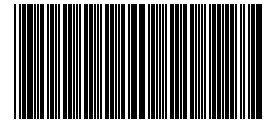




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Written Submissions

COURT DETAILS

Court	Supreme Court of New South Wales, Court of Appeal
List	Court of Appeal
Registry	Supreme Court Sydney
Case number	2025/00099362

TITLE OF PROCEEDINGS

First Appellant	Albert John Hartnett
First Respondent	THE TRUSTEES OF THE ROMAN CATHOLIC CHURCH FOR THE DIOCESE OF WILCANNIA-FORBES ABN 42569276422
Second Respondent	TRUSTEES OF THE MARIST BROTHERS
Number of Respondents	3

FILING DETAILS

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ATTACHMENT DETAILS

In accordance with Part 3 of the UCPR, this coversheet confirms that both the Lodge Document, along with any other documents listed below, were filed by the Court.

Written Submissions (Respondents' Submissions (amended to comply with r 51.36(1)(b))
30.9.25.pdf)

[attach.]

**ALBERT JOHN HARTNETT v TRUSTEES OF THE ROMAN CATHOLIC CHURCH FOR
THE DIOCESE OF WILCANNIA-FORBES & ORS**

(2025 / 99362)

RESPONDENTS' WRITTEN SUBMISSIONS

A. OVERVIEW

1. In 1992, the appellant was enrolled as a kindergarten student at **Saint Ignatius** Parish School in Bourke NSW. Putting aside some periods of absence while he attended other schools, between 1992 and 1994 the appellant was in the Infant Aboriginal class (kindergarten to year 2) at St Ignatius, taught by **Sister Marietta Green**, a Sister of Mercy who taught at St Ignatius for 29 years. The Aboriginal classes aimed to address Indigenous disadvantage via culturally sensitive teaching.
2. The appellant's factual case was that he was subject to constant cruelty and violence by Sister Green. He alleged that she tortured him, called him a "little bastard", hit him with a long wooden ruler (leaving marks and bruises), dragged him by the ears, and made him stand in the hot Bourke sun for very long periods. He also says that Sister Green was cruel and violent towards other students. His Honour correctly described the appellant's case as amounting to an allegation that there was a "reign of terror" perpetrated by Sister Green: J [192] Red 195G; J [227]-[228] Red 205X-206G. He further alleged that Mr Alex Anthony "Sweeney" Dixon (**Sweeney**¹), an Aboriginal teacher's aide, hit him, twisted his ears, and kicked him in the bottom.
3. Sister Green gave evidence and denied the allegations. So did Sweeney. During the period when Sister Green taught the appellant, she was assisted by various teacher's aides. They gave evidence. The effect of their evidence was that for most of the time, there was another member of the teaching staff either in the class with Sister Green or close by and that Sister Green was not cruel or violent to any of the students. They described a caring and nurturing environment.
4. After a 15-day hearing involving 33 lay witnesses, the trial judge found that the appellant was not subjected to "serious physical abuse" in 1993-1994 by Sister Green or Sweeney. His Honour made orthodox factual findings based on the credibility and reliability of lay witnesses, including having regard to the fact that the appellant was a child at the time of the events the subject of his claim and that those events had occurred around 30 years before the hearing. The trial judge also had regard to the fact that the appellant gave plainly unreliable evidence about a range of important matters.

¹ Mr Dixon was referred to in the evidence as Sweeney, the name by which the students knew him (or Uncle Sweeney). With no disrespect intended, he is referred to as Sweeney in these submissions.

5. The trial judge also made contingent findings addressing the appellant's case on liability against the respondents: J [219]-[228] Red 203Q-206G. He rejected the appellant's case on vicarious liability, non delegable duty and negligence with respect to any conduct alleged on the part of Sister Green. There is no challenge to these findings. His Honour found that if the factual allegations against Sweeney were established, the first respondent would have been vicariously liable: J [222] Red 204M-P.
6. The trial judge also rejected the appellant's case because he found that the abuse alleged was not "serious physical abuse" within the meaning of s 6A of the *Limitation Act 1969* (NSW) (***Limitation Act***).
7. The respondents' answer to the appeal is that the trial judge's factual findings are well-supported; his Honour stated and applied well established principles of fact finding in cases involving the obvious deficiencies in human memory; and his Honour correctly found that the appellant's account was implausible including because what he described was inconsistent with the evidence of not only Sister Green but the other teaching staff who worked in the classroom who denied the "reign of terror": J [227] Red 205X-206D. His Honour enjoyed an advantage as the trial judge in assessing the evidence, and his findings are not "glaringly improbable" or "contrary to compelling inferences". The appeal should be dismissed with costs.

B. BACKGROUND

B.1 *Sister Green's distinguished service*

8. Sister Green, a Sister of Mercy, was born in 1935 and began teaching in 1956. She taught at St Ignatius from 1976 until her retirement in 2005: J [63] Red 167D-I. The first respondent (**the Trustees** of the Roman Catholic Church for the Diocese of Wilcannia-Forbes) operated St Ignatius using teaching staff, including principals and other teachers, supplied by the second respondent (the Marist Brothers), while other teachers, including Sister Green, were supplied by the third respondent (or those it represents – a congregation of Catholic religious sisters known as the Congregation of the Sisters of Mercy of Wilcannia-Forbes): J [2] Red 142I-Q.
9. Sister Green and others pioneered opt-in "Aboriginal only" classes at St Ignatius to help address Indigenous educational disadvantage: J [28] Red 153T-V. From 1987 to 2005, she taught the Infant Aboriginal class (kindergarten to year 2), assisted in the classroom by teacher's aides: J [57] Red 164W-X; J [39] Red 157M-N. In 1995, she was awarded the Medal of the Order of Australia for her services to education, including to Aboriginal children: J [63] Red 167G-I. There was also a Primary Aboriginal class (years 3 to 6) taught by others: J [167] Red 189M. Sweeney was a teacher's aide for the Primary Aboriginal class, but also

helped in Sister Green's class: CB356 [8] Blue 300-P, CB357 [15] Blue 31M-Q, CB450 [15] Blue 85I-L.

B.2 *Extreme allegations of systematic abuse*

10. The appellant's case involved Sister Green perpetrating systematic physical abuse against infant Aboriginal students at St Ignatius from at least 1977 to 1997,² including the appellant in 1993 and 1994: J [57] Red 164W. The appellant alleged that Sister Green allegedly "hit, punished and tortured" him on a daily basis, including striking him forcefully on "most" days with a metre-long wooden ruler named "Montgomery", twisting his ears, and forcing him to stand in the sun for extended periods: J [29] Red 154D-O; Red 61K-W. The appellant also alleged that Sweeney repeatedly kicked him, twisted his ears and delivered "karate chops", when retrieving him and other truanting students: J [31]-[32] Red 155E-M; Red 62C-G.
11. The appellant called 14 former St Ignatius students as tendency witnesses, most of whom alleged similar abuse, including striking with "Montgomery" or other implements. Overwhelmingly their evidence was that the abuse was severe, daily (or very frequent),³ and – as logic would suggest – that it resulted in screams, cries or sobs from the abused children.⁴ At least 9 witnesses notified their own compensation claims in 2022 or 2023⁵ and accordingly had a financial interest in advancing the abuse narrative. There was no suggestion that the abuse allegations had ever been raised before their claims were made: J [191] Red 194S-U.
12. In evaluating the abuse allegations, the trial judge applied the *Briginshaw* principles (J [46]-[47] Red 159R-160N) and "had regard to the eroding effect of the passage of time on memory" (J [203] Red 199J), as well as the appellant's "comparatively tender years" at the

² See: CB170 [21], [23] Blue 10N-P, 10Q (statement of Catrina Dixon dated 30 June 2023); CB272 [5] Blue 164M (statement of Terrence Hines dated 22 November 2023).

