293 that, "[a]s for the one disclosure during this period directly to the office of the Archbishop, there was appropriate follow-up in accordance with Canon Law, and satisfying any duty that existed in civil law." Consequently, the judge rejected the argument that the Archdiocese was directly negligent.

[416] While the allegation of direct negligence was primarily based on this disclosure of sexual abuse by a civilian employee, discussed above, the judge also considered the appellants' further argument that the Archdiocese had direct knowledge of the Brothers' sexual abuse of the appellants, and had failed to act appropriately. The judge rejected this argument.

[417] We also conclude that this argument cannot succeed, for two reasons. First, and unlike the allegation regarding the civilian employee, there was no evidence that the Archdiocese has direct knowledge of the Brothers' abuse.

[418] Second, presuming the argument is that the Archdiocese had knowledge of the abuse because Monsignor Ryan was told of it, and also presuming that Monsignor Ryan's knowledge could be imputed to the Archdiocese (there was no evidence or finding on this point), in any event the judge found that the evidence at trial did not establish that Monsignor Ryan breached the duty of care. That is, the evidence did not show that Monsignor Ryan failed to take appropriate action in light of the disclosures.

[419] The judge noted on this point:

> [299] Even if I accept this evidence as sufficient to raise a duty to intervene, we have no evidence whether the priest followed up with the Superior of the orphanage. One witness, … , said that shortly after he disclosed, the offending Brothers left the orphanage. This could mean nothing, or it could mean that the priest did, in fact, intervene. We just do not know, and it would be speculation to conclude one way or the other. Speculation is not sufficient to satisfy the legal burden imposed on the Plaintiffs, and therefore, in the absence of any malfeasance, or nonfeasance, there is nothing for which the Archdiocese can be vicariously liable.

[420] The judge's finding in this respect is discussed in greater detail above, in Issue 2. As discussed above, we have concluded that the judge made no error in finding that Monsignor Ryan did not breach the duty of care.

[421] On appeal, the appellants did not seriously press this argument respecting direct negligence of the Archdiocese, and made only minor reference to the argument in the oral and written submissions. In any event, the appellants did not establish that the judge erred in concluding that the Archdiocese discharged its duty of care by dealing appropriately with the report of sexual abuse by a civilian employee. Nor did the appellants establish that the judge erred in finding there was no evidence that the Archdiocese had direct knowledge of the Brothers' abuse of the appellants, or in concluding that the evidence did not prove Monsignor Ryan breached a duty of care by failing to act when advised of the abuse.

[422] Accordingly, there is no basis on which the Archdiocese could be found directly negligent, and the appeal in this regard must fail.

Additional Observations

[423] Before leaving the issues on appeal, we offer the following observations in two areas. The first area relates to the expert evidence of Dr. Fitzgerald.

[424] The appellants argue that the judge permitted Dr. Fitzgerald to give contextual evidence "beyond the scope of his expertise", and that the judge inappropriately relied on it.

[425] The judge qualified Dr. Fitzgerald as "an expert in history, particularly of Newfoundland and related history in Newfoundland, and the history of the Roman Catholic Church in Newfoundland." The appellants say that Dr. Fitzgerald's expert evidence ought to have been limited to the pre-Confederation era, because his qualifications indicate this was his area of expertise. However, the judge ruled that Dr. Fitzgerald had "sufficient academic, publishing, and research experience to give opinion in the areas requested by counsel."

[426] The areas counsel for the Archdiocese wanted Dr. Fitzgerald to address were set out in a letter from Dr. Fitzgerald to counsel for the Archdiocese dated March 6, 2016. The fourth area asked for Dr. Fitzgerald's comment on "the Administration, operation and control of the Mount Cashel Orphanage and school and involvement of the Archdiocese of St. John's and interaction with the Christian Brothers."

[427] Dr. Fitzgerald provided a report which was admitted into evidence. He summarized his opinion in its introduction, saying:

> [T]hat the corporate entity known historically, and at present as the Roman Catholic Episcopal Corporation (RCEC) of St. John's, and before incorporation as the Diocese of St. John's, played no controlling, managerial, or oversight role whatsoever in the administration, fundraising, operations, or running of the Mount Cashel orphanage, or of, or over the assignment, work, supervision, or reassignment of Irish Christian Brothers who worked in Newfoundland.

[428] Dr. Fitzgerald's testimony shows that he testified to historical facts respecting the relationship between the Archdiocese and the Brothers at Mount Cashel and gave his opinions on the import and meaning of those historical facts. His interpretation of the facts supported his opinion, which he also gave, that the Archdiocese played no contributing managerial oversight role whatsoever in the operation of Mount Cashel or over the Brothers.

[429] While a recognized historian, Dr. Fitzgerald was not an expert in the relationship between the Archdiocese and the Brothers at Mount Cashel. Neither did he profess to be. Nevertheless, he was permitted to not only attest to historical facts respecting the Brothers at Mount Cashel and the Archdiocese and give his interpretation of them, but to go further and give conclusive opinion on the closeness of the relationship between the Brothers at Mount Cashel and the Archdiocese.

[430] Expert witnesses are permitted to opine on matters when it is *necessary* to assist a fact-finder in understanding information which is outside the experience and knowledge of a judge or jury or "necessary to enable a trier of fact to appreciate the matters in issue due to their technical nature" (*R. v. Mohan*, [1994] 2 S.C.R. 9 at 23 (S.C.C.)). The line between historical facts and interpreting what they mean is often blurred, and Dr. Fitzgerald's evidence respecting interpretation of historical facts doubtless assisted the Court. However, his evidence went well beyond interpreting historical facts and went so far as to opine on the very issue the judge was to decide. In *White Burgess Langille Inman v. Abbott and Haliburton Co.*, 2015 SCC 23, [2015] 2 S.C.R. 182 at paras. 14-18, the Supreme Court of Canada cautioned against the use of experts to draw ready-made conclusions from factual evidence, saying that such practice is only allowed when the fact finder is not necessarily equipped to draw inferences from the evidence. In this case, there was nothing about the evidence that was technical or difficult to understand such that expert opinion respecting the relationship between the Archdiocese and the Brothers was required. It was

the judge's role, not Dr. Fitzgerald's, to determine, on the basis of the evidence, whether the Archdiocese played a managerial or oversight role in running Mount Cashel or in the work of the Brothers. Accordingly, it was neither necessary nor proper for Dr. Fitzgerald to be permitted to opine on this fundamental issue.

[431] There is another concern respecting Dr. Fitzgerald's evidence. Dr. Fitzgerald had access to the Archdiocese's archives to select material to inform his opinion. The plaintiffs had no access to the Archdiocese's archives. The material Dr. Fitzgerald selected from the Archdiocese's archives to support his evidence was provided to the plaintiffs, just as the material the plaintiffs relied on was provided to Dr. Fitzgerald. However, the resources from which the parties could draw was different. Both parties were able to conduct research through publicly available archives, but the plaintiffs had no access to the archival material in the Archdiocese's archives. There is a certain inequity in this situation, given that the Archdiocese's archives could provide a fertile and valuable resource for relevant material, and trial fairness dictates that the usual course by far in cases where expert evidence is adduced is that all experts have access to the same information on which to base their evidence.

[432] This concern should not be interpreted as suggesting that Dr. Fitzgerald was not a credible witness. There are no concerns about his credibility or the sincerity of his opinions. The concern is that the nature of his mandate could have caused him to overlook material which the plaintiffs may not have overlooked had they been able to have access to it.

[433] In light of our earlier findings on vicarious liability, there is no need to determine whether the judge erred in his treatment of the testimony of this witness.

[434] Secondly, we observe that neither the Christian Brothers Institute Inc. nor any other Christian Brothers organization participated in the trial. Had that occurred, the evidence might have been presented, argued and interpreted differently to show more or less responsibility on the part of the Archdiocese. In this regard, we note the judge's view, with which we agree, that had a Christian Brothers organization with some responsibility for the Brothers at Mount Cashel participated in the trial as a defendant, there would be little doubt as to its vicarious liability for the Brothers' conduct. We say this because we are confident, as the judge was, that the sexual abuse of the appellants occurred as described by them. We also note the judge's references to partial payments of damages having been made to the appellants on behalf of the Christian Brothers,

although we have no information respecting the provenance of these payments. In the circumstances, we feel it appropriate to say that if a Christian Brothers organization had been found vicariously liable at trial, in allowing the appeal respecting the Archdiocese's vicarious liability we would have apportioned vicarious liability between the organization and the Archdiocese, in accordance with the Supreme Court of Canada decision in *Blackwater* that there is no principled reason why two defendants cannot be held vicariously liable for the same wrong in consideration of their respective levels of responsibility. However, what that apportionment would have been is not possible to determine.

CROSS-APPEAL ON DAMAGES

[435] Although the judge determined that there was no liability, he was requested by the parties to assess provisional damages for each of the plaintiffs. He did so, in paragraphs 302-646, addressing issues under the *Limitations Act*, S.N.L. 1995, c. L-16.1, and issues respecting how damages for each of the four plaintiffs ought to be assessed.

[436] The Archdiocese appealed the damages assessment of three of the four plaintiffs. For ease of reference, we continue to refer to the parties as the "Archdiocese" and the "appellants", the appellants being the three respondents on cross-appeal (G.E.B. #25, G.E.B. #26, and G.E.B. #33).

[437] The judge's provisional assessment of damages for each of the three appellants was as follows:

(a) Awards for general and aggravated damages:

(i) G.E.B. #25 - $125,000

(ii) G.E.B. #26 - $240,000

(iii) G.E.B. #33 - $325,000

(b) Awards for Economic Loss (including pre-judgment interest):

(i) G.E.B. #25 - $357,500

(ii) G.E.B. #33 - $1,628,500

[438] In calculating the global damage awards, the judge deducted amounts received by each plaintiff from what he described as the "Christian Brothers

Institute". The amounts deducted were $77,332.76 for G.E.B. #25, $84,887.15 for G.E.B. #26, and $72,666.13 for G.E.B. #33.

