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# Vicarious Liability and Non-Delegable Duty in common law actions based on institutional child abuse

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**Vicarious Liability and Non-Delegable Duty in common law actions based on  
institutional child abuse**

Neil Foster<sup>1</sup>

<b>1. Distinguishing Vicarious Liability and Non-delegable Duty .....</b>	<b>2</b>
<b>2. Action for Negligence.....</b>	<b>4</b>
<b>3. Action for Battery .....</b>	<b>8</b>
<b>(a) Vicarious Liability.....</b>	<b>8</b>
<b>(i) Employment relationship .....</b>	<b>8</b>
<b>(ii) Vicarious Liability for non-employed clergy- UK developments .....</b>	<b>17</b>
<b>(iii) Scope of employment for intentional tort liability .....</b>	<b>18</b>
<b>(b) Non-delegable duty .....</b>	<b>26</b>
<b>Conclusion .....</b>	<b>29</b>
<b>Other sources.....</b>	<b>30</b>

This paper will provide a review of the current law applicable in NSW to civil actions by victims of child abuse at the hands of those working for institutions such as churches and child care homes, with particular attention to the common law mechanisms by which liability can be sheeted home to the organisations in charge of such institutions.

There are of course a number of hurdles to overcome before a victim of historical child abuse can recover appropriate common law compensation. Some of those hurdles may be overcome by concessions made by institutions justifiably ashamed at what has been done in the past by people acting in their name. But in fully contested litigation obvious hurdles include fact-finding (what actually took place, when, where and by whom), applications of limitations of action legislation, and the difficulty occasioned if the institution concerned does not have “legal personality”.

This last hurdle is particularly an issue in relation to actions against mainstream churches, where the organisations concerned have been in existence for a very long time and may have no formal legal identity as a whole. This of course lay behind the dismissal of the action by John Ellis in *Trustees of the Roman Catholic Church v Ellis* [2007] NSWCA 117. There a priest, who had been appointed by a previous Bishop, had committed child abuse. Action against the current Archbishop was not possible as he had not been personally involved in the appointment. But an action against the property trustees failed because the trustees were simply involved in property issues and did not direct the ministry of the priests.

For another case, following *Ellis*, in which civil liability of the property trustees for a religious order was denied, see *Uttinger v The Trustees of the Hospitaller Order of St John of God Brothers* [2008] NSWSC 1354. See also *PAO and ors v Trustees of the Roman Catholic Church for the Archdiocese of Sydney and ors* [2011] NSWSC 1216, where liability for assault at the hands of a teacher who was a member of a religious order, the Patrician Brothers, was alleged. The court there held that the Trustees, while they owned the property on which the school was

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conducted, had no control over the running of the school, which was left to the Brothers.

In this paper I will not discuss the issue of legal personality or the responsibility of property trustees. My understanding is that in many cases churches concede the point.<sup>2</sup> But even if there is a proper defendant to sue, there are important issues surrounding how that defendant is to be held liable for child abuse committed by one of its clergy or agents.

Broadly speaking, there are two main avenues through which liability may be sheeted home to an institution for child abuse.

1. There may be an action for **negligence**, taken against those responsible for decision making in the appointment of the abuser, or those who became aware of the abuser's activities but failed to taken an action to stop them.
2. There may be an action based on the actual act of abuse, which will usually amount to the tort of **battery**. Here there will be issues as to whether the institution can be held strictly liable for an intentional tort committed by someone acting on their behalf. The two main options here are
  - a. Vicarious liability, or
  - b. Non-delegable duty.

We will deal briefly with the first avenue before turning to the main focus of this paper, the second two options.

Before exploring these avenues, however, it seems sensible to start by outlining the principles behind vicarious liability and non-delegable duty, and the differences between them.

