DISTRICT COURT OF QUEENSLAND

CITATION:	*PG v State of Queensland* [2023] QDC 109
PARTIES:	**PG** (plaintiff) **v** **STATE OF QUEENSLAND** (respondent)
FILE NO/S:	BD2513/21
DIVISION:	Civil
PROCEEDING:	Application for leave under rule 470 of the *Uniform Civil Procedure Rules 1999* (Qld) and under rule 223 of the *Uniform Civil Procedure Rules 1999* (Qld)
ORIGINATING COURT:	District Court at Brisbane
DELIVERED ON:	20 June 2023
DELIVERED AT:	Brisbane
HEARING DATE:	8 June 2023
JUDGES:	Smith DCJA

ORDER:

1. **Pursuant to Rule 470 of the *Uniform Civil Procedure Rules 1999* (Qld) leave is granted to the plaintiff to make the application.**

2. **Pursuant to Rule 223 of the *Uniform Civil Procedure Rules 1999* (Qld) the defendant is ordered to make disclosure of the following documents:**

   (a) Unredacted copies of notice of claim forms provided in a redacted form under cover of the defendant's solicitor's letter dated 24 February 2023, except the personal addresses and personal contact details of the claimants. The disclosure is on condition that the plaintiff's solicitors are to securely store the documents and only one copy is to be made for counsel and no further copies are to be made.

   (b) Any document (including but not limited to records of complaints, incident reports, investigation documents, liability responses, pleadings or affidavits containing information about the allegations - except those over

which a valid claim for legal privilege is made) concerning the allegations giving rise to the alleged liability of the defendant in the notice of claim forms referred to in (a) above.

(c) Any document (including but not limited to records of complaints, investigation documents, pre-court proceedings or court documents - except those over which a valid claim for legal privilege is made) recording information about or allegations of sexual abuse of a juvenile detainee by a detention officer at the Brisbane Youth Detention Centre occurring in the period 22 June 1999 to 8 September 2007.

(d) Any documents (including but not limited to daily logs and records, records of complaints, investigation documents, pre-court proceedings or court documents - except those over which a valid claim for legal professional privilege may be made) recording or alleging the digital penetration of a juvenile detainee's anus by a detention officer during a purported search of the juvenile detainee at the Brisbane Youth Detention Centre occurring in the period 22 June 1999 to 8 September 2009.

3. I give the parties liberty to apply.

4. I will hear the parties on the question of costs.

CATCHWORDS: PROCEDURE- DISCOVERY AND INTERROGATORIES – DISCOVERY AND INSPECTION OF DOCUMENTS – where plaintiff claims he was sexually abused at the Brisbane Youth Detention centre – where plaintiff claims the defendant is liable for negligence, breach of statutory duty and is vicariously liable – where 52 claim forms have been disclosed from other complainants but where the details of the complainants have been redacted – where the plaintiff seeks disclosure of documents relating to these claims – where the plaintiff seeks documents from 1999 to 2009 when the alleged abuse occurred in 2004 – whether documents should be disclosed – whether the documents should be redacted

Civil Liability Act 2003 (Qld) ss 9, 11
Juvenile Justice Act 1992 (Qld) ss 263, 268, 277

Juvenile Justice Regulation 2003 (Qld) ss 28, 35, 36, 37
Personal Injuries Proceeding Act 2002 (Qld) ss 20, 33
Uniform Civil Procedure Rules 1999 (Qld) rr 211, 212, 223, 224, 470
Anderson v Morris Wools Pty Ltd [1965] Qd R 65, cited
Aquila Coal Pty Ltd v Bowen Central Coal Pty Ltd [2013] QSC 82, cited
Astway Pty Ltd v Council of the City of the Gold Coast [2008] QCA 73; (2009) 159 LGERA 335; [2008] Q Conv R 54-968, applied
BBH v R [2012] HCA 9; (2012) 245 CLR 499, applied
Bird v DP [2023] VSCA 66, applied
Brinsmead v Property Solutions (Australia) Pty Ltd [2009] QSC 223, cited
Davis v Langdon (1911) 11 SR (NSW) 149, cited
Di Cesare v Bird [2021] VSC 25, considered
Esso Australia Resources Ltd v Plowman [1995] HCA 19; (1995) 183 CLR 10, cited
Grivas v Brooks (1997) 69 SASR 532, cited
Gunns Ltd v Marr [2008] VSC 464, cited
Harman v Secretary of State for the Home Department [1983] 1 AC 280, cited
Hearne v Street [2008] HCA 36; (2008) 235 CLR 125, cited
Integrated Medical Technology Pty Ltd and Anor v Gilbert and Ors (No 2) [2015] QSC 124, cited
Interchase Corporation Ltd (In liq) v Grosvenor Hill (Qld) Pty Ltd (No 1) [1999] 1 Qd R 141, cited
JCB v Bishop Paul Bird for the Diocese of Ballarat [2019] VSC 348; (2019) 58 VR 426, cited
Lenscak v Trustees of the Marist Brothers (No 2) [2021] VSC 49, distinguished
Levey v Bishop Paul Bernard Bird [2020] VSC 615, cited
LG v Brock [2016] NSWSC 323, applied
Magellan Petroleum Australia Ltd v Sagasco Amadeus Pty Ltd [1994] 2 Qd R 37, cited
Menkens v Wintour [2006] QSC 342; [2007] 2 Qd R 40, discussed
Mister Figgins Pty Ltd v Centrepoint Freeholds Pty Ltd (1981) 36 ALR 23, considered
Mobil Oil Australia Ltd v Guina Developments Pty Ltd [1996] 2 VR 34, applied
Mulley v Manifold [1959] HCA 23; (1959) 103 CLR 341, applied
New South Wales v Lepore [2003] HCA 4; 212 CLR 511, applied
O'Brien v Chief Constable of South Wales Police [2005] 2 AC 534, applied
Peninsula Shipping Lines Pty Ltd & Anor v Adsteam Agency Pty Ltd & Anor [2008] QSC 317, cited
Pfennig v R (1995) 182 CLR 461, applied
Prince Alfred College Incorporated v ADC [2016] HCA 37;

(2016) 258 CLR 134, cited
R v Meizer [2001] QCA 231, cited
Robson v REB Engineering Pty Ltd [1997] 2 Qd R 102, cited
Ryan v Electricity Trust (SA) No 1 (1987) 47 SASR 220, cited
SDA v Corporation of the Synod of the Diocese of Rockhampton & Anor [2021] QCA 172; (2021) 8 QR 440, distinguished
Sheldon v Sun Alliance Australia Ltd (1989) 53 SASR 97, cited
Stephensen v The Salesian Society Inc; Easton v The Salesian Society Inc [2018] VSC 602, distinguished
The Queensland Local Government Superannuation Board v Allen [2016] QCA 325, cited
Volunteer Fire Brigades Victoria v Country Fire Authority [2016] VSC 573, cited
Waltons Stores (Interstate) Ltd v Maher [1988] HCA 7; (1988) 164 CLR 387, cited

COUNSEL: G Diehm KC with J Liddle for the plaintiff
R Douglas KC with J V Pagliano for the defendant

SOLICITORS: Shine Lawyers for the plaintiff
Crown Solicitor for the defendant

Introduction

[2] This is an application by the plaintiff for disclosure of documents pursuant to rule 223(1) of the *Uniform Civil Procedure Rules 1999* ("UCPR").