[439] The judge noted that while the *Limitations Act* provides a proscription period for actions respecting personal injuries or torts committed against the person (sections 5 and 6), section 8 creates an exception for sexual torts. The judge found that the physical abuse experienced by the appellants, which was acknowledged by the parties, was not actionable under the *Limitations Act* and that damages could only be awarded for sexual abuse. Neither party took issue with this finding. Therefore, all of the issues identified for the purpose of the cross-appeal relate to damage awards for sexual torts.

[440] In its cross-appeal, the Archdiocese alleges the following six errors in the judge's provisional assessment of damages:

1) The judge erred when he assessed the damages on the basis of the material contribution test rather than the "but for" test;

2) The judge erred in failing to properly consider the impact of parental loss, abandonment, and the physical abuse at the orphanage for the three appellants when assessing the award for general and aggravated damages;

3) The judge erred in failing to properly consider the genetic link to alcohol abuse in the lives of two of the appellants when assessing the award for general and aggravated damages;

4) The judge erred in the assessment of the claim for loss of income for G.E.B. #25 when he concluded that there was a causal relationship between the sexual abuse and his inability to advance in the ranks of the Canadian military;

5) The judge erred in the assessment of the claim for loss of income for G.E.B. #33 when he concluded that there was a causal relationship between the sexual abuse and his inability to work after the age of 38 years of age; and

6) The judge erred in the manner in which he awarded pre-judgment interest on the claims for loss of income of G.E.B. #25 and G.E.B. #33.

[441] Decisions on damages attract a high level of appellate deference. This Court has described the applicable standard of review in *Bromley*:

> [16] … The issues relating to… the quantum of damages are questions of mixed fact and law. Those grounds of appeal can only succeed if the trial judge made an error on an extricable question of law or a palpable and overriding error.

[442] After stating that the phrase “palpable and overriding error” encapsulates the highest level of appellate deference, the Court went on:

> [18] … It is not enough for the appellant to show that the trial judge considered one irrelevant factor, or that he or she failed to consider one relevant one. An appellate court will only intervene if the error is significant enough to displace the strong arguments in favour of deference.

Issue 1: Did the judge err by failing to apply the correct test in assessing damages?

[443] The Archdiocese argues that the judge erred by assessing the claims for general and aggravated damages based on the material contribution test rather than the “but for” test. It argues that this would be an extricable error in principle attracting a review on the correctness standard. The Archdiocese maintains that the “but for” test recognizes that compensation for negligent conduct should only be awarded where there is a substantial connection between the negligent conduct and the injury, and that compensation ought not to be awarded for debilitating effects of pre-existing conditions that the appellants would have suffered in any event (Archdiocese’s factum on cross-appeal at para. 62).

[444] The appellants disagree, stating that the judge applied the “but for” test in a robust, common sense fashion which included a consideration of the extent to which the circumstances of each plaintiff allegedly contributed to the injuries. The appellants point to several examples in the judge’s decision where he applied the “but for” test, including examples where the application of the test also resulted in findings favourable to the Archdiocese:

- “Causation in law requires the Plaintiff to prove that the injury arose from the actionable conduct of the defendant. … The concept has often been stated as the "but for" test.” (paras. 329-330)

- “In assessing damages, I must find that "but for" the sexual abuse, the other circumstances of the Plaintiffs' lives made no meaningful contribution to the injury they suffered.” (para. 331)

- “In summary, causation is a significant issue in this case. I must be satisfied that, but for the sexual abuse on the Plaintiffs, they would not have suffered the loss. I must consider whether the sexual abuse as a causal factor, which is actionable, can be divided from the physical abuse, which is not actionable.” (para. 350)

- "I have already dealt with option 1, on the basis that there is little evidence, and very speculative to assume he would have chosen university but for the sexual abuse." (para. 441)

- "Therefore, I am not satisfied that [G.E.B. #26] can say that but for the sexual abuse he would have pursued the PhD program. There were too many other reasons not to pursue it at that time." (para. 528)

(Emphasis added.)

[445] At the hearing of the appeal, counsel for the Archdiocese conceded that the judge had applied the "but for" test and was correct when he found that "but for" the abuse, the appellants would not have suffered damage.

[446] The judge's reasons support that this was the approach taken. He consistently applied the "but for" test throughout his reasoning. Accordingly, there is no error in the judge's application of the "but for" test.

Issue 2: Did the judge err in failing to properly consider the impact of parental loss, abandonment, and the physical abuse at the orphanage for three appellants when assessing the award for general and aggravated damages?

[447] The Archdiocese submits that the judge erred in his calculation of the quantum of damages, arguing that the judge should have reduced the damages to account for the appellants' respective "original positions". The Archdiocese submits that there were several factors not considered by the judge that would have adversely affected the "original position" of each of the appellants. These include the loss of parents at a young age, abandonment at the orphanage by the remaining parent, the lack of heat and food while at Mount Cashel, the physical and emotional abuse while at Mount Cashel, and family history of alcohol abuse.

[448] In other words, while the Archdiocese concedes that the sexual abuse was a cause of the ultimate harm suffered by each of the appellants, it argues that the judge should have accounted for other causes of that harm. This issue also arises in the third ground of the cross-appeal.

Parties' Positions on G.E.B. #25

[449] At trial, G.E.B. #25 was awarded $125,000 in general and aggravated damages. In coming to this decision, the judge cited *D.M. v. W.W.*, 2013 ONSC

4176. In that case, a 12 year old boy had been sexually abused on one occasion by his uncle, and was awarded $95,000 in general and aggravated damages.

[450] The Archdiocese argues that the award of $125,000 for general and aggravated damages was too high:

> The award of general and aggravated damages for [G.E.B. #25] in the amount of $125,000.00 fails to account for the loss of a parent at a young age, the abandonment to the orphanage, the separation from his sisters and the deprivation he experienced, all of which shaped his "original position" well before any sexual abuse took place. The abuse was moderately invasive, but over a very short period of time. The impact of the abuse was mild. The award for [G.E.B. #25] should not have exceeded $75,000.00 (Archdiocese's factum on cross-appeal, at para. 77).

[451] The appellants submit that the higher award of $125,000 was justified. First, they argue that unlike in *D.M. v. W.W.*, G.E.B. #25 experienced three incidents of sexual abuse at the hands of two different individuals. Second, the appellants point to the judge's finding that G.E.B. #25 was found to be a "thin skull plaintiff", as opposed to a "crumbling skull plaintiff":

> [423] …While [Drs. Toborowsky and Badgio, the Archdiocese's expert witnesses] said that the pattern of aggressiveness was established early, and not related to sexual abuse, they also agreed that a child who suffered parental loss the way [G.E.B. #25] did would be more vulnerable to impacts from sexual abuse. This description fits the classic "thin skull" scenario.

Parties' Positions on G.E.B. #26

[452] The judge found that the sexual abuse suffered by G.E.B. #26 was severe and fell within the range of awards for long term sexual assaults. The judge awarded G.E.B. #26 $240,000 for general and aggravated damages.

[453] The Archdiocese argues that the award was too high, and points to *E.B. v. Order of the Oblates of Mary Immaculate (British Columbia)*, 2001 BCSC 1783, in support of their position. In that case, the plaintiff experienced sexual abuse for a longer period of time than G.E.B. #26. The plaintiff in *E.B.* did not experience the same trauma of parental loss and physical abuse that G.E.B. #26 experienced. In that case, the plaintiff was awarded general and aggravated damages of $150,000 ($199,000 adjusted for inflation as of 2016). The Archdiocese argues as follows:

> The award of general and aggravated damages for [G.E.B. #26] in the amount of $240,000.00 once again proceeds on the assumption that the impact of the loss of a

> parent, the abandonment to the orphanage and the physical abuse cannot be separated from the impact of the sexual abuse. On this incorrect approach, [G.E.B. #26] was overcompensated; he was placed in a position better than his "original position". The abuse was mild, with limited impact as demonstrated by his lifetime accomplishments. The award of general and aggravated damages should not have exceeded $150,000.00 (Archdiocese's factum on cross-appeal at para. 79).

[454] The appellants disagree that the award of $240,000 was too high. They point to the judge's findings that G.E.B. #26's "experience of sexual abuse was severe" (para. 455), and that G.E.B. #26's experience of parental loss and abandonment rendered him a thin skull plaintiff, as opposed to a crumbling skull plaintiff (para. 503).

[455] The appellants argue that a higher award than that in *E.B.* was justified based on the circumstances:

> The trial judge awarded [G.E.B. #26] $240,000. Given that [G.E.B. #26] was thin skulled and vulnerable, and that there has been a trend for courts to acknowledge the severe impacts of sexual abuse on victims over their lifetime, it was open to the trial judge to award a moderately higher amount in the present case than in *B.(E.)* (appellants' factum on cross-appeal at para. 59).

Parties' Positions on G.E.B. #33

[456] The judge found that the sexual abuse suffered by G.E.B. #33 was severe and fell within the range of awards for long-term sexual assaults, awarding $325,000 for general and aggravated damages.