## 1. Distinguishing Vicarious Liability and Non-delegable Duty

In general, as is well known, while an employer can be held vicariously liable for wrongs committed by an employee in the course of their employment, a “principal” is not vicariously liable for actions of an independent contractor.<sup>3</sup> The High Court of Australia noted in *Hollis v Vabu* [2001] HCA 44:

[32]... It has long been accepted, as a general rule<sup>4</sup>, that an employer is vicariously liable for the tortious acts of an employee but that a principal is not liable for the tortious acts of an independent contractor.<sup>5</sup>

There was an attempt by McHugh J in the High Court in the early part of the 21<sup>st</sup> century to reformulate the rules relating to liability for the actions of non-employees, where his Honour argued that “representative agents” ought to create

<sup>2</sup> In the future, if recommendations of the Royal Commission into Institutional Responses to Child Sexual Abuse as seen in their *Consultation Paper on Redress and Civil Litigation* (Jan 2015) were implemented, this problem may be overcome by legislation deeming property trusts to be the appropriate plaintiff for such actions, or requiring a corporate entity of some sort. See the summary of possible options on p 34 of the Paper.

<sup>3</sup> Widgery LJ in *Salsbury v Woodland* [1970] 1 QB 324 at 336G describes the proposition as “trite law”.

<sup>4</sup> See the observations of Brennan J in *Burnie Port Authority v General Jones Pty Ltd* (1994) 179 CLR 520 at 575.

<sup>5</sup> *Northern Sandblasting Pty Ltd v Harris* (1997) 188 CLR 313 at 329-330, 366.

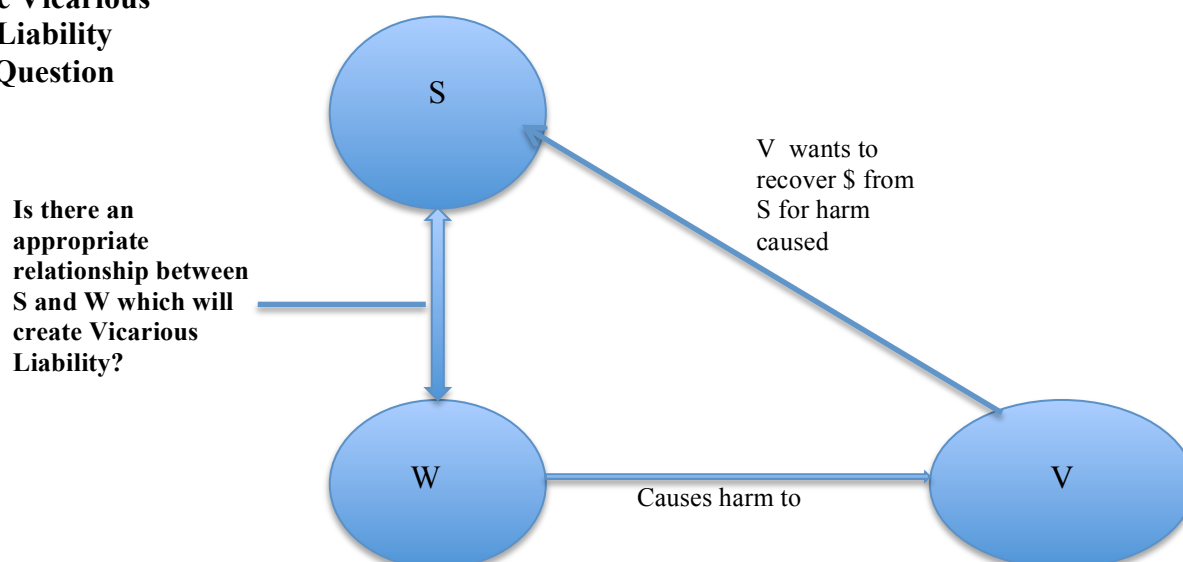
vicarious liability.<sup>6</sup> But the majority of the High Court firmly rejected this view, which remained a minority view when his Honour retired from the Court. An attempt by Kirby J to revive this theory in *Sweeney v Boylan Nominees* [2006] HCA 19 also failed.<sup>7</sup>

However, despite the general rule precluding vicarious liability for independent contractors, it has long been accepted that there are some specific situations where the courts have recognised what is called a “non-delegable duty of care” (herein often, “NDD”). In these situations liability may be imposed on a principal for the wrongful actions of a contractor.

While the outcome of a finding of non-delegable duty is similar to vicarious liability (in that one party is being held strictly liable for harm committed by another with whom they have a contract), there is a clear conceptual difference between the two doctrines.<sup>8</sup> The difference may be illustrated using the following diagrams.

Assume a wrongdoer W, a victim V, and the allegedly liable “superior” party S.