³ Catrina Dixon – CB171 [29] Blue 11I-L, T4.410.25-35 Black Vol. 1 410M-R, T412.45-46 Black Vol. 1 412V-W; Rachel Dixon – Exhibit CB228 [9] Blue 123V-Y; Marcia Dixon – CB204 [12], [14] Blue 119D-E, 119G-I, T378.23-49 Black Vol. 1 378L-Y; Charles Edwards – CB177 [10] Blue 131Q-T, CB178 [20] Blue 132P-R, T201.33-39 Black Vol. 1 201Q-T, T209.38-47 Black Vol. 1 209S-X, T213.5-6 Blue 123D-E; Margaret Leonard – CB213 [15] Blue 169F-G, T426.31-35 Black Vol. 1 426P-R; Janine Monaghan – CB183 [13] Blue 5W-X, T291.13-26 Black Vol. 1 291H-N, T293.19-33 Black Vol. 1 293J-Q; Leslie Leonard – CB200 [11] Blue 151L-N, CB201 [16] Blue 152E, T448.39-449.1 Black Vol. 2 448T-449B, T452.9-26 Black Vol. 2 452F-N; Pagan Burford – CB220 [12] Blue 138X-139I, CB223 [26] Blue 141E-G, CB224 [33] Blue 142Q-O, T345.14-25 Black Vol. 1 345H-M; Karla Cubby – CB195 [19] Blue 116M-O, T506.12-14 Black Vol. 2 506G-H, T508.17-28 Black Vol. 2 508I-O; Sylvia Fernando – CB268 [7] Blue 127P-R, CB269 [11] Blue 128D-F; T164.40-46 Black Vol. 1 164T-W, T166.27-32 Black Vol. 1 166N-Q; Terrence Hines – CB272 [13] Blue 164W-X, CB273 [21]-[22] Blue 165Q-R, T477.48-49 Black Vol. 2 477X, T264.18-27 Black Vol. 1 264J-N; Alicia Monaghan – CB167 [23] Blue 147P; Margaret Dixon – T937.43-46 Black Vol. 3 937U-W; Margaret Leonard – T429.12-21 Black Vol. 2 429G-K.

⁴ Catrina Dixon – T412.24-34 Black Vol. 1 412M-Q, T413.7-15 Black Vol. 1 413E-I; Rachel Dixon – CB228 [8] Blue 123S-V, T525.40-42 Black Vol. 2 525T-U; Marcia Dixon – T379.19-38 Black Vol. 1 379J-S; Charles Edwards – T219.4-38 Black Vol. 1 219C-S, T220.5-15 Black Vol. 1 220D-I; Margaret Leonard – T428.13-23 Black Vol. 2 428H-L, T429.23-35 Black Vol. 2 429L-R; Janine Monaghan – T292.39-293.14 Black Vol. 1 292T-293H, T293.48-294.2 Black Vol. 1 293X-294C; Leslie Leonard – T449.48-49 Black Vol. 2 449W-X, T450.10-18 Black Vol. 2 450F-J, T451.40-44 Black Vol. 2 451T-V; Pagan Burford – CB221 [15] Blue 139N-Q, CB224 [34] Blue 142Q-U, T345.27-346.2 Black Vol. 1 345N-346C, T346.5-8 Black Vol. 1 346D-E, T346.33-35 Black Vol. 1 346Q-R, T347.4-22 Black Vol. 1 347C-L, T350.33-37 Black Vol. 1 350Q-S; Karla Cubby – T512.41-513.2 Black Vol. 2 512T-513C; Sylvia Fernando – CB269 [12] Blue 128G-I, T166.12-25 Black Vol. 1 166G-M; Terrence Hines – T476.45-47 Black Vol. 2 476V-X, T478.10-14 Black Vol. 2 478F-I; Alicia Monaghan – T265.3-25 Black Vol. 1 265C-N.

⁵ Exhibit 10: Catrina Dixon, Marcia Dixon, Rachel Dixon, Ryan Faulkner, Leslie Leonard, Margaret Leonard, Alicia Monaghan, Janine Monaghan; Exhibit 11: Karla Cubby.

time of the alleged abuse (J [48] Red 160S). That was the correct approach. The unreliability of human memory as a feature of the fact finding process has been addressed by this Court in a number of cases. Recently, in *Trustees of the Roman Catholic Church for the Diocese of Maitland Newcastle v AA* [2025] NSWCA 72, Leeming JA (at [135]) referred with approval to Leggatt J's oft cited passage in *Gestmin SGPS S.A. v Credit Suisse (UK) Ltd* [2013] EWHC 3560 (Comm).⁶ (Indeed, in that decision, Leeming JA also referred with approval to the trial judge's reasons at Red 192P-193V). Further, it is well accepted that the unreliability of human memory is exacerbated where "evidence [is] given in the language of an experienced adult [rather than the contemporaneous language of a child] with all of the possibilities of reconstruction and re-interpretation that this entails": *Connellan v Murphy* [2017] VSCA 116, [47]; and "[r]ecollection of events which occurred in childhood is particularly susceptible to error and is also subject to the possibility that it may not even be genuine": *Longman v The Queen* (1989) 168 CLR 79, 107–8 (McHugh J).

B.3 *The abuse narrative was properly rejected*

13. As one witness described, "Sister Green was strict and kept tight control of her class but looked after her students and was committed to their welfare": J [175] Red 190X-Y. She had a wooden ruler named "Montgomery", which she used to attract students' attention by striking it on a desk or the blackboard: J [198] Red 197N-P. On occasion, she found it necessary to correct a child for misbehaviour by delivering an open-handed smack (which she colloquially called a "whack") on the bottom over clothing: J [199] Red 198C-G. She also recalled one instance where she gave a hard smack to Margaret Dixon, a student "who had run away from Sister Green's class three times to the nurses' office": J [66] Red 168H-J.
14. What the appellant alleged, however, was not smacking: it was severe and systematic abuse, including repeated hitting with "Montgomery", and regular karate chopping, kicking and ear twisting by Sweeney. The trial judge found that such abuse was implausible. Sister Green, a "quite impressive" witness, emphatically denied it, as did Sweeney: J [64] Red 167I-R; J [198] Red 197L; J [206] Red 200E-J. Corporal punishment was not permitted at St Ignatius: J [211] Red 201O-P. There was ample evidence of "Sister Green's good character, her good reputation and the esteem in which she was held by those who worked with her over many years": J [202] Red 199C-E. There was also no contemporaneous record of the alleged abuse: J [203] Red 199K-L.
15. Further, over 20 years of alleged systematic abuse by Sister Green, not one observation or complaint of it was ever made by or to:

⁶ See also *The Nominal Defendant v Cordin* [2017] NSWCA 6 at [165]; *Moubarak by his tutor Coorey v Holt* (2019) 100 NSWLR 218 at [77].