[3] The plaintiff applies for disclosure of the following documents:

(a) Unredacted copies of notice of claim forms provided in a redacted form under cover of the defendant's solicitor's letter dated 24 February 2023.

(b) Any document (including but not limited to records of complaints, investigation documents, liability responses, pleadings or affidavits containing information about the allegations) concerning the allegations giving rise to the alleged liability of the defendant in the notice of claim forms referred to in (a) above.

(c) Any document (including but not limited to records of complaints, investigation documents, pre-court proceedings or court documents) recording information about or allegations of sexual abuse of a juvenile detainee by a detention officer at the Brisbane Youth Detention Centre occurring in the period 22 June 1999 to 8 September 2009.

(d) Any document (including but not limited to records of complaints, investigation documents, pre-court proceedings or court documents) recording information about or allegations of sexual abuse of a juvenile detainee by a detention officer in a bathroom or in connection with the

purported search of the juvenile detainee at the Brisbane Youth Detention Centre occurring in the period 22 June 1999 to 8 September 2009.

(e) Any documents (including but not limited to daily logs and records, records of complaints, investigation documents, pre-court proceedings or court documents) recording or alleging the digital penetration of a juvenile detainee's anus by a detention officer during a purported search of the juvenile detainee at the Brisbane Youth Detention Centre occurring in the period 22 June 1999 to 8 September 2009.

The pleadings

[4] The plaintiff claims $750,000 damages for breach of duty, breach of statutory duty and the alleged tortious conduct of the State of Queensland, its employees, servants or agents.

[5] In the statement of claim, it is alleged the defendant was responsible for the operation and management of the Brisbane Youth Detention Centre ("BYDC") situated at Wacol. The BYDC was a government-run facility housing children who had been refused bail and remanded in custody or who had been sentenced by the courts to a period of detention. It is alleged that at all material times the State of Queensland was responsible for the safe custody and wellbeing of children detained at the BYDC. At all material times the plaintiff was in the custody of the defendant.

[6] The plaintiff, a male born on 9 October 1987, was detained in the BYDC from 22 June 2004 until 8 September 2004. On an occasion during the course of the plaintiff's admission into the BYDC, he was completing a business course within the Education Unit and requested to go to the toilet and was escorted by a detention centre officer ("Officer A") from the Education Unit to the toilet. On arrival at the toilet he was required to undergo a purported strip search in a toilet cubicle. During the purported strip search Officer A digitally penetrated the plaintiff's anus, hit the plaintiff in the back of the head and pushed him to the knees and anally raped him with his penis. About a week later a similar incident happened. The rapes of the plaintiff by Officer A were unlawful and not consented to by the plaintiff.

[7] It is alleged in paragraph 9 that at all material times the defendant owed statutory duties of care to children in its custody including:

(a) A duty to provide for the safe custody and wellbeing of children detained in the BYDC;[1]

(b) A duty to carry out its responsibility for the safe custody and wellbeing of children detained in the BYDC by complying with directions, codes, standards and guidelines;[2]

(c) A duty to provide services promoting health and wellbeing of children;

(d) Maintaining the security and management of the centre.[3]

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1 Section 203(1) *Juvenile Justice Act 1992* (Qld) is pleaded - it should be section 263.
2 Section 203(2) *Juvenile Justice Act 1992* (Qld) is pleaded - it should be section 263.
3 Section 203(3) *Juvenile Justice Act 1992* (Qld) is pleaded - it should be section 263.

[8] It is also alleged in paragraph 10 that at all material times the defendant owed to the plaintiff:

(a) A non-delegable duty of care and positive responsibility to safeguard the plaintiff from sexual and physical abuse whilst in detention;

(b) A non-delegable duty to take responsible care to ensure the safety and security of vulnerable child prisoners, "particularly having regard to the fact that the defendant knew or ought to have known of a substantial history of sexual and physical abuse of child detainees by detention centre officers and the fact that close supervision of the detainees and detention centre officers was not only warranted but also reasonably required.";

(c) A non-delegable duty of care to take all reasonable steps to ensure the plaintiff's safety;

(d) A duty to take all reasonable steps and precautions to prevent the plaintiff from being exposed to sexual and physical assaults from detention centre officers;

(e) A duty to take all reasonable and proper supervision of Officer A to prevent him from sexually and physically abusing the plaintiff;

(f) A duty to exercise constant, adequate and proper supervision of the plaintiff;

(g) A duty to properly and adequately educate and train its officers;

(h) A duty to implement, maintain and enforce a proper system of supervision;

(i) A duty to take all reasonable steps to reduce the likelihood of sexual and physical abuse;

(j) A duty to take due and proper care in selecting and employing appropriately trained officers;

(k) A duty to take all reasonable and practical steps to protect the plaintiff;

(l) A duty not to permit the detention centre officers "inappropriate access to the plaintiff when it knew or ought to have known of the history and propensity of detention centre officers to inflict sexual and physical abuse on child detainees";

(m) A duty to act on prior reports of, claims of and findings of sexual and physical abuse of children by detention centre officers;

(n) A duty to report acts, prior reports, claims and findings of sexual and physical abuse to appropriate authorities;

(o) A duty to employ adequately trained detention officers;

(p) A duty to exercise reasonable care in hiring officers;

(q) A duty not to afford detention centre officers a work environment which allowed them to inflict sexual abuse on children within their custody and control, including the plaintiff, with impunity.

[9] It is alleged in paragraph 11 that the defendant breached the statutory duties pleaded.

[10] Further in paragraph 12, it negligently breached the tortious duties alleged, in particular, in 12(b) it is pleaded:

> "Failed to ensure the safety and security of otherwise vulnerable child prisoners over whom the prison authority exercised complete effective control, particularly having regard to the fact that the defendant knew or ought to have known of a substantial history of sexual and physical abuse of child detainees by detention centre officers and the fact that close supervision of detainees and detention centre officers was not only warranted but also reasonably required."

[11] In paragraph 12(c) it is alleged there was a failure to properly supervise detention officers.

[12] Further in paragraph 12(k)-(n), it is alleged the defendant:

> "(k) Failed to take all reasonable and practical steps to protect the plaintiff and other children from sexual and physical abuse at BYDC when it knew, or ought to have known, that sexual and physical abuse of children by detention centre officers was occurring at BYDC;
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> (l) Permitted the detention centre officers inappropriate access to the plaintiff when it knew or ought to have known of the history and propensity of detention centre officers to inflict sexual and physical abuse on child detainees;
>
> (m) Failed to act on prior reports, claims of, findings of, and abuse of children by detention centre officers at BYDC;
>
> (n) Failed to report acts, prior reports, claims of, and findings of sexual and physical abuse of children by detention centre officers at BYDC to appropriate authorities."

[13] It is further alleged the defendant was vicariously liable for the conduct of the detention centre officer.