### The Vicarious Liability Question



**Figure 1: The Vicarious Liability Question**

In cases of *vicarious liability*, the main question is as to the relationship between **S and W**, in order to determine S's liability (eg is W an employee of S?)<sup>9</sup>

<sup>6</sup> See *Hollis v Vabu* (2001) 207 CLR 21 and *Scott v Davis* (2000) 175 ALR 217.

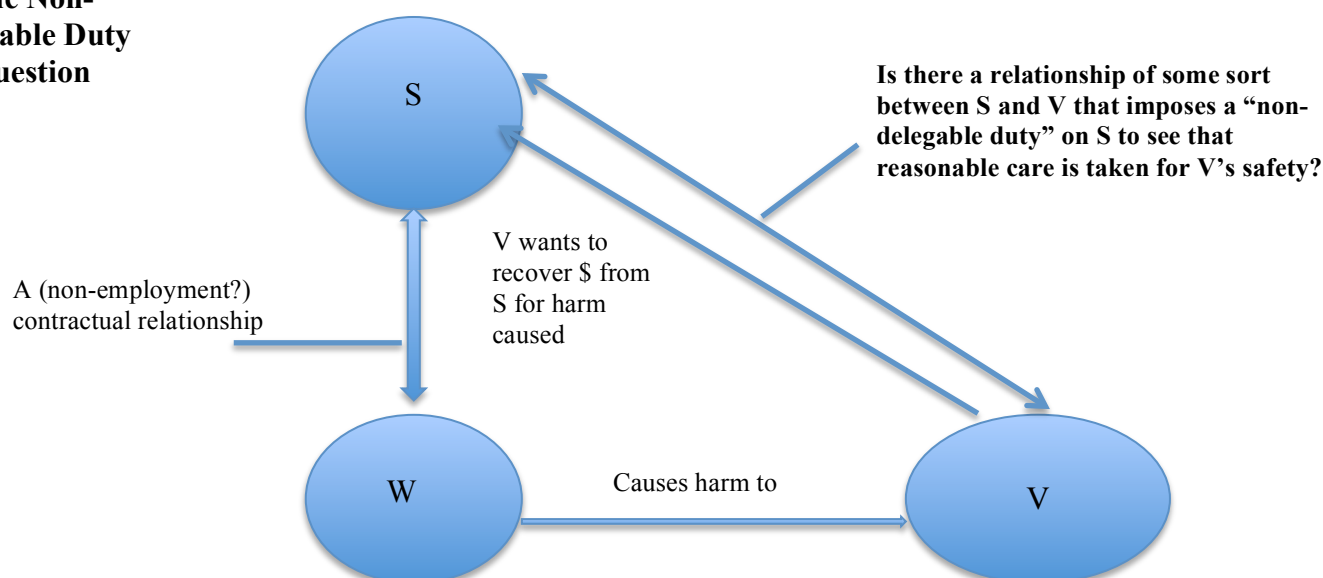
<sup>7</sup> For comment on this case, see N Foster, “Vicarious liability for independent contractors revisited: *Sweeney v Boylan Nominees Pty Ltd*” (2006) 14 *Torts Law Jnl* 219-223; J Burnett, “Avoiding Difficult Questions: Vicarious Liability and Independent Contractors in *Sweeney v Boylan Nominees*” (2007) 29 *Sydney Law Review* 163-174; D Rolph, “A Carton of Milk, A Bump to the Head and One Legal Headache: Vicarious Liability in the High Court of Australia” (2006) 19 *Aust Jnl of Labour Law* 294-305.

<sup>8</sup> See eg the comments of Lady Hale in *Woodland v Essex County Council* [2013] UKSC 66 at [33]: “They are conceptually quite different.”

<sup>9</sup> There are of course some other relationships that will give rise to vicarious liability. One is a commercial partnership arrangement: see eg *National Commercial Banking Corporation of Australia Ltd v Batty* (1986) 160 CLR 251; *Dubai Aluminium Co Ltd v Salaam* [2002] UKHL 48, [2003] 1 All ER 97. Other possibilities will not be explored in detail here.

However, the next diagram involves a different question.

### The Non-delegable Duty Question



**Figure 2: The Non-Delegable Duty Question**

In cases of *non-delegable duty*, the case is conducted on the *assumption* that W is (usually) an independent contractor acting under directions from S, and the main question is as to the relationship between **S and V**, and whether S owes a duty to see that reasonable care is taken for the safety of a person in V's situation.