- (a) The school principals: Sister Eileen Quade (1980 to 1983 and 1985 to 1987), Brother John O'Brien (1988 to 1992), and Brother Daniel Hollamby (1993 to 1998).⁷ There was an incident in the mid-1990s where the grandmother of student Janine Monaghan complained to Brother Hollamby that Sister Green had smacked Janine once on the bottom with an open hand (although Janine Monaghan did not recall this: J [120] Red 180K-L). Brother Hollamby counselled Sister Green, who was apologetic, and there were no further complaints: CB320 [16] Blue 102U-W; T783.48-49 Black Vol. 2 783X.
 - (b) The parent liaison staff member, Brother Robert Hayes, who from 1991 to 1994 regularly had "very natural and very truthful conversations" with parents about whether their children were enjoying school or had any concerns, including about Sister Green's class: J [147]-[149] Red 186J-U.
 - (c) The teacher's aides in Sister Green's classroom, both full-time – Patricia Mannix (1991 to 1993) and Lauretta Wheeler (1994 to 1996); and part-time – Phyllis Cubby (1987 to 2001), Joanne "Pinny" Edwards (1989 to 2005), and Sweeney (1980 to 2003).⁸
 - (d) Adam Foley, who in 1994 taught remedial reading to groups of Sister Green's students on the verandah outside her classroom and never saw a child show reluctance to return: J [143] Red 185J-T.
16. The absence of evidence from St Ignatius staff to corroborate the appellant's case was properly regarded by the trial judge as "significant": J [198] Red 197U-W. The appellant offered no coherent case theory to explain how Sister Green could have systematically abused students over a lengthy period without other staff noticing or hearing of it. Three witnesses maintained the abuse only occurred when no aides or other teachers were present, but the appellant (properly) disavowed that as a case theory.⁹ Senior counsel's proposition at T1039.13-40 Black Vol. 3 1039G-T that the aides and others were too focused on their own work to notice children being repeatedly struck with an implement and screaming, crying or sobbing afterwards was irreconcilable with the aides' evidence and was plainly unsustainable.
17. The trial judge accepted that some aides' recollections "were somewhat affected by their admiration for, and loyalty to, Sister Green" (a proposition not put to them, but conceded

⁷ Quade: J [170] Red 189U-V, CB442 [38] Blue 77F-H; O'Brien: J [174] Red 190Q-R, CB317 [19] Blue 108L-M; Hollamby: J [179]-[180] Red 191N-W.

⁸ Mannix: J [128]-[130] Red 182D-183D; Wheeler: J [131]-[135] Red 183E-U; Cubby: J [136]-[139] Red 183W-184R; Edwards: J [140]-[142] Red 184T-185I; Sweeney: J [69]-[73] Red 169F-170K.

⁹ Marcia Dixon (T378.11-18 Black Vol. 1 378G-J, T396.26-37 Black Vol. 1 396N-S), Janine Monaghan (T306.42-307.20 Black Vol. 1 306U-307K), Leslie Leonard (T450.20-32 Black Vol. 2 450K-Q, T451.46-452.4 Black Vol. 2 451W-452C); T1038.47-T1039.11 Black Vol. 3 1038W-1039G ("we rely on it all and we don't divvy it up into separate camps").

by the respondents in respect of Ms Cubby: J [138] Red 184I-J). However, this did not diminish the probative value of their evidence, as adult witnesses with no financial interest in the proceedings recalling what they observed as adult members of the teaching staff, who gave evidence accepted by the trial judge that they would have noticed children being struck with “Montgomery” and “would have told the truth about it”: J [198] Red 197Q-U. Further, their admiration and loyalty would hardly have endured if Sister Green had systematically abused her students.

18. The trial judge made only limited criticisms of Sister Green’s evidence. He found that she may have understated the force used in physical discipline, gave a malleable definition of “serious misbehaviour”, and drew an unpersuasive distinction between a “whack” (light tap or smack) and a “smack” (forceful smack): J [67]-[68] Red 168N-169D, J [199] Red 197W-198B. However, “this was not borne of a desire to mislead”: J [67] Red 168Q.
19. The appellant, meanwhile, was not a credible witness. He conceded that he had a bad memory: J [57] Red 164S-T. He was inconsistent on whether he had read or understood his written statement: J [52] Red 161K-V. He was unable to corroborate key aspects of that statement in his oral evidence.¹⁰ He made, and later withdrew, a false allegation of sexual abuse by Sister Green: J [53] Red 161W-162Q. He denied knowing he could receive compensation, and gave inconsistent explanations about how he came to instruct solicitors: J [54] Red 162Q-163I. He participated in at least six pre-sentencing interviews from 2001 to 2019 where he disclosed serious childhood trauma “including the murder of his aunt, drowning of his cousin, and the death of close friends in a motor vehicle accident...[b]ut he did not complain of physical abuse at school once”: J [55] Red 163L-T. His allegations of abuse at St Ignatius only emerged in his compensation claim, in 2022: J [35] Red 156O-Q; J [54] Red 163G-H. Accordingly, there were “serious unresolved questions about the accuracy and therefore the reliability of his account”: J [196] Red 197C-D.
20. The trial judge rejected the appellant’s factual case, finding it “simply implausible” that a “reign of terror” involving systematic abuse had occurred without the knowledge or intervention of other teachers working in, or regularly visiting, Sister Green’s classroom: J [227] Red 206B. “Reign of terror” is an apt description of the appellant’s case even if the appellant disavows it: Appellant’s Submissions [39], [48]. The key findings were that Sister Green “did not use Montgomery or any other ruler as an implement of punishment”: J [198] Red 197P-Q; that the appellant was not forced to stand in the blazing sun for extended periods: J [200] Red 198O-S; and “other than the evidence of the [appellant] that he was taken into the adjoining room and spanked hard on his naked bottom on one occasion, which I am not satisfied occurred, there is no evidence that Sister Green smacked him” as she sometimes did to

¹⁰ See, e.g., T44.17-35 Black Vol. 1 44I-R; T51.35-52.25 Black Vol. 1 51R-52M; T56.33-57.58.24 Black Vol. 2 56Q-58M.

discipline other children in her class: J [213] Red 202H-K. The appellant's only evidence of Sister Green twisting ("screwing") his ears was during his oral evidence (T92.49-9350.1 Black Vol. 1 92X-93B and T104.29 Black Vol. 1 104O), with no evidence of the force used.

21. His Honour was also unpersuaded of the appellant's uncorroborated allegations of abuse by Sweeney: J [209] Red 200W. Further, even if the appellant had been smacked by Sister Green or handled roughly by Sweeney, the defence of lawful chastisement would have applied: J [215] Red 202U-W; J [217] Red 203I-L. His Honour concluded that the appellant had not proved "serious physical abuse" on the balance of probabilities, as required to engage s 6A of the *Limitation Act* and overcome the limitation period: J [213] Red 202L-M, J [217] Red 203L-M. Also, as noted claims of direct liability, vicarious liability (with one exception noted above), and liability for breach of the Trustees' non-delegable duty of care, were also rejected: J [220]-[228] Red 203T-206G.

C. THE BURDEN ON APPEAL

22. The appellant challenges the trial judge's factual findings concerning the alleged abuse by Sister Green (grounds 1-3 and 5-9) and Sweeney (grounds 10-13), as well as his Honour's construction of "serious physical abuse" in s 6A of the *Limitation Act* (ground 4): Red 215K-219Q. As to the factual challenges, the trial judge's findings turned significantly on his Honour's assessment of the reliability and credibility of witnesses after seeing and hearing them give evidence. Such findings must stand unless they are "glaringly improbable" or "contrary to compelling inferences": *Fox v Percy* (2003) 214 CLR 118, 128 [28]-[29] (Gleeson CJ, Gummow and Kirby JJ); *Pirrottina v Pirrottina* [2025] NSWCA 55, [55].
23. Further, the principle of appellate restraint is not limited to findings expressly stated to be based wholly or partly on observations of demeanour in a narrow sense. The context of the evidence, the tone in which it is given, and pauses in answering all may be important in forming an impression of a witness: *Mt Pleasant Stud Farm Pty Ltd v McCormick* [2022] NSWCA 191 at [56]-[58].
24. The principle of appellate restraint applies not only to "factual findings which are likely to have been affected by impressions about the credibility and reliability of witnesses formed by the trial judge as a result of seeing and hearing them give their evidence", but also to "findings of secondary facts which are based on a combination of these impressions and other inferences from primary facts": *Lee v Lee* (2019) 266 CLR 129, 148-149 [55] (Bell, Gageler, Nettle and Edelman JJ); *Wang v Hur* [2024] QCA 126, [24(e)]-[24(f)]. Even where demeanour is not expressly relied upon, if credit findings are clearly in issue – as here – "it is unlikely that...presentation in the witness box was not keenly observed and taken into account": *Vella v Hobson* [2023] NSWCA 234, [214]

(Stern JA; Mitchelmore JA agreeing); *Vagg v McPhee* [2013] NSWCA 29, [84]-[85] (Tobias AJA; Ward JA (as her Honour then was) agreeing).