[14] As a result of tortious conduct and/or breaches of statutory duty, damages are claimed.

[15] The State of Queensland admits the matters contained in paragraph 1 of the claim including the requirement that the State of Queensland was responsible for the safe custody and wellbeing of children detained at BYDC. The State of Queensland denies the allegation of the rapes. It further denies the breach of statutory duties because section 263 of the *Juvenile Justice Act* does not impose the alleged duties but, in any event, a breach of those duties does not give rise to a civil course of action (paragraph 4).

[16] It denies it owed the tortious duties alleged but agrees that it owed a duty to the plaintiff to exercise reasonable care and take precautions against a risk of injury to the plaintiff that was foreseeable and, in the circumstances, a reasonable person in the position of the defendant would have taken the precautions (paragraph 5(c)).

[17] The defendant denies it breached any duties alleged and says that it did provide for the protection and welfare of the plaintiff, it did not permit him to be sexually abused, it provided adequate supervision, it took all reasonable precautions against a risk of injury and no further precautions for the safety of the plaintiff could have reasonably been taken. The sexual abuse generally is denied. The State of Queensland further raises issues of causation concerning mental illness alleged.

[18] In a number of paragraphs it says that the system was an adequate one and it took all reasonable precautions for the safety of the plaintiff.

[19] The issues raised on the pleadings are:

(a) Whether the abuse occurred as the plaintiff alleges;

(b) The content of statutory duties owed by the defendant to the plaintiff, whether they give rise to a cause of action and whether they were breached;

(c) The extent of the duty of care owed to the plaintiff;

(d) Whether the defendant breached its duty of care. This involves consideration of whether the risk of the abuse was reasonably foreseeable[4] and whether there were reasonably practicable means of obviating that risk[5] which the defendant failed to implement.

(e) Whether the plaintiff suffered damage which was caused by the defendant's breach of statutory duty or negligence;[6]

(f) Whether the defendant is vicariously liable for damage caused by the abuser.

Submissions by the plaintiff

[20] The plaintiff by its application seeks orders for disclosure of recorded similar incidents including unredacted documents which have already been disclosed by the defendant.

[21] A request for trial date has been signed and therefore under UCPR 470 the plaintiff requires leave to make the application.

[22] It is clear on the evidence,[7] that the extent of the defendant's likely non-disclosure is far larger than one might otherwise have suspected. It is submitted that the documents go to the central issues in the proceeding. At the time of the requesting of the trial date, the plaintiff did not have the benefit of Mr Dwyer's evidence about the significant number of allegations of sexual abuse at BYDC which have resulted in personal injury claims. At the time of the signing of the request for the trial date, the defendant had made disclosure of a small number of documents (four statements of claim) and asserted a privilege against disclosing the notice of claim documents which it has now conceded does not relieve it of its duty of disclosure.

[23] As to the category 1(a) documents, on 24 February 2023 the defendant disclosed 52 notice of claim forms relating to pre-court personal injury claims alleging abuse at

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4 Section 9(1) of the *Civil Liability Act 2003* (Qld).
5 Section 9(2) of the *Civil Liability Act 2003* (Qld).
6 Section 11 of the *Civil Liability Act 2003* (Qld).
7 Affidavit of Amy Carlson at [15].

BYDC. These are heavily redacted. There is an obligation to disclose the whole of each relevant document.[8] It is submitted the names of the claimants and names of witnesses are relevant and privacy considerations are subservient to the interests of justice. The identity of the perpetrators are particularly important where the plaintiff cannot identify the assailant. It may be concluded that many of the claimants would not object to the plaintiff knowing the details of their cases.

[24] As to the category 1(b) documents, the defendant has not disclosed any documents concerning the allegations made in the notice of claim forms such as investigation documents, liability responses, pleadings and affidavits. These documents would be directly relevant to the litigation.

[25] As to the category 1(c) documents, documents evidencing other acts of sexual abuse of detainees are directly relevant to the pleaded issues and they are likely to exist because of the evidence of Mr Dwyer. They are particularly relevant to whether there was adequate supervision, knowledge, the extent of duty of care and the existence of vicarious liability. Only 52 redacted notices have been given when the evidence of Mr Dwyer is that there are 750.

[26] Category 1(d) is not pressed.

[27] As to the category 1(e) documents, it is submitted the sexual abuse occurred under the pretext of a search of the plaintiff. Whether searches of this kind occurred on other occasions is directly relevant.

[28] In oral submissions the plaintiff submitted:

(a) The 52 claim forms are relevant to this proceeding as the occurrence of other sexual acts could well bear on the probability of the alleged acts occurring.

(b) The other claims are relevant to whether the defendant put in place proper systems of supervision and whether there were inappropriate systems of searching.

(c) The names of the persons in the claim forms are needed as they may be called to give evidence to prove the truth of the allegations.

(d) As to the paragraph 1(a) documents, there is only an entitlement to redact if they are irrelevant and there is a need for confidentiality.

(e) The names are clearly relevant and the issue is confidentiality. In this case, by reason of the implied obligations,[9] there are protections in place. Also, in this case the claimants had issued notices of claim knowing that the details would not be confidential and were most likely prepared to go to court.

(f) The case of *Lenscak v Trustees of the Marist Brothers (No 2)*[10] is to be distinguished. In this case the claimants can be inferred to know that their claims might become public.

(g) Whilst documents may be redacted, they should not be in this case and all information should be disclosed aside from personal contact details.

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8 *Menkens v Wintour* [2006] QSC 342; [2007] 2 Qd R 40 at [12].

9 Harman v Secretary of State for the Home Department [1983] 1 AC 280.

10 [2021] VSC 49.

(h) As to the category 1(b) documents, it may readily be inferred they exist, particularly when one considers the provisions of the *Personal Injuries Proceedings Act 2002* ("PIPA").

(i) An analysis of exhibit AC1 to the affidavit of Amy Carlson sworn 6 June 2023 (tab 12 of the Agreed Bundle of Court Documents) reveals a number of court documents have not been disclosed. Also, it may be readily inferred there are Youth Justice records with respect to each claimant.

(j) As to the category 1(c) documents, these are relevant to the issues in the pleadings including the system of supervision in place, knowledge or constructive knowledge of the defendant, and whether the detention officers were in a position of power and intimacy.[11]

(k) In light of the evidence of Mr Dwyer it may readily be inferred that other complaints/claims exist.

(l) Evidence of incidents both before and after the alleged abuse is relevant to whether the system in place was adequate, relying on *Astway Pty Ltd v Council of the City of the Gold Coast*.[12]

(m) As to the paragraph 1(e) documents, section 27 of the *Youth Justice Regulation* required a register of searches to be kept. None have been disclosed. It is clearly an issue on the pleadings, where the defendant denies any search was unlawful.

(n) The defendant has acted a misconception as discussed in *Mulley v Manifold.*[13]

(o) It is submitted that further claims are likely to exist - this can be inferred by the disclosure of 52 claims for a five-year period.

Submissions by the defendant

[29] The defendant submits that the plaintiff's application is without substance and ought to be dismissed. The defendant opposes leave being granted.