Recently in the UK Supreme Court decision in *Woodland v Essex County Council* [2013] UKSC 66 (discussed below) Lord Sumption at [15] noted that in a case involving a hospital Lord Denning had adopted this sort of approach:

Denning LJ considered that the critical factor was not the hospital's relationship with the doctor or surgeon, but its relationship with the patient, arising from its acceptance of the patient for treatment.<sup>10</sup>

In essence, then, the similarities between VL and NDD are that both principles impose **strict** liability (not able to be avoided by exercise of due care by the duty holder) on a superior party S for wrongdoing committed by someone carrying out paid work for the party, W, while acting in that capacity in some sense. But the difference is that in VL the fundamental question is whether the *worker* falls into the category of employee (or other status creating VL); whereas for NDD the question is about the relationship of S to the *victim* of the harm, V.

With that background in place we turn to cases of institutional child abuse.

## 2. Action for Negligence

An action for negligence against the institution will be based, not on the actions of the abuser directly, but upon the actions of someone within the institution in failing to guard against the abuse.

<sup>10</sup> Citing *Cassidy v Ministry of Health* [1951] 2 KB 343.

The elements of the action for negligence, of course, are a duty of care, breach of that duty, and causation of damage. Establishing the **duty** owed by the **institution** where a child has been placed in care of an institution will usually not be difficult. *Commonwealth of Australia v Introvigne*<sup>11</sup> holds that a school owes a “non-delegable” duty of care to children placed under its care. It seems fairly clear that institutions other than formal schools, which undertake the care of children and young people, such as youth clubs conducted by churches or sporting groups, would be covered by this principle.

(It may also be noted that in some situations an employed **manager themselves** might be held to have a duty of care to a child in their charge, and their failure to exercise due care might lead to the institution being held to be vicariously liable for the manager’s actions, *even if* there were no duty owed to the child by the institution. In most situations it will not be necessary to explore this option, as it is hard to imagine a situation where a lack of care for a child would be within the “scope of employment” of a manager and yet the institution itself not owe the child a duty. But if it is relevant, then the court will need to be persuaded that the “servant’s tort” theory of vicarious liability is the correct theory.)<sup>12</sup>

In relation to **breach** of duty, then, this **firstly** means that the school or other institution can be held liable if someone in the management of the school carelessly allows a child to be harmed.

In general it would not matter whether the “manager” was an employee or not—they will usually be, and hence if need be the doctrine of VL can be invoked. But there may be rare cases where VL is not applicable, yet the manager’s action would be held to be the school’s action simply because they are acting on behalf of the school. The manager might be deemed to be an agent acting for the school within an implied authority; or else in some situations, if a corporate structure were involved, it could simply be shown that the manager was such a senior level decision maker that their decision would be deemed to be that of the school (on the principles of corporate liability represented by *Tesco Supermarkets v Natrass*<sup>13</sup> and *Meridian Global Funds Management Asia Ltd v Securities Commission*.<sup>14</sup>)

But it also means that, **secondly**, the school can be held responsible under the NDD principle for a lack of care shown by a contractor under whose authority a child had been placed. In Australia examples of this principle applying to carelessness can be seen, not only in *Introvigne*, but in other recent examples.

In *Fitzgerald v Hill* [2008] QCA 283 the decision in *Introvigne* was extended slightly to cover the situation of a child injured in a recreational activity, while under the supervision of a business owner. In a “martial arts” class, the instructor was supervising some boys on a run along a road and failed to take sufficient care to prevent a passing car from running into the plaintiff, then 8 years old. The court held that the owner and operator of the business, a Mr Ivanov, had a non-delegable duty of care, which was breached by the instructor (who was not an employee). McMurdo P commented:

[75] In these circumstances, Sean’s relationship with Mr Ivanov as owner and operator of St Mark’s Hall academy was one of vulnerability on Sean’s part with Mr Ivanov having a high

<sup>11</sup> *Commonwealth of Australia v Introvigne* (1982) 150 CLR 258.

<sup>12</sup> For discussion of the competing theories of vicarious liability, see Luntz & Hambly (7<sup>th</sup> ed) at [17.4.1]-[17.4.11], *Fleming’s Law of Torts* (10<sup>th</sup> ed) at [19.20].