25. The **AS** over 36 pages do not address much less overcome these well-established constraints on appellate interference with credit-based factual findings. Nor, as will be explained, did the trial judge err in construing s 6A of the *Limitation Act*.

D. THE ACCURACY OF THE DESCRIPTION OF WITNESS “CAMPS”

26. The appellant’s complaint that the trial judge erred by treating witnesses as emerging from opposing “camps” (AS [10]-[15]) misunderstands his Honour’s reasoning and should be rejected. The characterisation of witnesses as forming “camps” was not an organising principle that dictated rejection of evidence in bulk, but rather a descriptive reference to how the evidence was structured at a trial after 33 lay witnesses gave accounts broadly consistent with the positions of the parties who called them. That is hardly an unusual feature of contested trials. Indeed, it was Senior Counsel for the appellant who introduced the concept of witnesses falling into camps, on the first day of the trial: T2.35-42 Black Vol. 1 2R-U.
27. The trial judge’s reference to “camps” was expressly in the context of explaining the caution with which he approached evidence from both sides – “there was a tendency for the competing cohorts of witnesses to divide themselves into quite separate camps”: J [191] Red 194X-195B. There followed a balanced acknowledgment of “an absence of consistency in essential matters and inconsistency in the details of some” among both groups of witnesses: J [191] Red 195B-D.
28. Further, the reasons contain both a careful individual analysis of the evidence of each lay witness,¹¹ and a broader weighing exercise based on “the eroding effect of the passage of time on memory”, the “apparent logic of events”, and the need to be satisfied to the standard reflected in *Briginshaw* and s 140(2) of the *Evidence Act 1995* (NSW): J [203] Red 199J-Q; J [45]-[47] Red 159H-160N. Ultimately, his Honour was not persuaded to that standard: J [51]-[56] Red 161I-164L, J [196]-[200] Red 196N-198S. This was the correct approach, assessing the witness evidence both individually and as a whole: *Nguyen v Tran* [2018]

¹¹ Sister Green (J [62]-[68] Red 166U-169D); Sweeney (J [69]-[73] Red 169E-170K); Charles Edwards (J [75]-[78] Red 170W-171Q); Leslie Leonard (J [79]-[81] Red 171R-172L); Margaret Leonard (J [82]-[84] Red 172M-173D); Pagan Burford (J [85]-[92] Red 173E-174S); Martin Haines (J [93]-[95] Red 174T-175G); Rachel Dixon (J [96]-[100] Red 175H-176F); Catrina Dixon (J [101]-[103] Red 176G-T); Marcia Dixon (J [104]-[108] Red 176U-178G); Karla Cubby (J [111]-[113] Red 179B-N); Sylvia Fernando (J [114]-[117] Red 179O-Y); Janine Monaghan (J [118]-[120] Red 180B-M); Alicia Monaghan (J [121]-[122] Red 180N-X); Terence Hines (J [123]-[126] Red 181B-O); Patricia Mannix (J [128]-[130] Red 182B-183D); Lauretta Wheeler (J [131]-[135] Red 183E-V); Phyllis Cubby (J [136]-[139] Red 183W-184R); Joanne “Pinny” Edwards (J [140]-[142] Red 184S-185I); Adam Foley (J [143] Red 185J-T); Max Boney (J [144]-[146] Red 185U-186I); Brother Robert Hayes (J [147]-[151] Red 186J-187F); Lisa Green (J [152]-[154] Red 187G-U); Annette Welch (J [155]-[160] Red 187V-188P); Jennifer Ward (J [161]-[166] Red 188Q-189I); Judith Ryan (J [167]-[169] Red 189J-T); Sister Eileen Quade (J [170]-[173] Red 189U-190P); Brother John O’Brien (J [174]-[178] Red 190Q-191L); Brother Daniel Hollamby (J [179]-[184] Red 191M-192N).

NSWCA 215, [54] (Beazley P; Emmett AJA and Bellew J agreeing). The very fact of multiple tendency and “anti-tendency” witnesses also necessitated a degree of grouping.

E. THE SISTER GREEN ALLEGATIONS WERE PROPERLY REJECTED

29. The appellant approaches grounds 1-3 and 5-9 collectively, which is inevitable given they overlap. Each ground restates the central contention that the trial judge should have accepted the appellant’s case. No legal error is identified: they comprise quarrels with factual findings the appellant would have preferred to fall differently.

E.1 *Consistent findings on discipline of the appellant (Grounds 1 and 2)*

30. The appellant alleges inconsistency in the trial judge’s finding, at J [213] Red 202K-M, that he was not struck with “Montgomery” or any other implement (nor was he smacked by Sister Green) and his Honour’s finding, at J [12] Red 146P, that he “was subjected to a degree of physical punishment by Sister Green...by way of discipline”: AS [23], [83]-[87]. The assertion of any inconsistency between these findings is misplaced and should be rejected. His Honour found that forms of physical discipline other than the abuse alleged by the plaintiff did occur – “putting hands on the child to put them in line at assembly or to move them along when assembly is over”, putting them in a “chalk circle” for a short period, or “requiring a child to stand in the corner”, all of which were “entirely unexceptionable”: J [201] Red 198T-199C. The finding at J [12] Red 146P is a finding that the appellant (likely) experienced some of these unexceptionable forms of physical contact or discipline from time to time. It was not necessary to make precise findings, because that form of physical discipline was not part of his case: 3FASOC [5] Red 61K-W.

E.2 *Proper rejection of the unreliable “eyewitness” evidence (Grounds 1 and 7)*

31. Contrary to AS [25]-[36], the trial judge did consider the effect of the “eyewitnesses”. He expressly noted some witnesses “were said to be eye-witnesses to the discipline applied to the [appellant]”: J [74] Red 170N. There were significant problems with their evidence, as found by the primary judge:
- (a) Charles Edwards gave an extreme account in which Sister Green hit him with a ruler several times a week, as hard as she could, drawing blood or leaving bruises; Ms Cubby retrieved “Montgomery” to facilitate the abuse; and he was hit weekly in the playground, in plain view.¹² He said the teacher’s aides witnessed the abuse, and he claimed to have a “really good memory” of Brother Hollamby

¹² T205.22-38 Black Vol. 1 205L-S, T211.46 Black Vol. 1 211V-W, T205.34-35 Black Vol. 1 205Q-R, T206.32-39 Black Vol. 1 206P-T, T205.48 Black Vol. 1 205X, T206.21-22 Black Vol. 1 206K-L, T207.7-8 Black Vol. 1 207E, T207.18-208.13 Black Vol. 1 207J-208H, T213.8-214.11 Black Vol. 1 213E-214G, T216.4-50 Black Vol. 1 214C-Y (Edwards XXN).

twisting his ear and dragging him to his office on numerous occasions (which was contrary to Brother Hollamby's policy against corporal punishment, and which allegation was so unreliable that it was not put to Brother Hollamby in cross examination): J [78] Red 171M-Q; T225.31-46 Black Vol. 1 225P-W. The trial judge effectively rejected the allegations about Brother Hollamby in stating that Brother Hollamby made a favourable impression on him: J [84] Red 173B-D; and in finding that he was conscientious and caring: J [199] Red 198H-J.