[30] It is submitted that UCPR 223(4)(b) makes it clear that orders should be made only if there is an objective likelihood that the duty to disclose has not been complied with. It is for the plaintiff to prove this. It is not sufficient simply that the plaintiff's solicitors want to satisfy themselves there is compliance. It is submitted there is no such evidence here.

[31] It is also submitted that the documents are not directly relevant to an allegation or issue in the pleadings. In paragraph 19 the defendant sets out the issues which are raised on the pleadings.

[32] It is submitted that there is no basis to disclose documents for the 10-year period as the period of detention was from June 2004 until September 2004. There is no basis for disclosure beyond 8 September 2004. The defendant relies on *SDA v Corporation of the Synod of the Diocese of Rockhampton & Anor*.[14]

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11 *Prince Alfred College Incorporated v ADC* [2016] HCA 37; (2016) 258 CLR 134 at [84].
12 [2008] QCA 73; (2009) 159 LGERA 335; [2008] Q Conv R 54-968 at [41]-[45].
13 [1959] HCA 23; (1959) 103 CLR 341 at p 343.
14 [2021] QCA 172; (2021) 8 QR 440 at [31] and [132].

[33] The defendant denies that a proper search has not been conducted. It is submitted that the disclosure of the 52 notices of claim came after an examination of the case by an experienced solicitor. The mere nomination of the figure of 750 by Mr Dwyer does not provide sufficient proof of existence.

[34] As to the category 1(a) documents, it is submitted that each of the 52 notices of claim have been redacted to remove the claimants' identities, identities of the alleged perpetrators, medical treatment providers, legal representatives and other personal information. It is submitted that the material is confidential and irrelevant and because these are complaints of sexual abuse, the public interest weighs in favour of preserving the confidentiality of these records. This is not apt insofar as the unredacted statements of claim are concerned. The defendant submits the law permits a party to redact material if it is regarded as confidential and irrelevant. The defendant relies on *Lenscak v Trustees of the Marist Brothers (No 2)*.[15] It is submitted the old "train of inquiry" test is no longer the correct test.

[35] It is also pointed out that the plaintiff agreed to redaction of the documents to be obtained the subject of the subpoena.

[36] The defendant relies on statements made in the report by the Royal Commission into Institutional Responses to Child Sexual Abuse also as justifying redaction. The PIPA itself provides for confidentiality under section 33.

[37] It is submitted that the plaintiff does not need the names. He can prove the existence of the prior allegations and deficiencies in the system. He also has the claims of four individuals and now eight more.

[38] It is disputed that the plaintiff cannot adduce evidence about the subject matter of the notices. The documents are not of direct relevance and the identity of other perpetrators is not relevant on the pleadings.

[39] It is submitted the claim for the disclosure is "fishing" and the pleadings do not support relevance at this point.

[40] As to the category 1(b) documents, the defendant relies on the same submissions submitting that they are not of direct relevance. There has been inadequate specification and the defendant is not obliged to provide any disclosure beyond that which has already been provided.

[41] It is submitted that there has been disclosure of some of the statements of claim. It is also submitted that investigations leading to a liability response would be the subject of legal professional privilege. This has been preserved by PIPA.

[42] As to the category 1(c) documents, the defendant repeats and relies on its earlier submissions. It is further submitted the defendant's policies and procedures have been disclosed together with litigated claims.

[43] It is submitted that a claim made after his discharge is not directly relevant to the pleadings. It is submitted that the statement of claim does not plead facts or details of actual or constructive knowledge on the part of the State.

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15 [2021] VSC 49 at [45], [51]-[59].

[44] Ms Mawer has correctly disclosed the 52 notices of claim from 1998 until September 2004.

[45] The category 1(e) documents were conceded in argument.

[46] It is finally submitted that the 52 notices of claim were disclosed by the defendant and were appropriately redacted in accordance with the authorities. It is submitted that the present request for disclosure of documents extends beyond documents which are directly relevant to the present pleaded case and further, legal professional privilege applies to preclude the production of some of the documents. There is no evidence in this case to reach the conclusion the duty of disclosure has not been complied with.

[47] In oral submissions the defendant submitted:

(a) That the onus of proving relevance and the objective likelihood of the existence of other documents is on the plaintiff, while the onus is on the defendant as to the validity of the redactions.

(b) As to category 1(a), both relevance and confidentiality are to be considered. Even if relevant, the need for confidentiality may justify the redactions. It is accepted that there is an implied undertaking on the parties. The matters though are very sensitive ones. There is no evidence the claimants were ever told that their documents would be handed to other parties. Bearing in mind 14 have actually issued proceedings and applying *Lenscak* at [56], the interests of justice weigh against the disclosure of the details sought. There is no obligation on the defendant to contact the claimants. The names are irrelevant. It is the fact of complaint, which is relevant to the issues, not the truth of the complaints.

(c) As to category 1(b), an issue of legal professional privilege arises with respect to investigation reports prepared for the dominant purpose of the litigation. Obtaining statutory declarations and psychiatric reports is far removed from the issues. They are not relevant. The defendant has disclosed all that it needs to. Offers to settle and the like should not be disclosed. They are without prejudice anyhow. There is no evidence of incident reports. Also, UCPR 224 is relevant to the discretion in UCPR 223. It is conceded that liability responses for the 52 claims should be disclosed.

(d) As to category 1(c), it has not been established that other documents do exist. It is really a fishing expedition. The evidence here is insufficient to prove the existence of other documents in reliance on *Brinsmead v Property Solutions (Australia) Pty Ltd*[16] and *Integrated Medical Technology Pty Ltd and Anor v Gilbert and Ors (No 2)*.[17] The reference to 750 claims in Mr Dwyer's evidence goes right up until 2022. Ms Mawer has appropriately analysed the documents and has disclosed relevant ones from 1999 until 2004. There is no evidence of other claims. The court would not be satisfied the defendant has acted under any misconception as discussed in *Mulley v Manifold*.[18]

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16 [2009] QSC 223 at [8] and [11].
17 [2015] QSC 124 at [11].
18 [1959] HCA 23; (1959) 103 CLR 341 at p 343.

(e) It is submitted that documents post the alleged abuse are not relevant in reliance on *SDA v Corporation of the Synod of the Diocese of Rockhampton & Anor*.[19] They are of low weight. In any event, the disclosure of 52 notices of claim is adequate.

Discussion

General

[48] Rule 223 of the UCPR provides:

> "**223 Court orders relating to disclosure**
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> (1) The court may order a party to a proceeding to disclose to another party a document or class of documents by—
>
> (a) delivering to the other party in accordance with this division a copy of the document, or of each document in the class; or
>
> (b) producing for the inspection of the other party in accordance with this division the document, or each document in the class.
>
> (2) The court may order a party to a proceeding (the ***first party***) to file and serve on another party an affidavit stating—
>
> (a) that a specified document or class of documents does not exist or has never existed; or
>
> (b) the circumstances in which a specified document or class of documents ceased to exist or passed out of the possession or control of the first party.
>
> (3) The court may order that delivery, production or inspection of a document or class of documents for disclosure—
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> (a) be provided; or
>
> (b) not be provided; or
>
> (c) be deferred.
>
> (4) An order mentioned in subrule (1) or (2) may be made only if—
>
> (a) there are special circumstances and the interests of justice require it; or
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> (b) it appears there is an objective likelihood—
>
> (i) the duty to disclose has not been complied with; or

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19 [2021] QCA 172; (2021) 8 QR 440 at [30]-[34].