<sup>13</sup> [1972] AC 153, 170 (*‘Tesco’*).

<sup>14</sup> [1995] 2 AC 500, 506 (*‘Meridian’*).

degree of control of Sean and Sean having a high degree of dependence on Mr Ivanov and those to whom Mr Ivanov delegated his responsibility. There is no evidence that this relationship was affected by the presence of some adults in the group.

[76] Like a school authority, Mr Ivanov as owner and operator of the Tae Kwon Do academy at St Mark's Hall where the eight year old Sean was enrolled, in the absence of other evidence, undertook Sean's care, supervision or control whilst he was at the academy participating in the academy's activities. As owner and operator of the academy which accepted the eight year old Sean's enrolment to learn tae kwon do, Mr Ivanov assumed a particular responsibility for Sean's safety because of his special dependence and vulnerability. That duty was to ensure that reasonable care was taken of him... [T]he relationship giving rise to a non-delegable duty of care is not limited to that between school authority and pupil but it extends to other relationships such as a day care centre for children whose parents work outside the home. It is consistent with and not an extension of established legal principle to recognise that the relationship between the eight year old tae kwon do student, Sean, and Mr Ivanov as owner and operator of the St Mark's Hall academy at which Sean was enrolled is properly one giving rise to a non-delegable duty of care. If policy considerations are relevant, the existence of a duty in the present case is consistent with the public interest in ensuring children involved in self-improvement activities are not treated negligently. The primary judge was right to find that Mr Ivanov owed Sean a non-delegable duty of care to ensure that reasonable care was taken of him whilst attending classes at the academy.

Another example of an Australian decision applying NDD to schools is *Harris v Trustees of the Roman Catholic Church for the Archdiocese of Sydney* [2011] NSWDC 172 (10 Nov 2011), with very similar facts to the *Woodland* case to be discussed below. The plaintiff was a student at a Roman Catholic school, who had gone on a school ski-ing excursion. It was alleged that the ski instructor had been careless, leading to the plaintiff's injury, and that the school was liable due to its non-delegable duty for the carelessness of the ski instructor.

Elkaim SC DCJ confirmed that on authority of *Introvigne* that the school owed such a duty- [117]. He also ruled that what the ski instructor was doing was within "the scope of the engagement" to teach the children- [119]. His Honour referred to an argument that this was a "casual act of negligence" for which the principal could not be held liable (an issue noted below), but ruled that what had happened was well within the scope of what the instructor was being paid to do and certainly not "spur of the moment"- [122]. The instructor was found to have been careless by allowing the class to take place in an area where there was a "ditch" which caused the accident; hence the school were liable for his carelessness (though they were entitled to recover their damages from the instructor).<sup>15</sup>

While there was some doubt about the application of this principle to schools in the UK for some years, recently the decision of the UK Supreme Court in *Woodland v Swimming Teachers Association*<sup>16</sup> confirms that this principle applies there as well.

Lord Sumption set out five criteria to be applied to determine if an NDD is owed:

(1) The claimant is a patient or a child, or for some other reason is especially vulnerable or dependent on the protection of the defendant against the risk of injury. Other examples are likely to be prisoners and residents in care homes.

<sup>15</sup> This decision was upheld on appeal *sub nom Perisher Blue Pty Limited v Harris* [2013] NSWCA 38 (27 February 2013), although the appeal though revolved around the facts of negligence by the ski operator rather than the liability of the school, which was accepted as uncontroversial.

<sup>16</sup> *Woodland v Swimming Teachers Association* (sub nom *Woodland v Essex CC*) [2013] UKSC 66, [2014] AC 537 (SC).

(2) There is an antecedent relationship between the claimant and the defendant, independent of the negligent act or omission itself, (i) which places the claimant in the actual custody, charge or care of the defendant, and (ii) from which it is possible to impute to the defendant the assumption of a positive duty to protect the claimant from harm, and not just a duty to refrain from conduct which will foreseeably damage the claimant. It is characteristic of such relationships that they involve an element of control over the claimant, which varies in intensity from one situation to another, but is clearly very substantial in the case of schoolchildren.

(3) The claimant has no control over how the defendant chooses to perform those obligations, i.e. whether personally or through employees or through third parties.