- (b) Leslie Leonard likewise gave an extreme account in which Sister Green hit students with a ruler almost every day, as hard as she could, leaving marks and causing children to cry, as well as striking children on the back of the head against a door: T448.35-450.14 Black Vol. 2 448R-449H, T451.12-44 Black Vol. 2 451G-V, T452.6-32 Black Vol. 2 452D-P. He incorrectly said that Sister Green was normally by herself in the classroom and that Brother Hollamby smacked and caned students (which, again, was never put to Brother Hollamby, and was rejected): J [79]-[81] Red 171R-172K.
- (c) Terrence Hines gave inconsistent evidence and absurdly alleged the teacher's aides "joined in" hitting the children: J [123]-[126] Red 181C-O. That contention was not put to any of the teacher's aides. He conceded that he had a poor memory: T475.42-45 Black Vol. 2 475U-W.

- 32. None of that evidence was remotely persuasive. Having summarised it individually, it was not necessary for the trial judge to reject it line-by-line. His Honour was entitled to, and did, prefer the evidence of Sister Green and the teacher's aides to the effect that the extreme and systematic abuse these "eyewitnesses" alleged did not occur: J [192] Red 195E-I, J [227] Red 205X-206E.

E.3 ***Proper rejection of the tendency evidence (Grounds 1 and 7)***

- 33. The same is true of the tendency witnesses. Contrary to AS [39], the trial judge did make "reference to the tendency purpose for which that evidence was adduced" - his Honour expressly stated "[t]hese witnesses were called to establish the alleged tendency of Sister Green to strike students with a ruler, and of Sweeney to engage in serious physical abuse of children": J [38] Red 157J-K; or "an asserted tendency on the part of Sister Green to physically discipline her pupils harshly": J [74] Red 170P. There can be no credible suggestion his Honour misapprehended the reason these witnesses were called. The trial judge was correct to prefer the evidence of Sister Green and the teacher's aides over the childhood memories of the appellant's camp which emerged some 30 years after the events and predominantly in the context of compensation claims.

E.4 ***The deficient evidence of Martin Haimes (Grounds 1, 6, 7 and 8)***

34. One witness who did not have a compensation claim was Martin Haimes. The appellant submits his evidence (summarised at J [93]-[95] Red 174T-175G) undermines Sister Green's sworn denial that she never used an implement to strike a child, and proves a tendency to engage in such conduct that the trial judge failed to recognise: AS [46].
35. The respondents contend that the trial judge ought not have accepted Mr Haimes's evidence for the following reasons.
36. Mr Haimes said he was struck on the fingers by Sister Green with a foot-long wooden stick on a single occasion in 1975, when he was a year 2 student at St Scholastica's Primary School in Mount Barker South Australia: CB217 [2], [7], [8], [10] Blue 154J, 154O-U, 154Y. He was cross examined about that recollection and he maintained the accuracy of his recollection (T322.34-327.33 Black Vol. 1 322Q-327Q), and presented as a witness who genuinely believed the accuracy of his recollection. However, there were significant problems with that recollection, in that key aspects of what he remembered were mistaken.
37. He identified himself in a 1975 class photo of a composite year 1/2 class: T322.7-16 Black Vol. 1 322E-I; CB1171 Blue 258C-Y. His memory was that his usual teacher "was Sister Claire, but we were also taught by Sister [Green] when Sister Claire was absent". He said that Sister Green "was usually teaching older children but was only substituting in our class for Sister Claire": CB217 [6] Blue 154M-O. He said that when Sister Green filled in for Sister Claire, Sister Green often hit his classmates "for minor things such as talking": CB217 [10] Blue 154Y.
38. This account was fundamentally mistaken. First, the 1975 class photo showed that Sister Green – not Sister Claire – was Mr Haimes's teacher: T4.327.37-45 Black Vol. 1 327S-W. Secondly, Sister Green gave unchallenged evidence that she only ever taught the year 1/2 class and that it was Sister Claire who taught the 3/4 class: CB407 [2] Blue 191H-K. That is, contrary to Mr Haimes's recollection, he misremembered who his usual teacher was in 1975. Thirdly, Sister Green said – again without challenge – that she did not substitute for Sister Claire, since she had her own class to teach: CB407 [6] Blue 191R-S.
39. Despite the "obvious deficiencies in his memory", the trial judge was "satisfied that [Mr Haimes's] evidence was accurate". With respect, the trial judge erred in not applying the principles summarised at [12] above with respect to fact finding which he stated and correctly applied elsewhere in his judgment. Mr Haimes was attempting to recall events which had occurred almost half a century before his evidence was given. There is no doubt he had a genuine belief in his recollection. However, his Honour committed a

similar error as did the primary judge in *Trustees v AA*, accurately recorded by Leeming JA (at [136]): “*At no stage in her Honour’s reasons is there consideration of the possibility that the plaintiff’s account was a sincerely held but unreliable belief of what had occurred half a century earlier, insufficiently probative to reach the state of satisfaction required. The description of the plaintiff’s recollection as “vivid” falls short of doing that, and illustrates precisely the error mentioned by Leggatt J.*”

40. In any event, the trial judge was correct to conclude that even if Mr Haimés’s evidence was preferred to Sister Green’s evidence, the evidence did not support the appellant’s case. The trial judge correctly found that the conduct Mr Haimés described “fell a long way short” of supporting the alleged “reign of terror” and did not offend “the standards of those times”: J [197] Red 197H-K. Mr Haimés’s evidence concerned alleged conduct in South Australia in the 1970s – a different jurisdiction, different decade, and different educational context from the allegations at Bourke in the 1990s. It did not establish a relevant tendency to act in the extreme and unlawful manner alleged at Bourke in the 1990s – by which time corporal punishment was no longer widespread (CB316 [10] Blue 107R-S) and was prohibited, at least informally, at St Ignatius (J [81] Red 172I-K, J [181] Red 192G). That is the correct import of his Honour’s comment that it did not support the “reign of terror”.

E.5 ***Brother Hollamby’s evidence supports Sister Green (Grounds 1, 2, 3, 5, 8 and 9)***

41. Contrary to AS [64]-[67], Sister Green’s failure to recall being counselled by Brother Hollamby regarding Janine Monaghan does not undermine her credibility. There is no reason to expect that an 88-year old would necessarily recall a single incident from over 30 years ago involving (T782.29-49 Black Vol. 2 782O-Y) a gentle reprimand from Brother Hollamby for smacking a misbehaving child. She did recall, in general terms, that there was some event which caused her to stop smacking students altogether: T570.28-45 Black Vol. 2 570L-W. Ms Monaghan also did not recall the incident: J [120] Red 180K-L. Indeed, Brother Hollamby’s account (T782.29-784.1 Black Vol. 2 782O-784B) shows it was an isolated incident prompted by reasonably extreme student behaviour and not a pattern of conduct, let alone abuse.

E.6 ***Sister Green’s good character undermines the allegations (Grounds 1, 5 and 8)***

42. The trial judge observed Sister Green and found she presented as “an honest person” whose “ability to recall events was sound” notwithstanding her advanced age: J [62] Red 166W-Y. He found that “she was sincere in her evidence, and appropriately made concessions regarding the events she could not recall”: J [62] Red 167C. She taught in the infants school at St Ignatius for nearly 30 years, and was awarded the Medal of the Order of Australia in 1995 for her services to education, including to Aboriginal children: J [63] Red 167F-H. She was held in high regard by those who worked with her, and by former

students.¹³ These matters showing good character were properly taken into account in assessing allegations of serious “moral delinquency”: J [202] Red 199D-H.