[457] The Archdiocese submits that the abuse suffered by G.E.B. #33 was mild and that award was too high. The Archdiocese argues that the judge "failed to untangle the sexual abuse from all of the other trauma which shaped G.E.B. #33, including the loss of a parent, the abandonment to the orphanage, the physical abuse, job loss and family breakdown". The Archdiocese argues that the case law does not support an award of $325,000 for G.E.B. #33:

> The case law does not support such a high award. In *B.(E.) v. Order of the Oblates of Mary Immaculate (British Columbia),* 2001 BCSC 1783,] the plaintiff was assaulted about twice a week from age 7 to 11 at a residential school. The abuse was serious. The impact was severe. General and aggravated damages were assessed at $150,000.00 ($199,000.00 in 2016). The plaintiff in *M.(K.M.) v. [Roman Catholic Episcopal Corporation of the Diocese of London,* 2011 ONSC 2143,] received an awarded [*sic*] of general and aggravated damages of $190,000.00 ($206,000.00 in 2016). She experienced mild to moderate abuse at the hand of a parish priest from age 7 to age 10. The trial judge did not acknowledge that the jury award of $347,293.00 in

> *Langstaff v. Marson*, [2014 ONCA 510,] where the plaintiff was very severely assault [*sic*] by a teacher for 15 months, was overturned on the basis of judicial bias, so that it is an outlier of no assistance to the court. The award for [G.E.B. #33] should not have exceeded $200,000.00 (Archdiocese's factum on cross-appeal at para.82).

[458] The appellants argue that the award of $325,000 was reasonable based on the circumstances. G.E.B. #33 had testified that Brother Lasik would fondle his genitals and buttocks three to four times a week for about one and a half to two years, until he was about 13 years old. The judge found that G.E.B. #33 was "abused mercilessly over an extended period" of time (para. 537). The appellants submit that the judge was alert to the other sources of trauma in G.E.B. #33's life and accordingly factored them into his analysis.

[459] The appellants also point to the judge's finding that the impact of the sexual abuse was most severe for G.E.B. #33, and further that:

> [581] In my view, the evidence disclosed a man who entered Mount Cashel with vulnerabilities associated with parental loss. He appeared to lack the resilience of some of the other Plaintiffs and was therefore more susceptible to the trauma inflicted by Brother Lasik. I view his situation as a "thin skull" situation, and any defendant has to take a claimant as they are. I believe he was abused sexually and physically while at Mount Cashel, and that the sexual abuse has had a significant impact on his subsequent life.

Law & Analysis

[460] Both the Archdiocese and the appellants cite *Johnstone v. Sealand Helicopters Ltd.* (1981), [1982] 35 Nfld. & P.E.I.R. 76 (Nfld. C.A.), as correctly setting out the approach to be taken on appellate review of an assessment of damages:

> [7] … On an appeal from an assessment of damages, the first and prime concern of an appellate court, in my view, must be to look at the overall award in light of all the evidence. If that global figure is within what the court regards as a proper range for the injuries sustained in the circumstances, that award should not be interfered with even though there might not be complete agreement with all facets or details of the trial judge's reasoning. It is not the function of this Court to critically examine all aspects of an award in every instance, but such detailed analysis should only be entered upon if the award, at first encounter, appears to be inordinately low or excessive. As has been stated many times, the assessment of general damages in personal injury cases requires the exercise of his discretion by a trial judge based on all the circumstances. Because such assessments are incapable of exactitude, an appellate court should be reluctant to interfere with that discretion unless there is good reason for doing so. To put it another way, it is not our purpose to examine with a fine-tooth comb the details of every award

> brought before us. Further, as re-stated recently by the Supreme Court of Canada in *Woelk v. Halvorson*, [1980] 2 S.C.R. 430, at page 435;
>
> > It is well settled that a Court of Appeal should not alter a damage award made at trial merely because, on its view of the evidence, it would have come to a different conclusion. It is only where a Court of Appeal comes to the conclusion that there was no evidence upon which a trial judge could have reached this conclusion, or where he proceeded upon a mistaken or wrong principle, or where the result reached at the trial was wholly erroneous, that a Court of Appeal is entitled to intervene.

[461] The Archdiocese submits that the judge erred in his approach and that the awards for general and aggravated damages were too high:

> The law required that the trial judge untangle the different sources of damage to ensure that the Plaintiffs were only compensated for the loss caused by the actionable wrong. The Plaintiffs were to be placed in the position they would have been in absent the sexual abuse. They were not to be placed in a position better than the original one. The trial judge proceeded upon a mistake or wrong principle (Archdiocese's factum on cross-appeal at para. 73).

[462] The appellants submit that, according to the approach set out in *Johnstone*, the judge's assessment of the damages would not warrant appellate intervention as the judge carefully assessed all of the evidence, examined awards for damages in similar cases, reviewed and made findings with respect to multiple experts and made decisions in line with awards for similar injuries.

[463] The Archdiocese acknowledged that the judge appropriately applied the thin skull principle because the appellants were children when the abuse took place and were therefore inherently vulnerable. The Archdiocese did not point to any errors in the judge's findings that the appellants were thin skull plaintiffs. Rather, the Archdiocese argued that the awards were too high when compared to the cases cited by the judge.

[464] The judge reviewed relevant case law on awards of general and aggravated damages for sexual abuse. He separated the case law into two categories, those that involved "less frequent sexual assault and abuse" and those that involved "more frequent and long-term abuse with greater impact".

[465] The awards of general and aggravated damages for cases involving the "less frequent" sexual abuse ranged from $46,000 to $150,000, while the awards for cases involving "more frequent" sexual abuse ranged from $98,000 to $347,293 (paras. 360-363).

[466] The judge also recognized that there appeared to be a trend towards higher awards for cases involving childhood sexual abuse: “It is clear that over time the awards have increased significantly, reflecting the change in the view of the courts towards the impacts of child sexual abuse” (para. 363).

[467] We are of the view that the judge carefully balanced the evidence, including the expert opinions, and came to a decision supported by the evidence and in line with awards for similar injuries. This is not a case where the awards were “inordinately low or excessive” as contemplated by *Johnstone*. Rather, the awards of general and aggravated damages were in accordance with the ranges established in the jurisprudence. This is particularly true when the older awards are adjusted for inflation. Furthermore, the judge recognized the trend towards higher awards for childhood sexual abuse. The awards of general and aggravated damages do not warrant appellate intervention.

Issue 3: Did the judge err in failing to properly consider the genetic link to alcohol abuse in the lives of two of the appellants (G.E.B. #25 and G.E.B. #33) when assessing the awards for general and aggravated damages?

Parties’ Positions on G.E.B. #25

[468] The Archdiocese argues that the judge’s failure to consider the genetic link to alcohol abuse in the life of G.E.B. #25 is an error. There was limited argument on this point. The Archdiocese’s position is that the judge did not consider the alleged history of alcohol abuse in G.E.B. #25’s family when assessing the award for general and aggravated damages.

[469] The appellants argue that the judge did consider G.E.B. #25’s potential genetic link to alcohol abuse, and that the judge found that the sexual abuse by the Christian Brothers is what triggered G.E.B. #25’s alcoholism.

Parties’ Positions on G.E.B. #33

[470] The Archdiocese alleges that the judge made a palpable and overriding error when he concluded that there was insufficient evidence to find that G.E.B. #33’s father had an alcohol use disorder. To support this position, the Archdiocese points to the testimony of G.E.B. #33’s sister regarding their father’s history with alcohol use:

> Q. In your recollection, did your father have any issues around alcohol abuse?

A. Not that I know of but I was ten years old. You know I was out playing most of the time. We were, we – home for meals and home for bed. He was usually around after work.

…

Q. So, if we accept for the moment some of the evidence we've heard that he did have problems with alcohol abuse, it would have been hidden from you?

A. I think so.

(Trial transcript, June 7, 2016, page 9, lines 8-16, and page 23, lines 15-19)

[471] The appellants disagree and state that the findings of the judge were supported by the documentary evidence and witness testimony.

Law & Analysis

[472] As discussed above, *Housen* provides that where a trial judge's finding of facts is at issue, the applicable standard of review is that of palpable and overriding error.

[473] With respect to G.E.B. #25, the judge did consider the potential impact of G.E.B. #25's family's history with alcohol abuse when assessing the award for general and aggravated damages:

> [404] [Dr. Goldstein] also agreed that just because family members abused alcohol was not a predictor of alcohol abuse. Environmental factors were more important than the genetic connection. This indicated that [G.E.B. #25] may have been predisposed to alcohol abuse, but that the trigger was the abuse at Mount Cashel.

[474] With respect to G.E.B. #33, the judge held that the evidence did not support a finding that G.E.B. #33's father was an alcoholic:

> [578] Drs. Toborowsky and Badgio appeared to place some credence on a theory that his alcoholism was more due to genetic factors than the abuse he suffered. It was based on comments [G.E.B. #33] had made in medical records many years previously about the alcoholism of his father, and several uncles. I had the benefit of hearing the testimony of both [G.E.B. #33] and his older sister. His sister testified that their father was not an alcoholic but did have some health problems. [G.E.B. #33] testified that when he reported earlier to hospital staff and the experts during their evaluations that his father was an alcoholic, he was mistaken. He said he based it on his own perceptions as a young boy before his admission to the orphanage that his father spent a lot of time in his room. His sister's testimony presented a different picture, and a more credible one since she was older and would have had a more

> realistic perspective on their father. As a consequence, I accept that any attempt to assign genetics to his alcohol abuse instead of the abuse at Mount Cashel was more likely than not in error.

[475] Furthermore, the judge found that G.E.B. #33's alcoholism was "materially due to the sexual abuse he suffered at the hands of Brother Lasik" (para. 582).

[476] It is clear from the reasons that the judge was aware that both G.E.B. #25 and G.E.B. #33 potentially had a family history of alcoholism that could have impacted their original position. The judge also held the appellants were considered to be thin skull plaintiffs as opposed to crumbling skull plaintiffs.