(ii) a specified document or class of documents exists or existed and has passed out of the possession or control of a party.

(5) If, on an application for an order under this rule, objection is made to the disclosure of a document (whether on the ground of privilege or another ground), the court may inspect the document to decide the objection."

[49] It is clear that in order for a plaintiff to obtain further disclosure there must be an objective likelihood the duty of disclosure is not being complied with. Further, the duty of disclosure relates to documents that are "directly relevantly to an allegation in issue in the pleadings".[20]

[50] It also may be accepted that a mere fishing expedition should not be permitted[21]and is not enough for a plaintiff to say that he believes there has been non-compliance.[22]

[51] There is no dispute that the disclosing party can claim legal professional privilege over disclosure of documents if there is a valid claim.[23]

[52] It is also right to give full terms to the rule rather than the "train of inquiry" test.[24]

[53] It is also clear that the onus is on the plaintiff to establish that there is an objective likelihood that the duty to disclose has not been complied with.

[54] I note in *Mulley v Manifold*[25] Menzies J said that it is not necessary to infer the existence of a particular document, it is sufficient if it appears that a party has excluded documents under a misconception of the case.

[55] It is therefore first necessary to examine the evidence in this case.

Evidential matters

[56] In this matter the pre-court proceedings were commenced via notice of claim on 24 January 2020. On 8 September 2021 Shine Lawyers requested the State make full disclosure of records of similar incidents of serious physical or sexual assaults perpetrated by prison guards on juvenile detainees in the Education Unit or bathrooms at BYDC. The claim and statement of claim were filed in September 2021.

[57] A list of documents was served by Crown Law on 4 January 2022 and the plaintiff was advised there would be updated disclosure.

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20 UCPR r 211(1)(b).

21 *Brinsmead v Property Solutions (Australia) Pty Ltd* [2009] QSC 223 at [11].

22 *Integrated Medical Technology Pty Ltd and Anor v Gilbert and Ors (No 2)* [2015] QSC 124 at [11].

23 *Aquila Coal Pty Ltd v Bowen Central Coal Pty Ltd* [2013] QSC 82; *Interchase Corporation Ltd (In liq) v Grosvenor Hill (Qld) Pty Ltd (No 1)* [1999] 1 Qd R 141 at p 148.

24 *Peninsula Shipping Lines Pty Ltd & Anor v Adsteam Agency Pty Ltd & Anor* [2008] QSC 317 at [42]-[43]; *Volunteer Fire Brigades Victoria v Country Fire Authority* [2016] VSC 573 at [33]; *Robson v REB Engineering Pty Ltd* [1997] 2 Qd R 102 at p 105; *The Queensland Local Government Superannuation Board v Allen* [2016] QCA 325 at [74].

25 [1959] HCA 23; (1959) 103 CLR 341 at p 343.

[58] On 25 January 2022 Crown Law advised they had collated statements of claim which related to similar incidents which had occurred five years prior. There were four of these.

[59] On 29 July 2022 a request for trial date was signed with the trial to commence on 27 September 2022. On 19 September 2022 the plaintiff served a subpoena to produce documents and give evidence of Mr William Dwyer, General Manager of the Queensland Government Insurance Fund ("QGIF"). The plaintiff was advised the terms of the subpoena were too broad and there would be an application to set it aside.

[60] This application was heard on 27 September 2022. Mr Dwyer gave evidence that 2500 claims had been received. 750 of these claims related to abuse at BYDC.[26]

[61] On 28 September 2022 Rosengren DCJ made an order ordering the production of various documents. The trial was then delisted. Rosengren DCJ's order was then appealed. This appeal did not proceed because disclosure was considered to be the more appropriate remedy and the order was set aside by consent with costs reserved.[27]

[62] On 16 November 2022 Shine Lawyers wrote to Crown Law requesting notices of claim that disclosed abuse at BYDC. Crown Law objected to this, claiming the notices of claim were privileged on the basis of section 33 of PIPA and the privilege identified in *Hearne v Street*[28] and therefore were protected from disclosure under rule 212 of the UCPR.

[63] Shine Lawyers in a letter dated 21 November 2022 advised that the implied obligation relied on was subservient to the obligation of disclosure, relying on *Esso Australia Resources Ltd v Plowman*.[29]

[64] On 8 December 2022 Crown Law accepted that it had an obligation to give disclosure of the notices of claim and it would therefore review them.

[65] Ms Mawer from Crown Law explains the process of her review.[30] The documents selected for disclosure were:

(a) For the period 1998 until September 2004 (the plaintiff's discharge from BYDC);

(b) Involved allegations of either sexual abuse or sexual and physical abuse;

(c) The abuse was against a juvenile detainee by BYDC staff members;

(d) The abuse occurred within or in the vicinity of the BYDC Education Unit toilet areas or during purported strip searches.

[66] Ms Mawer then made the following redactions:

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26 Tab 30 of Agreed Bundle of Authorities, Transcript of Proceeding, 27 September 2022, page 1-25.

27 Tab 32 of Agreed Bundle of Authorities, Transcript of Court of Appeal Proceeding, 31 May 2023, page 1-7.

28 [2008] HCA 36; (2008) 235 CLR 125 at [96]-[97].

29 [1995] HCA 19; (1995) 183 CLR 10.

30 Tab 6 of Agreed Bundle of Court Documents, pages 7-8, paras [34]-[37].

(a) Information identifying the claimant;

(b) Information that would identify the BYDC employees;

(c) Information that would identify the claimant's lawyers or treatment providers;

(d) Information related to unrelated allegations.

[67] On 24 February 2023 Crown Law served a bundle of 799 pages which included 52 heavily redacted notices of claim relating to the period 1998 until 2006. The redactions also include redactions of a diagram of the incident, of any emergency response and of the names of witnesses.

[68] On 21 March 2023 Shine Lawyers sought clarification from Crown Law as to the legal basis of the redactions made.

[69] On 2 June 2023 Ms Reeves from Crown Law instructed two employees to search Crown Law internal records to see if any of the claimants had commenced proceedings. Fourteen had, in addition to the four disclosed in May 2022. These have been disclosed to the plaintiff.

Conclusions on the evidence

[70] I conclude the following on the evidence on the balance of probabilities:

(a) That it is more likely than not that with respect to at least some of the 52 notices of claim there are primary documents not the subject of legal professional privilege such as liability responses under section 20 of PIPA. I also conclude it is likely that for some of the claims there would be complaint records, incident/investigation reports or statements or notes which were not prepared for the litigation. It is likely that some of the children and/or their parents (whether or not notices of claim have been issued) would have made complaints at the time. Under section 268 of the *Juvenile Justice Act 1992* (Qld) there was a requirement to immediately report harm to a child. Further, under section 277 of the Act there was a right for a child or parent of a child detained to make complaint to the Chief Executive or a community visitor. Regulations 35, 36 and 37 of the *Juvenile Justice Regulation 2003* (Qld) required records to be kept of harm to a child. This is likely because for some of the claims, there was an emergency response.