43. The appellant challenges the finding that Sister Green was a person of good character, relying on her admissions of physical discipline, the incident with Margaret Dixon, and counselling by Brother Hollamby regarding Janine Monaghan: AS [60]-[61]. However, the trial judge expressly considered those matters and found that Sister Green occasionally “found it necessary for the purpose of maintaining order in her classroom to correct a child by smacking him or her with an open hand on his or her bottom over clothing”: J [199] Red 198B-G. Sister Green used smacking for “serious misbehaviour”: J [64] Red 167J-R, J [68] Red 168T-169D; and Brother Hollamby said Janine Monaghan’s behaviour “must have been reasonably extreme” to elicit a smack from Sister Green: T783.37 Black Vol. 2 783R-S. Neither Janine Monaghan nor Margaret Dixon recalled the smacking incidents (J [120] Red 180K-L; J [127] Red 181R-U), which suggests they were relatively benign. In any event, they were plainly for a proper purpose and do not undermine Sister Green’s good character.

E.7 ***The teacher’s aides confirm no systematic abuse (Grounds 1 and 9)***

44. The appellant contends the evidence of the teacher’s aides should have been rejected because none recalled Brother Hollamby reprimanding Sister Green in their presence for smacking Janine Monaghan: AS [64]-[67]. This supposed discrepancy relates to only one aide’s account (it is unknown which one), yet is somehow advanced to impugn them all. Further, the event in question – a gentle reprimand over a single smack, not given by the aides themselves – is unlikely to have been particularly memorable, let alone 30 years later. Their lack of recollection does not undermine their accounts.
45. The appellant further contends that the teacher’s aides’ evidence should have been rejected because it was inconsistent with Sister Green’s account of her approach to physical discipline – for example, in whether she ever smacked children or used the phrase “where’s Monty?” – and that the trial judge’s observation that their evidence may have been shaped by respect and admiration for Sister Green amounted to a finding that their evidence lacked reliability and should not have been accepted: AS [68]-[74].

¹³ Sister Eileen Quade – Exhibit CB441 [32]-[34] Blue 76J-S, CB442 [37] Blue 77B-E; Brother John O’Brien – Exhibit CB317 [18] Blue 108K; Brother Daniel Hollamby – T783.34-40 Black Vol 2 783Q-T; Brother Robert Hayes – Exhibit CB313 [26] Blue 112E-F, Exhibit CB327 [21], [26], [29] Blue 175F, 121N-P, 121T-V; Laurretta Wheeler – Exhibit CB344 [17] Blue 18T-V, CB347 [36] Blue 21C-E; Patricia Mannix – Exhibit CB365 [22], [26] Blue 43E, 43M, T697.29-35 Black Vol. 2 697O-R, T698.23-24 Black Vol. 2 698L-M, T701.49-702.02 Black Vol. 2 701X-702B, T702.24-38 Black Vol. 2 702M-S; Phyllis Cubby – Exhibit CB374 [12]-[13] Blue 55C-H, [20], CB377 [44] Blue 58J, T755.15-24 Black Vol. 2 755H-M, T755.46-756.08 Black Vol. 2 755W-756F, T757.14-18 Black Vol. 2 757H-J; Joanne Edwards – Exhibit CB449 [9] Blue 84T-V, CB450 [13] Blue 85G, CB451 [19], [23] Blue 86D-G, 86O-Q; Sweeney – Exhibit CB357 [18] Blue 31U-W, CB361 [50] Blue 35H-I; Adam Foley – Exhibit CB384 [11]-[12] Blue 49D-H; Annette Welch – Exhibit CB281 [14] Blue 89R-T, CB282 [21]-CB283 [24] Blue 90P-91Q, T846.13-19 Black Vol. 3 846G-K; Jennifer Ward – Exhibit CB288 [21] Blue 96K-M, CB289 [29]-[30] Blue 97O-U, CB290 [32] Blue 98F-M, T854.09-14 Black Vol. 3 854E-H; Lisa Green: Exhibit CB351 [16]-[17] Blue 25S-X, CB352 [18] Blue 26B-C; Judith Ryan – Exhibit CB446 [7], [9]-[11] Blue 81D, 81F-N, CB447 [18] Blue 82L-M; Max Boney – Exhibit CB379 [10] Blue 37V, CB380 [12] Blue 38C-E, T630.01-12 Black Vol. 2 630A-G.

46. These submissions should be rejected. Slight differences in recollection are unsurprising given the passage of time, the variety of roles held, and the likelihood that Sister Green's methods or their frequency changed over time (noting, for example, that she stopped smacking altogether at some point: T570.28-45 Black Vol. 2 570O-W). The finding that "some of the teacher's aides were somewhat affected by their admiration for, and loyalty to, Sister Green" (J [198] Red 197Q-R) was not put to the witnesses. In any event, admiration and loyalty did not suggest they would fail to notice the alleged systematic abuse or that they would lie about it. To the contrary, "they would have noticed" and "would have told the truth about it": J [198] Red 197Q-U. That was an orthodox and overwhelmingly probable finding.
47. There is a faint retreat at AS [76]-[81] to the "surreptitious abuse" theory – namely, that if the aides did not witness Sister Green's alleged systematic abuse, then it must be "that she was able to carry [it] out...without the teacher's aides[]" observation or knowledge": AS [76]. However, given the nature of the alleged conduct – frequent, violent, and naturally said to elicit screams, cries or sobs – that theory is simply not credible.

E.8 *Lawful chastisement is a false issue (Ground 3)*

48. The trial judge found that Sister Green did not use implements to punish students: J [198] Red 197P-Q; did not force students to stand in the sun for extended periods: J [200] Red 198O-S; and did not smack the appellant: J [213] Red 202H-K. Those findings effectively disposed of the appellant's pleaded case against Sister Green: 3FASOC [5] Red 61K-W. At J [215] Red 202U-W, the trial judge added: *"Were I to assume that, from time to time, Sister Green found it necessary to administer to the [appellant] the type of smack I have found she administered to other pupils under her care, I would regard it as no more than lawful chastisement, being both moderate and reasonable and for a proper purpose. This being so, I repeat, I am not satisfied that the [appellant] has established severe [sic] physical abuse at the hands of Sister Green."*
49. That contingent finding was strictly unnecessary, as it was never part of the appellant's case that he was smacked in this way: AS [86]. Nor did he rely on other forms of physical discipline that Sister Green used (and which were the subject of the finding at J [12] Red 146P), such as putting children into line at assembly, moving them along after assembly, or requiring them to stand in a corner: J [201] Red 198T-199C. In those circumstances, it was unnecessary to make detailed findings about whether these practices were applied to the appellant, or whether they were justified as lawful chastisement. In other words, ground 3 and AS [82]-[99] posit a false issue. The question of lawful chastisement did not arise for conduct that was never part of the appellant's case.
50. Had the issue properly arisen, it was not necessary for the respondents to lead evidence justifying each specific incident: cf AS [96]. That would be impossible given the passage

of time. True it is that Sister Green recalled the appellant being well-behaved and did not require discipline: J [34] Red 156B-D, J [214] Red 202N; but if that be wrong, the evidence was that smacking was reserved for serious misbehaviour, or as Brother Hollamby put it, behaviour that was “reasonably extreme”: J [64] Red 167Q-R; J [66] Red 168H-M; T783.34-40 Black Vol. 2 783Q-T. There was no expert evidence that the appellant’s deprived background made smacking an unacceptable risk: cf AS [96], [99].

E.9 *The Sister Green grounds should be dismissed*

51. Grounds 1-3 and 5-9, which challenge the trial judge’s factual findings with respect to Sister Green, amount to disagreement with factual conclusions that turned on assessments of credibility and reliability. His Honour carefully evaluated the competing accounts, applied the *Briginshaw* standard, and made findings that were overwhelmingly probable on the evidence. These grounds should be dismissed.