[477] Furthermore, we see no error in the judge's handling of G.E.B. #33's sister's testimony regarding their father's alcohol use. G.E.B. #33's sister did not testify that her father was an alcoholic. Rather, she testified that her father most likely would have hid his alcoholism, if in fact he did have a problem with alcohol use. The testimony of G.E.B. #33's sister indicates that she was unaware as to whether her father was an alcoholic. The Archdiocese did not point to any other evidence to support their position that G.E.B. #33's father was an alcoholic.

[478] The judge was aware of and considered the plaintiffs' potential family history with alcoholism as well as the evidence of the expert witnesses.

[479] We conclude that the Archdiocese has not demonstrated that the judge erred in his consideration of this issue respecting G.E.B. #25 and G.E.B. #33. Accordingly, there is no basis for this Court to intervene in the judge's assessment for the awards of general and aggravated damages on this ground of appeal.

Issue 4: Did the judge err in the assessment of the claim for loss of income for G.E.B. #25 when he concluded that there was a causal relationship between the sexual abuse and his inability to advance in the ranks of the Canadian military?

[480] The judge concluded that G.E.B. #25 would have advanced to a low level of non-commissioned officer if he had not been sexually abused. The judge relied on expert evidence to calculate the difference in lost income at $197,000 and the loss of pension at $160,000 for a total loss of income award of $357,000 (which included pre-judgment interest of $118,220 calculated from 1957-1991).

[481] The Archdiocese argues that there was an insufficient evidentiary basis to find that there was a causal relationship between the sexual abuse suffered by G.E.B. #25 and his inability to advance in the ranks of the Canadian military. It argues that there were other reasons, such as the physical and emotional abuse suffered while at Mount Cashel, which could have explained why G.E.B. #25 failed to advance in the military.

[482] The appellants disagree. They argue that the expert evidence led at trial reflected the reality of the type of injuries suffered by the appellants and that the evidence spoke to their indivisible nature. As such, the appellants argue that the judge's conclusion regarding G.E.B. #25's claim for loss income was supported by the evidence.

[483] The judge recognized that he was required to distinguish between the impact of the physical and emotional abuse suffered by G.E.B. #25, and the sexual abuse:

> [438] … The challenge is to separate the impact of the general violent environment at Mount Cashel from the impact of three incidents of sexual abuse he experienced. I have already found that the sexual assaults were significant in his attitude and response to authority. These would be critical factors in progression in the military. I accept that he likely would have had some opportunity for promotion but for the sexual abuse. Since he was already compromised, I believe it would have been at the lower level.

[484] The judge recognized that G.E.B. #25 "was already compromised" due to the physical and emotional abuse he suffered, and thus held that his opportunity for promotion would have been at a "lower level". The judge also considered the impact the physical and emotional abuse would have had on G.E.B. #25 in making his assessment.

[485] Furthermore, the judge stated that: "…I have to find the loss was due to the three incidents of sexual abuse, and not due to the statute-barred physical abuse." Further, "[a]ll of the experts agreed that the sense of betrayal that arose from the sexual assault by Brother J.E. Murphy was likely to have been the basis for [G.E.B. #25's] attitude towards authority in the military". The judge found that the sexual abuse suffered by G.E.B. #25 "contributed materially to his failure to advance to the lower level of non-commissioned officer" (para. 442).

[486] It is clear from the judge's reasoning that he considered the evidence relevant to this issue. The Archdiocese did not demonstrate the judge committed a palpable and overriding error in his treatment of the causation issue.

Accordingly, there is no basis to intervene in the judge's assessment of G.E.B. #25's claim for loss of income, with the exception of the calculation of pre-judgment interest, which will be addressed later in these reasons.

Issue 5: Did the judge err in the assessment of the claim for loss of income for G.E.B. #33 when he concluded that there was a causal relationship between the sexual abuse and his inability to work after the age of 38?

[487] The judge determined that G.E.B. #33 was the plaintiff most seriously affected by the sexual abuse. The judge found that the sexual abuse, which was intensive, extended over a period of close to two years. The judge stated that "it was the sexual abuse which permeated all aspects of his life. His ability to carry on a career was substantially and materially harmed by his experience of sexual abuse" (para. 590). The judge awarded G.E.B. #33 $899,500 as loss of income after age 38 until the age of retirement at 62 based on calculations provided by the appellants' expert. Pre-judgment interest was awarded separately and will be dealt with later in these reasons.

[488] The Archdiocese submits that the judge erred in considering irrelevant factors and not considering relevant factors in the assessment of G.E.B. #33's claim for loss of income. In particular, it argues that G.E.B. #33 had a genetic link to alcohol abuse, which would have negatively affected his employment opportunities.

[489] The Archdiocese claims that the judge was unfairly critical of their experts' evidence. The Archdiocese points to the assessment made by Dr. Foote, where G.E.B. #33 was asked to explain why he drank. When assessed by Dr. Foote, G.E.B. #33 explained that he did "not understand why he [drank] other than to help him relax". The Archdiocese alleges that by the time G.E.B. #33 testified at trial, his evidence had changed; he had testified that he thought he drank to self-medicate because of his experience at Mount Cashel.

[490] The Archdiocese also points to the judge's assessment of G.E.B. #33's sister's testimony regarding their father's use of alcohol as another potential error. It claims that her testimony supported the conclusion that G.E.B. #33's father had an alcohol use disorder, which would have established a genetic link to alcohol abuse for G.E.B. #33.

[491] The appellants submit that the judge's findings are clearly supported by the documentary and *viva voce* evidence. With respect to G.E.B. #33's potential genetic predisposition to alcoholism, the appellants point to the judge's finding

that G.E.B. #33 presented as a thin skull plaintiff. The appellants argue that even if G.E.B. #33 had been predisposed to alcohol abuse (which they point out the judge found he was not), the event that triggered any alcohol use issues was the sexual abuse at Mount Cashel.

[492] As discussed above, the judge considered both the testimony of the Archdiocese's experts and the testimony of G.E.B. #33's sister, and concluded as follows regarding the genetic link to alcohol use:

> [578] Drs. Toborowsky and Badgio appeared to place some credence on a theory that his alcoholism was more due to genetic factors than the abuse he suffered. It was based on comments [G.E.B. #33] had made in medical records many years previously about the alcoholism of his father, and several uncles. I had the benefit of hearing the testimony of both [G.E.B. #33] and his older sister. His sister testified that their father was not an alcoholic but did have some health problems. [G.E.B. #33] testified that when he reported earlier to hospital staff and the experts during their evaluations that his father was an alcoholic, he was mistaken. He said he based it on his own perceptions as a young boy before his admission to the orphanage that his father spent a lot of time in his room. His sister's testimony presented a different picture and a more credible one since she was older and would have had a more realistic perspective on their father. As a consequence, I accept that any attempt to assign genetics to his alcohol abuse instead of the abuse at Mount Cashel was more likely than not in error.

[493] The judge held that the evidence failed to establish that G.E.B. #33's father was an alcoholic and declined to find that G.E.B. #33's alcohol abuse was due to genetics as opposed to the sexual abuse he suffered at Mount Cashel. He found that G.E.B. #33's ability to carry on a career was substantially and materially harmed by his experience of sexual abuse.

[494] As already noted, the judge carefully considered G.E.B. #33's sister's testimony. The Archdiocese has not demonstrated any error in the way the judge handled this evidence and his conclusion**s** respecting it. Neither has the Archdiocese demonstrated error in the judge's assessment of the Archdiocese's experts' testimony. As the appellants point out in their submissions, a person who suffers from alcohol abuse often gains a greater understanding as to the root cause of the problem over time and this may be particularly true when a person, such as G.E.B. #33, is reluctant to discuss the potential underlying causes such as sexual abuse. It was not unreasonable to conclude that G.E.B. #33's understanding and explanation as to why he drank evolved over time.

[495] It is clear from the judge's reasoning that he considered all of the evidence relevant to this issue. The Archdiocese did not demonstrate the judge

committed a palpable and overriding error in his treatment of the causation issue. Accordingly, there is no basis to intervene in the judge's assessment of G.E.B. #33's claim for loss of income, with the exception of the calculation of pre-judgment interest, which will be addressed next.

Issue 6: Did the judge err in the manner in which he awarded pre-judgment interest on the claims for loss of income of G.E.B. #25 and G.E.B. #33?

[496] The judge did not award pre-judgment interest on the non-pecuniary damages (paras. 372-374). Neither party took issue with the judge's reasoning in this regard. This issue was not appealed to this Court. As such, this Court makes no determination on this point. However, the judge did award pre-judgment interest on the economic loss awards. For G.E.B. #25's past loss of income, the judge accepted the calculations of the appellants' expert witness and included pre-judgment interest in the amount of $118,220.00 calculated from 1957. For G.E.B. #33, the award of past loss of income included pre-judgment interest of $729,000 calculated from 1975.

Parties' Positions on Pre-Judgment Interest

[497] The Archdiocese took the position that the judge incorrectly relied on the interest calculations of the expert witness and instead should have determined the date on which the causes of action arose. Their position was that the statements of claim were issued in 1999 and that the limitation period for tort actions at that time was two years and therefore the causes of action could not have arisen prior to 1997.

[498] The appellants took the position, referring to the 1990 version of the *Judgment Interest Act*, R.S.N. 1990, c. J-2, (the "*1990 Act*") that interest should be calculated from the day the causes of action arose. In the appellants' view, that date is when the sexual abuse occurred, based on the fact that there is no limitation period because of the nature of the misconduct.

[499] This Court raised with the parties whether an award of pre-judgment interest was permitted in this case, as the sexual abuse committed by the Christian Brothers occurred in the 1950s when there was no statutory provision for pre-judgment interest. The first *Judgment Interest Act*, S.N. 1983, c. 81, (the "*1983 Act*") in the province did not come into force until 1984.

[500] At the conclusion of the hearing, the Court requested additional submissions from the parties respecting the applicability of the *1990 Act.* Neither party had addressed this issue at the hearing of the appeal.