(b) It is more likely than not that notices of claim or complaint documents/incident reports exist relating to the period September 2004 to September 2009. It is true that 750 claims relate to the period up until September 2022, but we know 52 relate to the period 1999 until 2004. It is unlikely there would be none in the five-year period from 2004 until 2009 – there would be some.

(c) The majority, if not all of the claimants by lodging their claim forms were aware they would be disclosed to third parties. Exhibit 5, an example of a claim form shows that a claimant would know that the notice of claim with details of the alleged abuse would be disclosed to BYDC, Crown Law, the alleged abuser and/or other people involved in the incident or witnesses. They would be aware that their personal health details were being disclosed to others, and each person at fault needed to be provided with the notice of

claim. They would also be aware the matter would be investigated by the defendant. It is also more likely than not the lawyers would have advised them of the need to issue proceedings if the matter did not resolve. This would involve a lack of confidentiality.

(d) I also consider that the defendant has acted under a misconception here. It originally considered none of the claims were disclosable but has since conceded this. It still considers that category 1(c) documents are not disclosable and documents for the five-year period after September 2004 are not disclosable. For the reasons I later give, I consider that some of them are.

(e) In light of the history of the matter, I do not consider the plaintiff is estopped from seeking the unredacted claim forms in light of the way the appeal was disposed of. There is no particular detriment alleged by the defendant.[31]

Leave

[71] It is common ground that the plaintiff requires leave in this case under UCPR 470. In light of the history of the matter, in light of the most recent disclosure and in light of the Court of Appeal proceedings I will grant leave for the hearing of this application.

Relevance

[72] Relevance is determined by reference to the content of the proposed evidence, the issues at trial, and issues about facts relevant to facts in issue. As French CJ has said, a fact is relevant to a proceeding if it is established:

> "[A]ny two facts to which it is applied are so related to each other that according to the common course of events one either taken by itself or in connection with other facts proves or renders probable the past, present or future existence or non-existence of the other."[32]

[73] Similar fact evidence can be admissible in civil proceedings. It is often tendered in misleading and deceptive conduct cases where evidence of similar representations is admitted as it bears on the probability of the disputed representations.[33]

[74] Also, similar fact evidence is often tendered to establish that there was a particular system in operation. For example, in *Grivas v Brooks*[34] evidence of similar acts of a parking inspector was admissible in an action for malicious prosecution.

[75] Evidence of this type is a form of circumstantial evidence which enables the court to draw inferences if the evidence is proved.[35]

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31 *Waltons Stores (Interstate) Ltd v Maher* [1988] HCA 7; (1988) 164 CLR 387.
32 *BBH v R* [2012] HCA 9; (2012) 245 CLR 499 at [50]-[51].
33 *Mister Figgins Pty Ltd v Centrepoint Freeholds Pty Ltd* (1981) 36 ALR 23 at pp 30-31.
34 (1997) 69 SASR 532 at p 535, 546-548.
35 *Sheldon v Sun Alliance Australia Ltd* (1989) 53 SASR 97 at p 144-145.

[76] In the UK it has been said that the only test of admissibility is relevance.[36] I agree that the touchstone of admissibility is always the question of relevance, and a fact or facts are relevant if they are logically probative as to the issues in dispute.[37]

[77] In this case it is my opinion that the existence of other acts of sexual abuse both before and after the alleged events are relevant in the following respects:

(a) They may bear upon the probability of the alleged acts occurring, bearing in mind the defendant denies the acts alleged occurred. If another person has been sexually interfered with in a similar way this could support the contentions of the plaintiff that he was so abused. Similar fact evidence is admissible in civil proceedings as noted above. In this way it may be understood that the evidence of another person who suffered similar acts at the hands of officers at the BYDC may be admissible at the plaintiff's trial and it is therefore necessary for the plaintiff to be aware of the identity of both the victim and the alleged perpetrator. It may be these witnesses will be called at trial, although as noted in argument, attention will need to be given to the pleadings. Similar fact evidence ordinarily should be pleaded. It seems to me that further particularisation is needed. This may only be done after disclosure is complete.

(b) In this case, the existence of other incidents may be relevant to the extent of the duty of care; whether the duty of care was breached, and as to causation and foreseeability. If other sexual incidents did happen and/or there were complaints made and little was done to protect the plaintiff from the alleged abuse, then this evidence would be relevant to all of these questions. As was noted in *Bird v DP*,[38] the question in a negligence action is whether there is sufficient evidence there was a foreseeable risk that the Officer might assault the plaintiff. As Gleeson CJ said in *New South Wales v Lepore*,[39] an important matter is fault on the part of the school authority. It seems to me that if indeed other sexual acts in truth happened, this is relevant to the content of the duty of care and the issue of foreseeability. It might be more difficult to establish the plaintiff's case without establishing the truth of the other acts of sexual abuse. To establish truth, the plaintiff needs to call the other complainants. Again, one would have thought it will be necessary to further particularise the pleadings in this regard.

(c) As the plaintiff points out in his submissions in paragraph 21, the issue is relevant to supervision, responses and whether BYDC officers were in a position of power and intimacy vis-à-vis detainees, such as to render the defendant liable under the principles of vicarious liability.[40] I consider the truth of the other complaints is entirely relevant to this. Indeed at [84] in *Prince Alfred College* the plurality specifically referred to the position of the respondent and "other children."

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36 See *O'Brien v Chief Constable of South Wales Police* [2005] 2 AC 534.
37 See *BBH v R* [2012] HCA 9; (2012) 245 CLR 499 at [50] per French CJ.
38 [2023] VSCA 66 at [52].
39 [2003] HCA 4; 212 CLR 511 at [2].
40 *Prince Alfred College Incorporated v ADC* [2016] HCA 37; (2016) 258 CLR 134 at [84].

[78] The defendant relied on *SDA v Corporation of the Synod of the Diocese of Rockhampton & Anor*.[41] In that case, the argument was as to the extent of disclosure in PIPA pre-actions procedures. The plaintiff alleged that between 1973 and December 1974 over the period of a year he was sexually abused by reverend M. He sought disclosure of all records of sexual abuse committed by M between 1963 (when M first started there) and 10 January 1975. The evidence revealed that complaints were made but decades after M had left. The primary judge had held the respondent was not obliged to provide information which related to prior incidents unless it could be demonstrated they had a causative effect. The Court of Appeal in overturning the decision noted at [5] that section 27 of PIPA was not confined to information about prior incidents which had a causative effect and on the evidence it could not be concluded there was no causative effect.

[79] It was in the context that M left in December 1974 that Fraser JA noted that evidence before the last act was capable of bearing on questions of negligence and the system in place. It was also relevant to the question of vicarious liability.