F. THE SWEENEY ALLEGATIONS WERE PROPERLY REJECTED

F.1 *The uncorroborated Sweeney allegations*

52. The appellant alleged that when he and two of his friends were truanting from school, Sweeney would come in a car to look for them and give the appellant a karate chop, a kick in the bottom, and forcefully twist his ears (**Sweeney allegations**): 3FASOC [5A] Red 62C-G; T90.18-T91.35 Black Vol. 1 90J-91R. Sweeney denied those allegations, although he did admit to lightly smacking the appellant on his upper right thigh over his clothing on one occasion: J [206] Red 200E-J.
53. The trial judge did not accept the Sweeney allegations: J [209] Red 200W. Ground 10 challenges that finding generally (asserting the allegations should have been accepted), while grounds 11 to 13 allege specific ways in which the fact-finding miscarried.

F.2 *The factual findings with respect to Sweeney were correct*

54. Having correctly expressed serious concerns about the appellant’s reliability (J [196]-[197] Red 196N-197E), his Honour observed that the allegations against Sweeney were uncorroborated (J [207] Red 200K-M), were not included in the appellant’s witness statement (J [205] Red 200B-D), and were denied by Sweeney (J [206] Red 200E-G). While Sweeney’s evidence itself required “some caution” (J [69] Red 169K), at least “some weight” could be given to the fact that he was “held in high regard by the principals of the school and was regarded as a good role model” (J [208] Red 200N-R).
55. Sweeney said that on one occasion when the appellant was misbehaving, Sister Green “told [him] to take [the appellant] outside and...have a yarn with him” (T668.13-15 Black Vol. 2 668G-I), at which point he “told [the appellant] to wake up to himself” and gave him a soft tap

on the upper thigh (T668.40-T669.31 Black Vol. 2 668T-669P). AS [104] mischaracterises this as being “smacked....at the direction of Sr Green”. In any event, the trial judge accepted Sweeney’s admission and found that he administered minor physical discipline on that occasion, but otherwise rejected the claims against him: J [12] Red 146P; J [73] Red 170I; J [206] Red 200I; J [217] Red 203F-H.

56. His Honour considered that, logically, some rough handling could have occurred when retrieving truanting students, but he was not satisfied of this on the balance of probabilities: J [209] Red 200R-W. Even if “a degree of rough handling” occurred (which was not proved), that would be “moderate and reasonable force to chastise [truanting] pupils”, and would not amount to “serious physical abuse”: J [217] Red 203H-N.

F.3 ***Proper acceptance of Sweeney’s limited admission***

57. Grounds 10 and 11 assert error in finding that the appellant was not “assaulted” (meaning physically disciplined) by Sweeney in circumstances where Sweeney admitted to smacking the appellant on the upper right thigh and the trial judge found (at J [12] Red 146P) that the appellant “was subjected to a degree of physical punishment by...Mr Dixon by way of discipline.” The appellant contends that the admission should have been “accepted” and “taken into account in assessing whether Sweeney assaulted the Appellant in the manner alleged”: AS [106].
58. Contrary to these grounds, and as set out above, the trial judge did not fail to consider Sweeney’s admission that he had smacked the appellant. His Honour accepted the admission, evaluated the evidence in the context of it, made factual findings consistent with it, including that the appellant was subjected to a degree of physical discipline by Sweeney but had not established “serious physical abuse”.

F.4 ***The problematic tendency evidence was properly assessed***

59. Contrary to AS [109], the trial judge did “consider the tendency evidence adduced by the appellant in assessing the [Sweeney] allegations”. His Honour’s analysis of supporting lay witnesses spans J [75]-[184] Red 170W-192N, including specific consideration of the witnesses now relied upon by the appellant.
60. There were significant problems with each of them. Charles Edwards and Terrence Hines are dealt with at [31(a)] and [31(c)] above. Margaret Leonard wrongly alleged (and this was never put to Brother Hollamby) that she was frequently caned by Brother Hollamby: J [84] Red 172X-173D. Pagan Burford claimed “all the aid[e]s witnessed” students being hit (T351.8 Black Vol. 1 351E-F) and implausibly alleged that Sweeney grabbed her hair and swung her 360 degrees in the air to break up a fight in the presence of Mr Foley (T361.50-362.37 Black Vol. 1 361Y-362S; J [90] Red 173S-X), an allegation never put to Mr Foley

(T825.7-829.2 Black Vol. 2 825E-829C). Rachel Dixon gave inconsistent evidence and had demonstrably false memories of Sister Green: J [96]-[99] Red 175J-V. Sylvia Fernando said Sweeney twisted pupils' ears, but admitted it "never used to hurt us" (T190.11 Black Vol. 1 190G) and she thought of it as a joke (T178.1-7 Black Vol. 1 178A-E): J [116] Red 179U-V. Janine Monaghan was unable to explain key inconsistencies in her evidence: J [118]-[119] Red 180C-J.

61. The trial judge was entitled to assess this evidence and determine its weight and reliability. The mere existence of tendency evidence does not compel acceptance – particularly where, as here, the evidence was internally inconsistent, contradicted by other witnesses, and contained demonstrably false allegations.

F.5 ***Brother Hollamby's counselling was precautionary, not responsive***

62. The appellant overstates the significance of Brother Hollamby's evidence about counselling Sweeney: AS [110]-[113]. Brother Hollamby did not understand Sweeney to have hit anyone at St Ignatius, but for abundant caution he reminded Sweeney not to treat children at St Ignatius in the same way as might occur in the Aboriginal community: T786.47-788.28 Black Vol. 2 786W-788O. This was proactive, preventative counselling, not a response to any observed or alleged misconduct. The fact that Sweeney did not recall these reminders three decades later (T677.5-37 Black Vol. 2 677D-S) is of no moment and did not require a specific finding by the trial judge.

F.6 ***Sweeney's good character supports the factual findings***

63. The trial judge acknowledged Sweeney's conviction for a domestic violence incident in November 1993, but found that "on the whole" the evidence established good character: J [73] Red 170I-K; J [208] Red 200N-R. Sweeney was highly regarded by those who worked with him.¹⁴ Such a conviction does not in terms show a relevant propensity towards routine violence in a work context or towards children, as the appellant's case requires. The trial judge did not give undue weight to Sweeney's overall good character, but merely said it had "some weight" (J [208] Red 200Q-R), which was plainly correct.

F.7 ***Any physical contact constituted lawful chastisement***

64. Sweeney admitted to giving the appellant a soft tap or smack on the upper thigh to discipline him, which the appellant also recalled (albeit at a different location): T668.40-T669.31 Black Vol. 2 668S-V; T138.37-43 Black Vol. 1 138S-V. However, that was not part of the appellant's

¹⁴ Sister Green: CB402 [53] Blue 67H-L; Sister Eileen Quade: J [171] Red 190C-D; Brother John O'Brien: CB317 [23]-[24] Blue 108P-S; Brother Daniel Hollamby: T9.787.9-13 Black Vol. 2 787F-H, T9.790.25-27 Black Vol. 2 790M-N; Brother Robert Hayes: J [151] Red 187D-F, CB313 [35]-[36] Blue 112T-V, CB330 [59] Blue 178E-F; Patricia Mannix: CB364 [13] Blue 42G-I; Phyllis Cubby: Exhibit CB375 [31] Blue 56R-S; Adam Foley: CB385 [28] Blue 50V-Y; Judith Ryan: CB446 [15] Blue 81V-Y; Max Boney (former student): CB380 [20] Blue 38U-V.

pleaded case, which relied on karate chopping, kicking, and twisting ears: 3FASOC [5A] Red 62C-G. The appellant cannot now elevate the smack into part of his case, as attempted at AS [117]-[118]. The trial judge expressly noted the smack was “not...an allegation the [appellant] makes”: J [217] Red 203H.