[501] The parties were asked to consider two decisions of the Supreme Court of Newfoundland and Labrador, where that court ruled that the *1983 Act* did not have retroactive effect and no pre-judgment interest was payable on causes of action that arose prior to the *Act* coming into force in 1984. The two decisions are *Slaney v. Ellis*, [1993] 108 Nfld. & P.E.I.R. 181 (Nfld. S.C.T.D.) and *Benedict v. Sealand Helicopters Ltd.* (1993), [1994] 111 Nfld. & P.E.I.R. 66 (Nfld. S.C.T.D.). The parties were requested to address whether this Court should adopt the reasoning in those two cases, as well as whether there is jurisdiction to award pre-judgment interest on damages in tort regardless of the provisions of either *Act.*

[502] The appellants argue that the *1990 Act* should apply in this case, and that even if it does not, there is a basis in common law to make an award for pre-judgment interest.

[503] The Archdiocese disagrees that the *1990 Act* applies, citing the two decisions referenced above in support of their position. The Archdiocese also maintains that this Court does not have the ability to award pre-judgment interest at common law.

Pre-Judgment Interest at Common Law

[504] The appellants argue that this Court may award pre-judgment interest at common law, separate and apart from the legislation, acknowledging that the majority of cases dealing with common law entitlement to pre-judgment interest are in relation to contract law. They rely on this Court's reasoning in *Baldwin v. Chalker* [1984], 48 Nfld. & P.E.I.R. 86 (Nfld. C.A.) to support their position, arguing that *Baldwin* stands for the proposition that where a court is satisfied that the circumstances of the case justify pre-judgment interest then it should be awarded, regardless of whether the action was founded in contract or tort. The decision in *Baldwin* does not, in our view, stand for such a proposition. Rather, the Court in *Baldwin* was simply stating that since liability had already been admitted, it was of little consequence whether the action was founded in contract or tort or both.

[505] The Court in *Baldwin* reviewed the decision in *Goodyear & House Ltd. v. Eaton* (1971), [1972] 2 Nfld. & P.E.I.R. 56 (Nfld. S.C.T.D.), which dealt with whether interest could be awarded in the absence of legislation authorizing pre-judgment interest:

> [4] As to the claim for interest by way of damages the learned trial Judge was of the view that he was bound by the case of *Goodyear & House Ltd. v. Eaton* (1971), 2 Nfld. & P.E.I.R. 56, a decision of Mifflin J. (as he then was), and concluded, but with reluctance, that interest by way of damages was not recoverable in the absence of provincial legislation authorizing pre-judgment interest.
>
> [5] In my respectful view *Goodyear & House Ltd. v. Eaton* is not authority for such a broad proposition. In that case the plaintiff sued the defendant for the price of goods sold and delivered. It also claimed interest on the debt. Mifflin J., adopting the statement of Lord Herschell L.C. in the *London Chatham & Dover Ry. v. Smith Eastern Ry.*, [1893] A.C. 429 at 437 (H.L.), concluded that interest was not recoverable where there had been no agreement, express or implied, by the customer to pay it. That common law principle established by a long line of authorities, applies only where a debt is owed but is unlawfully withheld. It has no application where, as here, a professional man is sued for breach of his duty to use reasonable care.

[506] In *Baldwin*, the purchaser was unable to obtain title to the property he had purchased through his solicitor, and the Court determined that, in addition to the purchase price, legal fees and out of pocket expenses, the purchasers were entitled to be reimbursed for loss of interest on money borrowed to buy the property. The Court determined that the rule to be adopted in cases such as this was one of *restitutio in integrum*. The Court concluded that the loss of interest was recoverable by way of damages on the breach of the solicitor's undertaking as it could "reasonably be supposed to have been in the contemplation of both parties at the time the contract was made…" (*Baldwin*, at para. 8). This was not a case of pre-judgment interest but rather a decision that the purchasers were entitled to recover damages for the interest paid on money borrowed.

[507] The appellants also reference *Bank of America v. Mutual Trust Co*., 2002 SCC 43, [2002] 2 S.C.R. 601, in support of the proposition that pre-judgment interest is available at common law. The Supreme Court of Canada confirmed that courts have the jurisdiction to award pre- and post- judgment interest at both common law and in equity. *Bank of America* involved the appellate court's failure to confirm the trial judge's' award of compound interest (as opposed to simple interest). The Supreme Court stated at paragraph 50: "… contract law principles may require such interest to be compounded so as to award the plaintiff the benefit of the bargain." In *Bank of America*, the common law jurisdiction to award pre-judgment interest flowed from the application of contract law.

[508] The Archdiocese argues that there is no basis in common law to award pre-judgment interest on damages for sexual abuse and cites the Supreme Court of British Columbia's decision in *Blackwater v. Plint*, 2001 BCSC 997. The

question before the court was whether to award pre-judgment interest under the *Court Order Interest Act*, R.S.B.C. 1996, c. 79. The British Columbia legislation contained a similar provision to that of this province, which stated the legislation applied only to those causes of action that arose after the legislation came into force. Brenner C.J.S.C. stated as follows:

> [925] The plaintiffs claim pre-judgment interest on the damages awarded. Entitlement to court order interest is statutory. There was no right to pre-judgment interest at common law. The *Court Order Interest Act*, R.S.B.C. 1996 c. 79 does not apply to causes of action that arose before June 1, 1974. Any and all sexual and physical abuse in these actions as well as any other legal wrongs suffered occurred before June 1, 1974. When the Legislature elected to remove the limitation period for claims of a sexual nature, it could at the same time have amended the provisions of the *Court Order Interest Act*. It chose not to do this. In the absence of such an amendment I conclude that the plaintiffs are not entitled to court order interest.

[509] The issue of court ordered interest in *Blackwater* was not considered on appeal by the British Columbia Court of Appeal. Neither was it considered in the decision by the Supreme Court of Canada.

[510] In *Courtney v. Cleary*, 2010 NLCA 46, 299 Nfld. & P.E.I.R. 85, this Court reviewed the history and application of judgment interest in this province. Cameron J.A. stated as follows regarding pre-judgment interest at common law:

> [80] Prior to the introduction, in 1983, of legislation providing for its payment, pre-judgment interest was denied in this Province, except in very narrow circumstances: *Goodyear & House Ltd. v. Eaton* (1971), 2 Nfld. & P.E.I.R. 56. The payment of pre-judgment interest on non-pecuniary damages is not a development of the common law but the result of legislative action.

This paragraph refers, by way of footnote, to two older cases dealing with claims for debts in which interest was allowed: *Prowse v. The Government of Newfoundland* (1900), 8 Nfld. L.R. 386 and *Whiteway v. The Government of Newfoundland* (1901), 8 Nfld. L.R. 482, noting that neither was cited in *Goodyear & House Ltd*.

[511] Mercer J.A. concurring with Cameron J.A., except in respect to an issue pertaining to calculation of non-pecuniary damages, considered the reasoning in *Bank of America*, and stated that prior to the enactment of judgment interest legislation, common law in this jurisdiction prohibited an award of pre-judgment interest on damages, absent a pre-existing contractual obligation to pay interest.

[512] We conclude that while there may be limited circumstances in which the common law may be relied upon to support a claim for judgment interest, in this case, given the enactment of statutory provisions, there is no basis in common law to award pre-judgment interest on the damages for economic loss.

Statutory Approach – Legislative History

[513] The *1983 Act* was proclaimed into force on April 2, 1984. Section 10 of the *1983 Act*, entitled "Transitional", stated as follows:

> 10. This Act does not apply to a cause of action that arises before the coming into force of this Act, or to a judgment debt payable before the coming into force of this Act.

[514] The revised *1990 Act* is substantially the same as the *1983 Act*, except that the *1990 Act* did not include the transitional or commencement provisions.

[515] In *Slaney*, the plaintiff was injured in a motor vehicle accident on March 27, 1984 and commenced an action for his injuries. The judge held that the plaintiff was entitled to $51,838 for loss of income from the date of his injuries to the date of the trial (June 1, 1992). The plaintiff also sought pre-judgment interest.

[516] The accident occurred a few days before the *1983 Act* was proclaimed. Therefore, on its face, under the *1983 Act* the claim for pre-judgment interest would be barred under section 10 because the cause of action arose before it came into force. However, the *1990 Act* did not contain a section similar to that of section 10 of the *1983 Act*. In *Slaney*, the plaintiff argued that the *1990 Act* allowed for a person to claim pre-judgment interest for a cause of action that arose before the date the *1983 Act* came into force (April 2, 1984). The respondent disagreed and argued that entitlement to pre-judgment interest was specifically excluded under the provisions of the *1983 Act*, in force at the time the action arose, and that it could not be awarded now. The trial judge held that the plaintiff was not entitled to pre-judgment interest as the cause of action arose prior to the *1983 Act* coming into force:

> [109] … In my view the elimination of the limiting section from the revised *Act* is not tantamount to a statement of legislative intent to clothe that *Act* with retroactive effect to cover causes of action arising before the date of proclamation of the *Judgment Interest Act* in 1984. I find that the Plaintiff is not entitled to pre-judgment interest. My finding in that respect, of course, does not affect his right to post-judgment interest in accordance with the *Judgment Interest Act*, c. J-2, R.S.N. 1990.

[517] In *Benedict*, the plaintiff was injured in a helicopter accident in 1978 and commenced an action for negligence in 1980 prior to the proclamation of the *1983 Act*. At trial, in 1993, the question arose as to whether pre-judgment interest should be awarded, or whether such an award was barred due to section 10 of the *1983 Act*. Mercer J. at paragraph 76 concluded that: "the non-inclusion of Section 10 in the 1990 *Act* does not clothe that *Act* with retroactive effect."