[80] Thus, in my view, the reference to the "last act" was not laying down a fixed proposition of law. It was a statement related to the facts of that case.

[81] In the case of *Astway Pty Ltd v Council of the City of the Gold Coast*[42] Atkinson J at [43] accepted that "retrospectant evidence" is admissible. It is a form of circumstantial evidence in which the subsequent occurrence of the act, state of mind or state of affairs justifies an inference that the act was done or that the state of mind or affairs previously existed. It is true that it is a question of weight, but the fact is it is admissible.

[82] It can also be admitted on the question of the breach of duty of care. For example, acts taken after the events in question may be admissible to show that later steps taken were not impracticable to obviate the risk of injury.[43]

[83] In my view the evidence of similar events occurring after the alleged abuse would be admissible in this case. A question is raised though as to whether five years is an appropriate period.

[84] As I mentioned earlier, the identity of the offender is a live issue in this case. I was told by the parties in argument that the defendant has sought particulars of the identity of the offender. The plaintiff's response is that disclosure is necessary first.[44]

[85] Similar fact evidence or propensity evidence can be admitted to prove identity.[45] Prior and subsequent similar acts may be admitted on this question. Indeed for example, in *R v Meizer*[46] similar sexual acts were admitted over a number of years.

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41 [2021] QCA 172; (2021) 8 QR 440.
42 [2008] QCA 73; (2009) 159 LGERA 335; [2008] Q Conv R 54-968.
43 For example, *Davis v Langdon* (1911) 11 SR (NSW) 149; *Ryan v Electricity Trust (SA) (No 1)* (1987) 47 SASR 220; *Anderson v Morris Wools Pty Ltd* [1965] Qd R 65.
44 The identity issue is not fishing.
45 *Pfennig v R* (1995) 182 CLR 461.
46 [2001] QCA 231- 1991, 1994, 1996 and 1997.

[86] In my view, assuming the truth of the plaintiff's allegation, it would be unlikely an officer who was prepared to rape a child would stop. It was a brazen rape. He would be likely to do it again. In that way it may be seen that evidence subsequent to September 2004 may be admissible at this trial.[47]

[87] But it is a matter of degree. As Mr Diehm KC said, there was little reason to choose five years after the event aside from that period mirroring the earlier period.

[88] If the officer was to act in this way again, it is more likely it would have been sooner rather than later. I think that five years after the event is too remote.

[89] Doing the best I can with the information available, I consider that three years after the event is the relevant period for the purpose of the pleadings.

[90] A three-year period would also enable a court to more safely conclude whether the systems in place were adequate.

[91] I also note that Fagan J in *LG v Brock*[48] held that evidence of alleged abuse both before and after the relevant event was admissible on the question of knowledge and foreseeability.

Redaction

[92] Usually, a discovering party is required to produce the whole of the document being discovered even if parts are irrelevant. As Makenzie J noted in *Menkens v Wintour*,[49] generally the whole document should be disclosed. Even if a document contains some irrelevant matters there is a need for caution in masking parts of a document as it may detract from a proper understanding of the document.

[93] It is to be accepted that discovery is an invasion of privacy and confidentiality. But as Hayne JA noted in *Mobil Oil Australia Ltd v Guina Developments Pty Ltd*:[50]

> "Where it is said that the documents are confidential it may be accepted that the fact that the documents are confidential will not ordinarily be a sufficient reason to deny inspection by the opposite party. In most cases, the fact that the documents may not be used except for the purposes of the litigation concerned will be sufficient protection to the party producing them."

[94] The principles relating to the redaction of documents produced for inspection were discussed in *Gunns Ltd v Marr*.[51] Kaye J noted at [30] that strictly speaking, a party must disclose the whole of the document, but it is recognised that a party is entitled to redact irrelevant parts of a document where the party has a legitimate claim for confidentiality. The onus is on the party seeking to uphold the redactions. The ultimate test is the attainment of justice between the parties.

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47 The criminal law principles of admission also apply in civil cases - *Sheldon v Sun Alliance Australia Ltd* (1989) 53 SASR 97.
48 [2016] NSWSC 323 at [24].
49 [2006] QSC 342; [2007] 2 Qd R 40 at [12].
50 [1996] 2 VR 34 at 38.
51 [2008] VSC 464.

[95] There have been a number of Victorian cases in which similar issues have been considered.

[96] The first is *Stephensen v The Salesian Society Inc; Easton v Salesian Society Inc*.[52] In that case, the plaintiffs subpoenaed records held by the Catholic Church Insurance and the defendants. The actions involved allegations the plaintiffs were sexually abused whilst students in 1979 and 1980 at Salesian College in Sunbury. Similar issues were raised on the pleadings.

[97] A subpoena was issued to Catholic Church Insurance ("CCI") seeking production of documents relating to complaints against the relevant perpetrators on or before 1979 or 1980. Objections were taken to the subpoenas being too wide and compromising the privacy of other victims. Also, they amounted to a "fishing expedition."

[98] Ultimately the Judicial Registrar was satisfied there was a legitimate forensic purpose in seeking the documents. They would establish a tendency on the part of the perpetrators to commit the abuse and to establish actual or constructive knowledge on the part of the defendant. The subpoenas were not unduly broad.

[99] As to the issue of confidentiality, it was said that a relevant factor was the issue of privacy. The Registrar was satisfied the evidence should be provided in a redacted form. However, unlike the present case, at [54] Clayton JR noted that there may be individuals who did not go to the police, participate in criminal prosecutions and had not taken steps at common law. There may have been an expectation the allegations to CCI would be kept confidential.

[100] *Di Cesare v Bird*[53] also involved the issue of subpoenas. The plaintiff alleged he was sexually abused as a child by a Catholic Priest in Ballarat in 1984 and the diocese was vicariously liable. Documents relating to sexual abuse by the priest were sought up until the date of the abuse and after the date of the abuse until the "present".

[101] Keogh J referred to the pleadings and noted that vicarious liability and negligence had been pleaded.

[102] His Honour noted the defendant's submissions that the core of the plaintiff's case is what happened in November 1984 and the knowledge the diocese had or should have known about the priest before that date. However the pleadings did not illuminate how the diocese knew this. The subpoena process was being used to see if the plaintiff had a case at all. Any documents after November 1984 were irrelevant.

[103] His Honour ultimately noted at [37] that there was no doubt the Priest abused children before 1984 and that the respondent held files relating to this abuse. There was a reasonable possibility that the documents would assist the plaintiff's case as to constructive knowledge. It was also noted that the plaintiff's case was not a narrow one and raised more generally a duty to protect the plaintiff from sexual abuse by priests. The documents were relevant to the issue of foreseeability and the content of the duty owed to the plaintiff by the diocese. The documents could assist

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52 [2018] VSC 602.
53 [2021] VSC 25.

in showing what precautions were available and the likelihood that taking those steps would guard against the abuse occurring. There was a legitimate forensic purpose for the subpoenas and there was a reasonable possibility the documents would materially assist the plaintiff's case. No redactions were ordered but the judge said he would hear the parties on this question.