65. The trial judge made a contingent finding that even if “a degree of rough handling” had occurred (meaning handling as alleged by the appellant: J [32] Red 155L), it would constitute “moderate and reasonable force to chastise [truanting] pupils”, thus falling within the defence of lawful chastisement, since “authority to use [such] force...falls upon members of the teaching staff and not only the principal”: J [217] Red 203H-L.
66. The trial judge’s analysis of the legal framework for lawful chastisement at J [17]-[22] Red 148M-151O was correct. The right to discipline extends not only to the headmaster but also to others *in loco parentis* and responsible for discipline, which Sweeney was.
67. Contrary to AS [118], truancy was a serious disciplinary breach justifying physical intervention. On the appellant’s own description (T90.18-T91.35 Black Vol. 1 90J-91R), there was no evidence as to the force of the karate chops or kicks, and the ear twisting was said to be painful only because the appellant “had bad ears at the time” due to grommets – a fact it was never suggested Sweeney knew. Accordingly, his evidence – even at its highest – did not go beyond a degree of rough handling within the scope of lawful chastisement
68. The submission at AS [118] that Sweeney could not raise the defence of lawful chastisement must be rejected. While corporal punishment was understood to be prohibited at St Ignatius, there was no formal policy to that effect, nor was there evidence that the appellant’s parents knew of that policy or expressly prohibited physical discipline of the appellant: cf. AS [94]. Contrary to AS [118], there was unchallenged evidence that Sweeney’s role included disciplinary functions. This included reprimanding misbehaving students (including at the request of class teachers) or putting them in “time out”;¹⁵ taking them to the principal’s office and, if requested by the principal, taking them home to their parents;¹⁶ and retrieving truanting students.¹⁷ He was clearly *in loco parentis* and his role included discipline of Aboriginal students.

F.8 ***The Sweeney grounds lack merit***

69. The trial judge made careful and well-supported findings rejecting the Sweeney allegations, while expressly considering the only incident admitted by Sweeney. The finding that any

¹⁵ CB340 [57] Blue 184U-X (Brother Hollamby statement); CB356-357 [11] Blue 30V-31D (Sweeney statement); T659.35-47 Black Vol. 2 659R-X, T666.20-34 Black Vol. 2 666K-Q, T668.8-24 Black Vol. 2 668E-M (Sweeney XXN).

¹⁶ CB321 [25] Blue 103Q-S (Brother Hollamby statement); CB357 [12] Blue 31D-H (Sweeney statement); T658.23-37 Black Vol. 2 658L-S, T660.18-27 Black Vol. 2 660J-O (Sweeney XXN).

¹⁷ J [32] Red 155J-L; CB326 [18] Blue 174V-X, CB330 [60] Blue 178F-H (Brother Hayes statement); CB337 [13]-[14] Blue 181H-L, CB340 [53] Blue 184N-O (Brother Hollamby statement).

physical contact (during truanting episodes) amounted at most to reasonable discipline by a staff member with clear authority to chastise was correct. Grounds 10–13 should be rejected.

G. “SERIOUS PHYSICAL ABUSE” WAS PROPERLY CONSTRUED

G.1 *The orthodox statutory construction*

70. Contrary to ground 4, the trial judge’s construction of “serious physical abuse” in s 6A of the *Limitation Act* (J [14]–[15] Red 147F–148F) was orthodox and discloses no error. The phrase “serious physical abuse” is not defined in the *Limitation Act* and takes its ordinary meaning, subject to the statutory context. His Honour correctly observed that the phrase must be construed as a whole, and that the combination of “perpetrated”, “serious” and “abuse” (it is not just abuse but serious abuse) connotes “a high degree of misconduct” and “an intensity well beyond what is minor or trivial”.

71. It is incorrect to say the trial judge “gave no consideration” to the Second Reading Speech: AS [125]. It is directly referenced in his consideration of the purpose of removing the limitation period for claims for sexual and other (that is, including serious physical) child abuse: J [190] Red 194K–P. While not quoted expressly on the meaning of “serious physical abuse”, his Honour said “[t]he requisite intensity can be supplied by either the severity in terms of injurious potential of a blow struck or by the period of time over which there has been ongoing physical abuse of the child” (emphasis added): J [15] Red 147X–148C. That directly reflects references in the Second Reading Speech to “physical contact with a child that could cause injury”, consisting of “serious, one-off conduct” or “a series of relatively minor episodes over a period that cause the conduct to become serious” (emphasis added): AS [124]. His Honour also referred to the expression being understood as having the meaning that ordinary people would understand it to convey (J [14] Red 147H–I), which reflects the statement in the Second Reading Speech that the phrase would be interpreted by Courts “having regard to the circumstances of each case and the ordinary meaning of the terms”: AS [123].

72. The principle that remedial legislation should be construed beneficially (see AS [123], [124], [126]) is a manifestation of the more general principle that all legislation is to be construed purposively: *Sydney Seaplanes Pty Ltd v Page* [2021] NSWCA 204, [85] and [97] (Leeming JA). The construction adopted by the trial judge was correct as a matter of text, context, and purpose.

G.2 *Other alleged errors misread the judgment*

73. The suggestion at AS [123] and [130] that the trial judge required actual bodily harm as a precondition for “serious physical abuse” mischaracterises his Honour’s reasons. The trial judge correctly recognised that “serious physical abuse” encompasses conduct with

“injurious potential” through single incidents or cumulative lesser acts (J [15] Red 147Y-148), indicating that actual bodily harm is not required. The reference at J [15] Red 147T-U to the need for “the infliction of injury to the person of the child concerned” picks up the physical aspect of the provision, which requires acts or treatment capable of causing harm to the child’s body. It is not a reference to actual bodily harm.

74. Contrary to AS [132]-[133], the references to “severe physical abuse” at J [215] Red 202X and J [224] Red 204X are errors, but not of substance. It is clear that his Honour understood the words used in the statute: see J [14]-[15] Red 147F-148F; J [193] Red 195K-L; J [204] Red 199S-T; J [217] Red 203L-M.
75. While AS [133]-[134] suggest otherwise, it should go without saying that the trial judge’s “Contingent findings on quantum” (J [229] Red 206H), and contingent acceptance of medical opinion about the effects of the “alleged abuse” (J [244] Red 209N-P), are in no way a finding that the alleged assaults in fact occurred. To the contrary, given the appellant’s “earlier psychological trauma”, unrelated to the alleged abuse by Sister Green and Sweeney, “one does not need to look for serious physical abuse to account for the [appellant]’s psychiatric disorder”: J [195] Red 196I-J.

H. NO BASIS FOR RELIEF

76. The appellant’s argument for a new trial at AS [135]-[136] is misconceived. The factual findings are not “impacted” by the trial judge’s construction of s 6A of the *Limitation Act*. The findings that there was no hitting with an implement by Sister Green, and no rough handling of truants by Sweeney, stand regardless of how “serious physical abuse” is construed. Even if the appellant was smacked by Sister Green (which must have been for good reason) or roughly handled by Sweeney when truanting (which was itself an adequate reason), the finding of no “serious physical abuse” would stand on any plausible construction, quite apart from the fact that smacking was never part of the appellant’s case.
77. The unchallenged contingent findings – that there is no direct liability, no vicarious liability for Sister Green, and no breach of a non-delegable duty – also defeat the claim in its entirety, other than vicarious liability for the Sweeney allegations. But the Sweeney allegations were rejected, and that rejection is not “glaringly improbable” or “contrary to compelling inferences”. Hence there is no basis for a new trial.
78. The appeal should be dismissed with costs.


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~~6 August~~ 30 September 2025