[518] Mercer J. went on to consider the impact of the *Revised Statutes, 1990 Act*, S.N. 1991, c. 41 (the "*Revised Act*") and concluded at paragraph 78 that:

> … Section 9(1) of the *Revised Act* clearly states that the revised statutes shall not operate as new laws but shall be construed as a consolidation of the law. Section 9(3) explicitly deals with the situation where the provisions of the revised statutes are not the same as the previous enactments. The provisions of previous enactments apply to all earlier transactions, matters and things. Therefore the provisions of Section 10 of the 1983 *Act* continue to apply, thereby denying pre-judgment interest to the cause of action in this case which arose in 1978.

The Reasoning in Slaney and Benedict

[519] The appellants argue that this Court should not adopt the reasoning in *Slaney* and *Benedict*. They say that the reasoning in those cases is incorrect and, in any event, inapplicable to the present case because they fail to analyze the legislative objective for the elimination of section 10. They also submit that there was no consideration of the changes in law over the years regarding compensation for victims of sexual abuse and finally, that an overly broad interpretation of the presumption against the retrospective operation of statutes was applied.

[520] The Archdiocese argues that the reasoning in *Slaney* and *Benedict* should be applied, with the effect that the *1990 Act* would not have retrospective application to a cause of action that arose prior to the *1983 Act* coming into force. The Archdiocese cites the *Revised Act* in support of its argument.

[521] Sections 10 and 11 of the *1983 Act*, the provisions entitled "Transitional" and "Commencement" respectively, were removed in 1990 when the statutes of the province were consolidated under the *Revised Act*. Consolidation provided a record of all statutes in force prior to January 1, 1991, including any amendments that had been made.

[522] The *1990 Act* provides that it is not retrospective, through the operation of section 9(3) of the *Revised Act* and section 10 of the *1983 Act.* The *1990 Act* is

not the same as the *1983 Act* in that it does not contain the language of section 10. This engages section 9(3) of the *Revised Act*:

> (3) If on any point the provisions of the revised statutes are not in effect the same as the previous enactments for which they are substituted, … with respect to all earlier transactions, matters and things the provisions of the previous enactments prevail.

[523] In applying the provisions of section 9(3) of the *Revised Act* and considering section 10 of the *1983 Act*, we conclude that the *1990 Act* does not apply to a cause of action that arose before the *1983 Act* came into force.

[524] "Transitional" and "Commencement" provisions were removed from many, if not all, statutes that came into force prior to January 1, 1991. For example, *The Young Persons Offences Act*, S.N. 1984, c. 2, also contained a "Transitional" provision (section 26) and a "Commencement" provision (section 33). These "Transitional" and "Commencement" provisions were similarly removed from the revised statute, *Young Persons Offences Act*, R.S.N. 1990, c. Y-1.

[525] We conclude that the elimination of section 10 appears to have more to do with the consolidation of the statutes in 1990 rather than a conscious decision on the part of the legislature to remove the statutory preclusion set out in section 10 of the *1983 Act*.

[526] The appellants further submit that the reasoning in *Slaney* and *Benedict* failed to consider the legislative objective for the elimination of section 10 from the *1990 Act*. However, the appellants fail to submit any evidence or jurisprudence in this regard, or point to any discussion in the legislature, either through *Hansard* or some other means, where the elimination of section 10 was discussed or debated.

[527] The appellants argue that when the statutory preclusion was included in the *1983 Act*, the legislature had not turned its mind to sexual misconduct as a civil cause of action. In support of this argument, they cite section 8(2) of the 1995 *Limitations Act* which provides that there is no limitation period for actions involving sexual misconduct committed against a person that was under the care of another person, organization or agency.

[528] The supplementary submissions of the appellants do not indicate how such developments regarding the limitation period for historical sexual abuse of a child would impact this Court's decision to adopt the reasoning in *Slaney* and *Benedict*. Rather, it appears that the appellants are arguing that since the

legislature had not turned its mind to sexual misconduct as a civil cause of action until 1995, the legislature had not considered such a cause of action when it enacted the *1983 Act*. The appellants appear to be implying that if the legislature had considered sexual misconduct as a civil cause of action in 1983, that it would have granted an exception for such a cause of action under section 10 of the *1983 Act*, as it did under section 8(2) of the *Limitations Act*. If this is indeed the position of the appellants, it is merely speculative about what the legislature might have done had it turned its mind to the issue.

[529] The appellants also argue that the presumption against the retrospective operation of statutes was given an overly broad interpretation in *Slaney* and *Benedict*, and that such an interpretation was contrary to the objective of compensation. In making this argument, the appellants rely on *Fontaine v. Canada (Attorney General)*, 2017 MBQB 21, which dealt with an award for pre-judgment interest under the *Judicature Act*, R.S.O. 1970, c. 228 on a cause of action that arose in the 1950s – approximately 20 years prior to the applicable legislation coming into force. In our view, the Ontario[1] legislation referred to in *Fontaine* is distinguishable from the legislation in this province for the following reasons. In 1977, amendments were made to the 1970 *Judicature Act*, which established a statutory entitlement to pre-judgment interest in what became section 36 of the *Judicature Act*, R.S.O. 1980, c. 223. At paragraph 81 of *Fontaine*, section 36(7) of the 1980 *Judicature Act* is referenced:

> (7) This section applies to the payment of money under judgments delivered on or after the 25th day of November, 1977, but no interest shall be awarded under this section for a period before that date.

[530] The Ontario scheme lacked the same limitation that section 10 of the *1983 Act* places on an award for pre-judgment interest. Rather, the only limitation on an award of pre-judgment interest under the Ontario legislative regime referenced in *Fontaine* is that no pre-judgment interest should be awarded under the *Act* for the period before November 25, 1977. As such, the judge held at paragraph 82 in *Fontaine* that the "statute makes it clear that there is a discretion to award pre-judgment interest as I may find just to do so, at least as far back as November 25, 1977".

[531] Section 10 of this province's 1983 legislation, states that if a cause of action arose prior to the *1983 Act* coming into force then the *Judgment Interest*

[1] This matter was part of a multi-province class action where parties agreed that Ontario legislation would be used.

Act has no application. Thus, the reasoning in *Fontaine* is distinguishable due to the differences in the two legislative regimes.

[532] We see no errors in the way the *1990 Act* or the *Revised Act* were interpreted and applied in *Slaney* and *Benedict*, and no reason why this Court should depart from the reasoning in those cases. We now turn to when the causes of action arose to determine if the *1990 Act* would apply in this case.

Causes of Action

[533] Accordingly, if the appellants' causes of action arose prior to the *1983 Act* coming into force, then by operation of section 10 of the *1983 Act* and section 9 of the *Revised Act*, there could be no award for pre-judgment interest.

[534] However, if the appellants' causes of action arose after the *1983 Act* came into force, pre-judgment interest may be awarded under the consolidated *1990 Act*.

[535] The appellants' factum on cross-appeal at paragraph 74 states that the causes of action arose "when the plaintiffs were abused". The appellants do not suggest a definitive date for when the causes of action arose in their supplementary submissions. Rather, they say at paragraph 22 that "if it is necessary to determine the date the various causes of action arose in the present case, it should be a date that does not disadvantage the plaintiffs." At paragraph 20 of their supplementary submissions, they refer to the *Limitations Act* which provides that there is no limitation period for actions arising from sexual misconduct in these circumstances and argue that "courts no longer have to parse out the events of a tort involving sexual abuse to determine exactly when a cause of action accrued."

[536] The Archdiocese submits that the causes of action did not arise until the appellants' statements of claim were issued in 1999, or at the earliest, two years earlier due to the two-year limitation period set out in section 5(a) of the *Limitations Act* which reads:

> 5. Following the expiration of 2 years after the date on which the right to do so arose, a person shall not bring an action
>
> > (a) for damages in respect of injury to a person or property, including economic loss arising from the injury whether based on contract, tort or statutory duty;

[537] Section 5(a) of the *Limitations Act* is of no application in this case, because section 8 of that *Act* states that there is no limitation period for claims of sexual abuse like those in this case. As such, section 5(a) should not impact the date on which the causes of action arose for limitations purposes.

[538] While it may be unnecessary to determine when the causes of action arose in this case for the purposes of the *Limitations Act*, the same cannot be said of the *1990 Act*. *Slaney* and *Benedict* reason that if the cause of action arose prior to the *1983 Act* coming into force, the legislation would not apply. Furthermore, under section 4(1) of both the *1983 Act* and the *1990 Act*, pre-judgment interest may only be awarded from the date the cause of action arose until the day of judgment. Therefore, it is necessary to determine the date the causes of action arose in order to see if the legislation applies and if so, whether pre-judgment interest could be awarded under the *1990 Act*.

Did the judge make a finding as to when the cause of action arose?

[539] The judge did not make explicit findings in relation to the dates on which the causes of action arose. He did not make a finding as to when the cause of action arose based on discoverability principles outlined and adopted in the jurisprudence for historical sexual abuse. He did not consider the impact of the *Limitations Act* of 1995 on the revival of a cause of action previously statute-barred, which allowed for certain parts (the sexual abuse but not the physical abuse complaint) of this litigation to proceed. He did not consider the impact of the 1999 Supreme Court of Canada decision in *Bazley* on the determination of when the causes of action (the historical sexual assaults with vicarious liability implications for institutions) arose in the circumstance of this litigation.

[540] The judge heard evidence from the appellants' expert, Ms. Cara Brown, a forensic economist, regarding the calculation of damages and pre-judgment interest. It would appear from her testimony that she calculated pre-judgment interest from 1957 for G.E.B. #25 and from 1975 for G.E.B. #33 up to the date she testified. Ms. Brown testified that she relied on the interest rates set out under the *Regulations* of the *Judgment Interest Act* for the period from 1984 up to 2016, and the Bank of Canada rate from 1957 up to 1984, by taking the average rate between October and November of each year and then reducing that average by one percent.