(4) The defendant has delegated to a third party some function which is an integral part of the positive duty which he has assumed towards the claimant; and the third party is exercising, for the purpose of the function thus delegated to him, the defendant's custody or care of the claimant and the element of control that goes with it.

(5) The third party has been negligent not in some collateral respect but in the performance of the very function assumed by the defendant and delegated by the defendant to him.<sup>17</sup>

Lady Hale agreed in an essentially concurring judgment, citing in support an article by Beuermann.<sup>18</sup> Of course none of the fact scenarios in these cases involve a failure to prevent child abuse, but there seems no reason why such a case might not be made out.

It may be objected that the courts do not usually impose liability on a defendant for failing to prevent a criminal action by a third party. But the decision in *Modbury Triangle Shopping Centre Pty Ltd v Anzil* [2000] HCA 61; (2000) 205 CLR 254 where this principle is discussed, makes it clear that an exception to the principle applies where there is a relationship between the plaintiff and the defendant requiring the defendant to care for the well-being of the plaintiff. Gleeson CJ commented in that decision at [26]:

Leaving aside contractual obligations, there are circumstances where the relationship between two parties may mean that one has a duty to take reasonable care to protect the other from the criminal behaviour of third parties, random and unpredictable as such behaviour may be. Such relationships may include those between ... school and pupil.<sup>19</sup>

If the carelessness of the manager, whether employed or independently contracted, results in a child being abused where it was reasonably foreseeable that this might happen, then **causation** can be established and an action will usually be available.

One further set of considerations becomes important when dealing with negligence, however. It seems fairly clear that an action based on a failure to exercise due care to prevent child abuse would be subject to the provisions of the *Civil Liability Act* 2002 (NSW). The amount of damages that could be awarded would be limited by Part 2 of that Act (psychological harm being a form of “personal injury” under s 11), and no aggravated or exemplary damages could be awarded, pursuant to s 21. So there are good reasons to explore the availability of an action in battery based directly on the actions of the abuser. Such an action, being usually one under s 3B(1)(a) that is based on “civil liability of a person in respect of an intentional act that is ... sexual assault or other sexual misconduct committed by the person”, will not be

<sup>17</sup> Ibid, at para [23].

<sup>18</sup> Ibid, at [33], citing C Beuermann, ‘Vicarious liability and conferred authority strict liability’ (2013) 20/3 *Torts Law Journal* 265-274.

<sup>19</sup> *Trustees of the Roman Catholic Church for the Diocese of Bathurst v Koffman* [1996] Aust Torts Reports 81,399.



subject to the CLA. (And it has been made clear in *Zorom Enterprises Pty Ltd v Zabow* [2007] NSWCA 106 (4 May 2007) at [13]-[14] that neither is an action against an employer who is vicariously liable for such an intentional tort subject to the CLA.)

The other reason for relying on strict liability for the battery committed by the actual abuser, of course, is that in some cases the school or church as a whole may have not been in breach of their “direct” duty to supervise or respond to concerns: see for example *A, DC v Prince Alfred College Incorporated* [2015] SASC 12 (4 Feb 2015) where Vanstone J ruled that the College was not in breach of its direct duty of care, summarised at [166].

### 3. Action for Battery

#### (a) Vicarious Liability

As noted above, the principles of vicarious liability impose strict responsibility for a tort committed by an employee who is acting in the scope of their employment. It will be assumed for the purposes of this discussion that the employment relationship is the main criterion being used, but recent developments in the UK in this area need consideration. Three issues need to be addressed:

- i. Was the wrongdoer an employee?
- ii. Can there be vicarious liability for non-employees?
- iii. Was the wrongdoer acting in the course of their employment?

#### (i) Employment relationship

In most situations the standard common law tests will provide the answer as to whether someone is an employee or not: ie the control test, the *Stevens v Brodribb* (1986) 160 CLR 16 *indicia* as supplemented by some of the considerations discussed in more recent cases such as *Hollis v Vabu* (2001) 207 CLR 21.<sup>20</sup> However, the situation of clergy is unusual and warrants more detailed comment.