[104] In *Lenscak v Trustees of the Marist Brothers (No 2)*,[54] the application was one for disclosure. The plaintiff alleged he had been sexually abused as a student at a school in Traralgon. He sought documents with respect to another province. An issue was raised as to redaction.

[105] The judge ordered disclosure of the documents sought but in a redacted fashion.

[106] His Honour held at [8] that it has been previously decided that prior complaints are relevant to foreseeability and the duty of care.[55]

[107] His Honour determined that the additional records should be disclosed. The documents evidencing other abuse allegations may be significant with respect to both foreseeability and damages. Evidence of widespread sexual abuse of minors within a diocese during the period preceding the sexual abuse of the plaintiff may bear upon the defendant's duty of care to take steps to prevent such sexual abuse.

[108] As to the issue of redaction, His Honour noted the plaintiff's submissions that he was entitled to documents which would enable him to locate witnesses.

[109] His Honour noted at [37] that strictly speaking, a party should be entitled to the whole document, but a party may redact material if it is confidential and irrelevant.

[110] Ultimately His Honour determined that the need for confidentiality for sexual assault victims was paramount in that case. However, in that case, I note the records were held by "Towards Healing". At [57], with reference to *Levey v Bishop Paul Bernard Bird*,[56] the judge noted that the court's concern was as to the individual having a reasonable expectation that in approaching an organisation such as Towards Healing, the records would be kept confidential.

[111] I consider the cases relied on by the defendant may be distinguished. In the present case, as I have found earlier, I infer the complainants were aware that a number of persons would become aware of the allegations and of the potential for court proceedings to be commenced (as has happened in 14 cases). The step that each claimant has taken is a pre-court step which is necessary prior to the issue of proceedings.

[112] Bearing in mind the onus of proof and the importance of the information in the documents, and the importance of confidentiality, I consider the documents should not be redacted. I would have been inclined to order that the contact details of the claimants be disclosed but Mr Diehm KC conceded that he did not want them. One can understand this concession as contact can be made through the solicitors rather

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54 [2021] VSC 49.

55 *Di Cesare v Bird* [2021] VSC 25 at [37]-[43]; *JCB v Bishop Paul Bird for the Diocese of Ballarat* [2019] VSC 348; (2019) 58 VR 426 at [54].

56 [2020] VSC 615.

than by way of a direct call out of the blue. In light of the concession, I will not order disclosure of the claimants' personal contact details.

[113] I note what the defendant says about the report of the Royal Commission into Institutional Responses to Child Sexual Abuse. It may be accepted that there are multiple barriers to disclosure, but during the Royal Commission victims gave evidence with protections in place. I consider that may be done here.

[114] As I have said, in light of the denial by the defendant of the fact of the abuse, the plaintiff may seek to call similar fact evidence to prove the truth of what happened. The fact that abuse did happen (rather than it just being reported) goes to the plaintiff's case on the extent of the duty of care, the breach of the duty of care, foreseeability and vicarious liability. He is entitled to call witnesses on the question, and thus needs to know their names. He still has not identified the perpetrator and this may well happen once there is full disclosure.

[115] I consider that the implied duty of disclosure provides protection to the claimants at this point of the proceeding and measures can be put in place at trial to preserve their confidentiality. For example, in *LG v Brock*,[57] Fagan J put in place protections such as the suppression of publication and the use of pseudonyms.

[116] Taking into account all of the evidence and submissions made and bearing in mind the above conclusions, I specifically find as follows with respect to each category of documents.

Category 1(a)

[117] There is no doubt in my mind that the notice of claim forms are directly relevant to an issue in the pleadings. There is an allegation in the pleadings that the State of Queensland knew or ought to have known of other complaints of sexual abuse such that it breached its statutory duties or duty of care towards the plaintiff. These documents are directly relevant to this issue. They are relevant to causation, the extent of the duty of care and any breach and whether vicarious liability is to be established. They are also potentially relevant towards proof of the alleged abuse of the plaintiff.

[118] In my respectful opinion, there is no clear basis for the redactions shown and the unredacted copies of the notices of claim forms should be disclosed aside from the contact details of the claimants, but the solicitors contact details should be disclosed. Also, the documents should be securely stored.

Category 1(b)

[119] For similar reasons, I consider that the documents referred to in paragraph 1(b) should be disclosed. As I have noted above, it may reasonably be supposed there are source documents relating to the notice of claim forms which are not the subject of legal professional privilege. In those circumstances, I consider they are likely to exist and are directly relevant to the matters in the pleadings. I order that the 1(b)

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57 [2016] NSWSC 323. Also see *Magellan Petroleum Australia Ltd v Sagasio Amadeus Pty Ltd* [1994] 2 Qd R 37.

documents be disclosed aside from those over which there is a valid claim for legal professional privilege.

Category 1(c)

[120] For the reasons expressed above, I am satisfied such documents are likely to exist and have not been disclosed.

[121] I consider such documents are directly relevant to the matters in the pleadings.

[122] I also consider disclosure should occur with respect to the documents until September 2007 aside from those over which there is a valid claim for legal professional privilege.

Category 1(d)

[123] This is not pressed.

Category 1(e)

[124] It is common ground such documents should be disclosed by reason of regulation 28 of the *Juvenile Justice Regulation 2003* (Qld).

[125] They should be disclosed aside from those over which there is a valid claim for legal professional privilege.

Orders

[126] In the circumstances I make the following orders:

1. Pursuant to UCPR 470 leave is granted to the plaintiff to make the application.

2. Pursuant to UCPR 223 the defendant is ordered to make disclosure of the following documents:

   (a) Unredacted copies of notice of claim forms provided in a redacted form under cover of the defendant's solicitor's letter dated 24 February 2023, except the personal address and personal contact details of the claimants. The disclosure is on condition that the plaintiff's solicitors are to securely store the documents and only one copy is to be made for counsel and no further copies are to be made.

   (b) Any document (including but not limited to records of complaints, investigation documents, liability responses, pleadings or affidavits containing information about the allegations - except those over which a valid claim for legal professional privilege may be made) concerning the allegations giving rise to the alleged liability of the defendant in the notice of claim forms referred to in (a) above.

   (c) Any document (including but not limited to records of complaints, investigation documents, pre-court proceedings or court documents - except those over which a valid claim for legal professional privilege may be made) recording information about or allegations of sexual abuse of a juvenile

detainee by a detention officer at the Brisbane Youth Detention Centre occurring in the period 22 June 1999 to 8 September 2007.

(d) Any documents (including but not limited to daily logs and records, records of complaints, investigation documents, pre-court proceedings or court documents - except those over which a valid claim for legal professional privilege may be made) recording or alleging the digital penetration of a juvenile detainee's anus by a detention officer during a purported search of the juvenile detainee at the Brisbane Youth Detention Centre occurring in the period 22 June 1999 to 8 September 2009.[58]

3. I give the parties liberty to apply.

4. I will hear the parties on the question of costs.

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[58] I note that no specific point was taken as to this period by the defendant concerning these documents once disclosure was conceded. If an issue remains as to the period, I am prepared to hear further submissions on this point. Hence, I have ordered liberty to apply.