[541] Ms. Brown testified as to how she determined the starting date for her calculation of pre-judgment interest for G.E.B. #25 and G.E.B. #33 She testified that for G.E.B. #25, she used 1957 as a date when he started earning income and

that no one had directed her to use that date. For G.E.B. #33 she testified she used 1975 because that was the date from Dr. Goldstein's report where "negative things started happening in [G.E.B. #33's] life."

[542] In accepting the dates and calculations from Ms. Brown, perhaps the judge determined that this was when the causes of action arose. However, he did not make a specific finding in this regard. Alternatively, perhaps he merely accepted that this would be the period of economic loss for the two appellants if pre-judgment interest was awarded.

[543] The judge also considered the fact that one of the appellants did not disclose the sexual abuse until decades later and described the events that led up to the disclosure. The judge appears to connect this appellant's disclosure of the sexual abuse to the criminal investigations into the Christian Brothers and the Hughes Inquiry.

> [575] One of the interesting things about this case is that none of the Plaintiffs spoke of the sexual abuse until many years later. They all testified that they feared the stigma attached to an admission that they had been involved in sexual activities with any of the Brothers. [G.E.B. #33] was no different. Even though it had a serious impact on his marriage, he refused even to disclose to his wife. When he was contacted by Sergeant Mark Wall of the Royal Newfoundland Constabulary in the 1990's he initially was not prepared to disclose anything about sexual abuse. It was only later after Sgt. Wall persisted that he agreed to disclose. That was in the context of the criminal investigations in the 1990's against several Brothers, including Brother Lasik. These matters came to light after testimony at the Hughes Commission which reported in 1991.

[544] The Supreme Court of Canada in *M.(K.) v. M.(H.)*, [1992] 3 S.C.R. 6 (S.C.C.), discussed limitation periods and the application of the discovery principle regarding claims of historical sexual misconduct. The Court began by reviewing the discoverability rule generally. On this point, the Court referred to comments by Le Dain J. in *Central Trust Co. v. Rafuse*, [1986] 2 S.C.R. 147 at 224 (S.C.C.):

> ... a cause of action arises for purposes of a limitation period when the material facts on which it is based have been discovered or ought to have been discovered by the plaintiff by the exercise of reasonable diligence ...

The Court went on to adopt this principle and stated that it applies to cases involving historical sexual misconduct (in that case, incest) where La Forest J. stated at 35:

> In my view the only sensible application of the discoverability rule in a case such as this is one that establishes a prerequisite that the plaintiff have a substantial awareness of the harm and its likely cause before the limitations period begins to toll. It is at the moment when the incest victim discovers the connection between the harm she has suffered and her childhood history that her cause of action crystallizes. …

[545] In the present case, the judge made no finding nor was there any evidence before him as to when the appellants had a substantial awareness of the harm done and its likely cause. He did not make a finding as to when the cause of action would have arisen or crystallized using the discoverability principle.

Parties' Positions as to When the Causes of Action Arose

[546] The Archdiocese submits at paragraph 18 of its supplementary submissions, there was "no evidence at trial that G.E.B. #25 or G.E.B. #33 received therapeutic assistance before the statement of claim was issued, nor any evidence that they independently developed a substantial awareness of the harm and its likely cause at any time". The Archdiocese argues that the causes of action therefore did not arise until the appellants filed their statements of claim in 1999.

[547] The Archdiocese submits that to allow interest to run from a historical date, such as 1957, where the Archdiocese did not receive notice of the claim until 1999, some 42 years later, would offend principles of fairness. Additionally, the claim against the Archdiocese is in part, one of vicarious liability. The Archdiocese contends that the impact of the 1999 Supreme Court of Canada decision in *Bazley* created vicarious liability implications for institutions in circumstances of historical sexual assault. The Archdiocese queries in submission as to how an institution could be liable for pre-judgment interest from 1957 to 1999 when the claim was not even within the ambit of risk articulated by the Court at that time.

[548] The Archdiocese takes the position that there is no distinction for this purpose in the words "cause of action arises" (*Judgment Interest Act*) or "cause of action crystallizing" (*M.(K.) v M.(H.)*). Further, there being no evidence of therapeutic treatment, or any other disclosures or reports to service providers, there could be a presumption that the causes of action arose when the statements of claim were filed in 1999. This date is coincidental with when the Supreme Court of Canada first ruled that vicarious liability was legally available for claims of historical sexual abuse.

[549] The Archdiocese submits that the judge erred by not conducting the analysis required under the *1990 Act* to determine when the causes of action arose. It argues, in the absence of evidence of therapeutic treatment for either of these plaintiffs, the most logical approach would be to determine that the causes of action arose in 1999 when the statements of claim were issued. Alternatively, it could be returned to the judge to receive evidence and submissions to determine when the causes of action arose.

[550] The appellants submit the significance of *Bazley* is only that it allowed vicarious liability claims for historical sexual abuse to proceed. They argue that 1999 is not some sort of hard or bright line – it is merely a decision of the Supreme Court of Canada in 1999 that recognized the right of individuals to sue in these historic cases.

[551] In response to the fairness argument put forward by the Archdiocese, the appellants submit that fairness favours their position. They argue that just as the law respecting vicarious liability and limitation periods for historical sexual abuse claims have evolved, so too should the law regarding pre-judgment interest.

[552] The appellants submit that one of the purposes of pre-judgment interest is to compensate a plaintiff for the deprivation of monies to which the plaintiff has been found to be entitled. The appellants argue that because there was a finding of economic loss, they should recover pre-judgment interest for the entire period that they were deprived of the money.

[553] The Archdiocese submits that this purpose for awarding pre-judgment interest must be tempered by fairness, and fairness requires that a defendant must know that a plaintiff may commence or has commenced a claim so that money may be reserved to earn interest during the period of litigation. In this case, the Archdiocese argues that it could not have reserved funds as it did not have any knowledge of the claims prior to the suits being filed in 1999.

Law & Analysis

[554] According to section 4(1) of the *Judgment Interest Act* (both versions), a court should calculate pre-judgment interest from the day the cause of action arose to the day of judgment at a rate determined by averaging the interest rates in effect during that period. In this case, if the causes of action arose prior to 1983, then no pre-judgment interest would be awarded. If the causes of action did not arise until the early 1990s or 1999 when the statements of claim were

issued, then according to section 4(1) of the *Act*, pre-judgment interest would be calculated from then until the date of judgment. Accordingly, we are of the view that the judge erred in awarding pre-judgment interest for the period from 1957 or 1975 to the date of hearing without making any finding as to when the causes of action arose.

[555] Much of the Canadian jurisprudence regarding when the cause of action arose, for pre-judgment interest purposes, has adopted the discoverability approach (as opposed to the date of the abuse), holding that interest should be calculated from the date a plaintiff reasonably discovers the injury.

[556] The Nova Scotia Court of Appeal took this approach in *R. (G.B.) v. Hollett*, 1996 NSCA 121, 139 D.L.R. (4th) 260, leave to appeal to S.C.C. refused (1997), 160 N.S.R. (2d) 80 (note). This case involved the defendant (Hollett) who was a counsellor at the Nova Scotia Home for Girls where R. (G.B.), the plaintiff, was a student. Beginning in October 1976, the plaintiff began to stay at the defendant's home, where she was abused emotionally, physically and sexually. It was not until 1993, some 17 years later, that the plaintiff commenced a civil action against Mr. Hollett.

[557] In 1991, the plaintiff read newspaper accounts of allegations of sexual abuse at the Nova Scotia Home for Girls, which she testified triggered her memories of the abuse she suffered. As a result, she disclosed her relationship with Mr. Hollett to the authorities, which led to him being convicted in November 1992 of sexual intercourse with a person under the age of 16.

[558] A year later, in 1993, the plaintiff commenced a civil action against Mr. Hollett. The judge found that prior to November 1992, the plaintiff was not substantially aware of the harm inflicted and that Mr. Hollett was the likely cause of that harm. As such, the judge held that the cause of action did not arise until November 1992 and awarded pre-judgment interest from that date to the date of judgment. R. (G.B.) appealed this decision, arguing that the cause of action arose when the abuse occurred and sought pre-judgment interest from June 1977 to the date of judgment.

[559] The Nova Scotia Court of Appeal dismissed this ground of appeal, stating:

> 184 The appellant cannot contend that she has lost the use of the money, or has been deprived of the use of the money, (awarded to her in this litigation) prior to November 1992, when she was not even aware, prior to November 1992, that she had a claim to advance. Likewise, from the Crown's perspective, it cannot be said that the Crown was failing to make proper recompense to the appellant, since June 1977, when

> the Crown was not even aware until some time after November 1992 that the appellant had a damage claim against the Crown.
>
> …
>
> 186 In my opinion, in awarding the appellant pre-judgment interest from November 1992 to the date of judgment, the trial judge neither "penalized" the appellant nor "rewarded" the Crown. To say that the Crown should pay interest, for 16 years prior to November 1992, when not only did it not know that the appellant was making a claim against the Crown, but the appellant did not know that herself, is contrary to the purpose and intent of the pre-judgment interest legislation.

[560] The Court's analysis in *R.(G.B.)* applied the discoverability principle to determine the date the cause of action arose even though the actual sexual abuse occurred much earlier. The Court rejected the appellant's claim for pre-judgment interest back to the date of the actual abuse.

[561] The judge in the present case did not apply the discoverability principle and made no finding as to when the appellants would have had substantial awareness of the harm done and its likely cause. There is only an inferential discussion that could lead one to infer that one of the appellants may not have discovered his cause of action until the investigation into the Christian Brothers commenced in the early 1990s. Without an analysis by the judge (who merely noted the first time one of the appellants disclosed the sexual abuse to anyone was in the 1990s fearing the stigma of disclosure), we find we are unable to use the discoverability principle to determine when the causes of action arose.

[562] Is the analysis and application of the discoverability principle the only way to determine when the cause of action arose in this case? If so, this could result in remitting the matter to the judge to determine when the causes of action arose for the purposes of calculation of pre-judgment interest. This would not be the most desirable course of action given the passage of time, the ages of the appellants, the benefit to the parties of concluding the litigation and for the reasons outlined above in the discussion of the *Madsen Estate* and *Matchim* principles.

[563] The *Limitations Act* in 1995 removed the limitation period for historical sexual misconduct, under certain conditions, which were statute-barred under the previous legislation. The following are the relevant portions of the *Limitations Act* which contemplate reviving causes of action:

No limitation period

8. (2) Notwithstanding sections 5, 6, 7, 9 and 22, where misconduct of a sexual nature has been committed against a person and that person was

(a) under the care or authority of;

(b) financially, emotionally, physically or other-wise dependant upon; or

(c) a beneficiary of a fiduciary relationship with

another person, organization or agency, there shall be no limitation period and an action arising from that sexual misconduct may be brought at any time.

(3) Notwithstanding section 24, subsection (2) shall apply regardless of when the cause of action arose.

Extinguishment of Rights

17. (1) A cause of action and the right or title on which it is based are extinguished upon the expiration of the limitation period for that cause of action.

(2) Where under another Act, an order extending a limitation period is made after the limitation period has expired, that order revives the cause of action and the right or title on which it is based.

Application of Act

24. (1) This Act applies to causes of action that arose before this Act comes into force as well as to causes of action that arise after this Act comes into force.

(2) Nothing in this Act revives a cause of action in respect of which the limitation period has expired before this Act comes into force.

(Emphasis Added.)

[564] The *Limitations Act* contemplates "reviving" causes of action. When read together, sections 8(3) and 24(2) would have the effect of reviving causes of action based on sexual misconduct that would have been statutorily barred under the former *Limitation of Personal Actions Act*, R.S.N. 1990, c. L-15.

[565] The concept of a cause of action being revived by a *Limitations Act* was discussed by the British Columbia Court of Appeal in *J.P. v. Sinclair* (1997), 37 B.C.L.R. (3d) 366, 148 D.L.R. (4th) 472. In that case, J.P. had commenced an action in October of 1993 for sexual misconduct against a former teacher and

the School District. J.P.'s claim would have been statutorily barred under the former *Limitations Act*, however in the early 1990s there were amendments made to that province's *Limitations Act* to eliminate limitation periods in relation to claims based on sexual misconduct. The British Columbia Court of Appeal had to decide whether the amendments to the *Limitations Act* revived J.P.'s claims, which had been previously extinguished by statutory limitation, and thus allow J.P. to commence/continue her claims based on the alleged sexual misconduct.

[566] The British Columbia Court of Appeal reviewed the old and new versions of the *Limitations Act*, as well as the amending *Act*, and determined that the amendments to the *Limitations Act* did have the unusual effect of reviving causes of action where they had been previously extinguished under the former *Limitations Act*.

[567] Were the appellants' causes of action revived with the introduction of the *Limitations Act* in 1995 in the circumstances in this case? An appropriate conclusion to be drawn from the facts of this litigation is that the causes of action must have been previously statutorily barred due to the operation of the limitation periods in place at the time. The causes of action were revived by the operation of the *Limitation Act* and the appellants were able to commence an action in 1999 for the historical sexual abuse but not for the physical abuse which had occurred at the same time.

[568] The removal of the statutory bar in 1995, while having the effect of reviving the cause of action, does not necessarily mean that this is when the cause of action arose for the purpose of section 4 of the *Judgment Interest Act.*

[569] According to section 4 of the *Judgment Interest Act*, pre-judgment interest should be calculated from "the day the cause of action arises to the day of judgment". It is not clear that revival of the cause of action is equivalent to the date the cause of action arose for calculation of pre-judgment interest. Judgment interest should be calculated from the date the cause of action arose, not necessarily the date the cause of action was revived.

[570] The causes of action pursued by the appellants in this case were claims that the Archdiocese was vicariously liable for the historical sexual abuse endured by the appellants.

[571] The state of the law respecting vicarious liability in these circumstances was beginning to evolve in the late 1980s and 1990s. Four appellate court

decisions that dealt with the issue of vicarious liability in the context of sexual assault prior to *Bazley* included: *Q. v. Minto Management Ltd.* (1985), 49 O.R. (2d) 531, 15 D.L.R. (4th) 581 (Ont. S.C.), aff'd (1986), 57 O.R. (2d) 781, 34 D.L.R. (4th) 767 (Ont. C.A.); *F.W.M. v. Mombourquette,* 1996 NSCA 125; *J.B. v. Jacob* (1998), 204 N.B.R. (2d) 254, 166 D.L.R. (4th) 125 (N.B. C.A.); and *C.A. v. J.W.C.* (1998), 60 B.C.L.R. (3d) 92, 166 D.L.R. (4th) 475 (B.C. C.A.).

[572] It is noteworthy that, except for the decision in *Q. v. Minto*, each of the other decisions cited or referred to the lower courts' decisions in *Bazley* and recognized that the law in this area was evolving. Furthermore, the Courts in *J.B. v. Jacob* and *C.A. v. J.W.C.* explicitly recognized that leave to appeal to the Supreme Court of Canada in *Bazley* had been granted. The lower courts may have been signaling to litigants that a decision from the Supreme Court of Canada would provide some guidance, in that vicarious liability in these circumstances was not settled, and that the area of law needed clarification from the Supreme Court of Canada.

[573] Prior to the decision in *Bazley*, the appellants would not have been aware that they had a cause of action arising from sexual abuse in which it would be possible to hold the Archdiocese vicariously liable. Their statement of claim was issued approximately six months after the decision in *Bazley*.

[574] The Archdiocese has submitted that 1999 is the date when the causes of action arose. The appellants have submitted in their supplementary brief "if it is necessary to determine the date the various causes of action arose in the present case, it should be a date that does not disadvantage the plaintiffs."

[575] The *Judgment Interest Act* contains a discretionary provision that may apply in the calculation of pre-judgment interest. Section 3(3) states as follows:

> (3) Where it is proven to the satisfaction of the court that it is just to do so having regard to the circumstances, the court may, with respect to the whole or a part of the amount for which judgment is given,
>
> (a) refuse to award interest under this Act; or
>
> (b) award interest under this Act at a rate or for a period or both other than a rate or period determined pursuant to section 4.

[576] We have found that the amendment to the *Limitations Act* in 1995 revived the appellants' causes of action and that this may provide the earliest possible date for the application of pre-judgment interest. We have also found that the 1999

decision in *Bazley* provided guidance and confirmation of the potential for institutional vicarious liability for historical sexual abuse, followed shortly thereafter by the issuance of the statements of claim by the appellants. We have also considered the parties' arguments with respect to fairness and equity. In all of the circumstances, we rely on the discretion available to us in section 3(3) of the *Act* and award pre-judgment interest from December 29, 1999.

[577] In summary, on the issue of pre-judgment interest, we conclude that a common law entitlement to an award of pre-judgment interest is available only in limited circumstances. We confirm the approach taken in *Slaney* and *Benedict* regarding the application of the *1983 Act* and *1990 Act.* Further, the analysis in *Benedict* sets out a principled approach to the interpretation of the revisions under the *1983 Act* and *1990 Act.* Pre-judgment interest on the economic loss awards will be calculated from the date the statements of claim were filed until the date of judgment.

Disposition of the Cross-Appeal

[578] In the result, we dismiss the first five grounds of the cross-appeal and allow the cross-appeal respecting the calculation of pre-judgment interest. Pre-judgment interest is to be calculated on the economic loss awards for G.E.B. #25 and G.E.B. #33 from December 29, 1999 to the date of judgment.

SUMMARY AND CONCLUSION

[579] With respect to the appeal on liability, we find the judge erred in concluding that the Archdiocese is not vicariously liable for the Brothers' sexual abuse of the appellants. We conclude the Archdiocese is vicariously liable in this regard, and allow the appeal on this issue.

[580] The judge did not err in concluding that the Archdiocese was not vicariously liable for Monsignor Ryan's conduct. Further, the judge did not err in deciding that the Archdiocese is not directly negligent. The appeal on these grounds is dismissed.

[581] With respect to the cross-appeal on damages, the judge did not err on the first five issues, discussed above. The cross-appeal on these issues is dismissed. However, we find that the judge erred respecting the issue of pre-judgment interest, and we allow the cross-appeal on this issue.

[582] In the result, the appeal is allowed and the cross-appeal is allowed in part.

COSTS

[583] Rule 58(1) of the *Court of Appeal Rules*, N.L.R. 38/16, allows for a lump sum costs award. The parties jointly submit that a lump sum costs award of $150,000.00 plus disbursements and HST with respect to costs at trial of this matter would be appropriate. Costs were sought at trial but the judge did not hear submissions or make an order. Rule 58(2) provides this Court with the jurisdiction to do so. Accordingly, the appellants shall have their trial costs, in the amount above, as agreed to by the parties.

[584] The appellants were successful on the appeal and are awarded costs for two counsel on the appeal, under column 3 of the scale of costs in the *Court of Appeal Rules.*

[585] On the cross-appeal, success was mixed. The appellants were successful on a number of issues and the Archdiocese was successful on the issue of pre-judgment interest, which has a significant monetary impact on the award of damages. As such, there shall be no order as to costs on the cross-appeal.

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D. E. Fry C.J.N.L.

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L. R. Hoegg J.A.

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F. P. O'Brien J.A.