In the main Australian recent case in this area, *Ermogenous v Greek Orthodox Community of SA Inc* [2002] HCA 8; 209 CLR 95 the majority judgment pointed out that even within the broad Christian tradition, practices and terminology may differ vastly:

[7] No assumption can or should be made that the organisation or institutions of the church and community in and with which the appellant worked in Australia was necessarily similar to the organisation or institutions of the churches of the western or Latin tradition. To take a seemingly small example noted by the Industrial Magistrate, the witnesses before him spoke of the “consecration” of priests but the “ordination” of bishops, reversing the customary usages of the western or Latin tradition. This is no more than one example of the error that may be made if there is an unthinking application of the practices of one tradition to another. Especially is that so if the questions concern the structures of church governance, the relationship between clergy and laity, or the relationship between the community and whatever may be the group or institution that is identified by that community as the “church”.

The difference there referred to was that between the “Western” branch of Christianity (which, until the Reformation owed allegiance to the Pope, the Bishop of Rome) and other “Eastern” versions such as the Greek Orthodox Church, which was being discussed in that case.

<sup>20</sup> For a more detailed discussion see Foster (2012) *WHS Law in Australia*, ch 3; *Stewart’s Guide to Employment Law* (5<sup>th</sup> ed).

The decision in *Ermogenous* provides an excellent overview of this whole area, and we may take the different categories discussed there as a guide to some of the different options for legal recognition of the status of clergy. Broadly speaking, the position of a minister of a church may be seen as (1) not governed by legal principles at all, as purely “spiritual”; (2) governed by law but as a public law “office” rather than as a contract; (3) established as a contract but under the category of “independent contractor”; or (4) set up as an employment contract.

**(1) The relationship may be purely “spiritual” and not intended to create legal relations**

In some circumstances the courts in the past have concluded that the role of the minister in charge of a local congregation is simply not intended by either party to create obligations that are enforceable by the “secular” legal system at all.

We will just note first cases of this sort that have come not come from the “established” church in the UK; as we will see cases involving the Church of England or the Church of Scotland may raise slightly different issues.

Cases where the courts have found that the “spiritual” nature of the duties concerned mean that (on the classic contractual analysis) there was no “intention to create legal relations” include, for example, *President of the Methodist Conference v Parfitt* [1984] 1 QB 368, *Rogers v Booth* [1937] 2 All ER 751, and *Davies v Presbyterian Church of Wales* [1986] 1 WLR 323.

These decisions were followed in NSW in *Reverend Howard Ian Knowles and The Anglican Property Trust, Diocese of Bathurst* [1999] NSWIRComm 157 (22 April 1999), holding that a minister of the Anglican church was employed on a “spiritual basis”.<sup>21</sup>

A number of decisions to similar effect are cited by the High Court majority in *Ermogenous* at [19], as relied on by the Full Court of the Supreme Court of SA in its decision.

The facts of *Ermogenous* are that Archbishop Ermogenous had been engaged (to use a neutral word) by the Greek Orthodox Community of SA Inc (an incorporated association) to undertake a range of duties, which included acting as Archbishop of the Greek Orthodox Church in SA, conducting religious services and carrying out other clerical duties. Having been removed from his position in 1994 after working in it since 1970, he claimed that he ought to have been paid annual leave and long service leave owed to him as an employee of the Association.

The Industrial Magistrate at first instance found in favour of the Archbishop, and a judge of the Industrial Relations Court of South Australia upheld this decision. But on appeal to the Full Court of the Supreme Court of SA, the decision was overturned on the basis that there was a long-standing “presumption” that a church and clergyman did not have “intention to create legal relations” under contract law.

The decision of the High Court was that in general it was no longer appropriate to rely on such a presumption (or indeed on other “presumptions” relating to “intention” in this area), and hence that the matter had to be sent back to the Full Court for further consideration of the actual intention of the parties in the relevant circumstances. There were a number of features of the case pointing to the parties all believing that legal obligations were involved, including PAYE deductions and reference to the Archbishop’s “salary”. (See below where we discuss the difference between “salary” and “stipend”.)

<sup>21</sup> See also *Teen Ranch Pty Ltd v Brown* (1995) 11 NSWCCR 197, although this decision hinged very strongly on the “voluntary” nature of the work rather than solely on its “spiritual” nature.

The Court also noted that the Association had a high degree of control over the decisions of the Archbishop, even those of a “spiritual” nature- see [17]. Hence the need to revisit the question. In the end, having looked at the matter again, the Full Court on remittal from the High Court held that there was no sufficient reason to overturn the decision of the Industrial Magistrate at first instance, and hence the outcome of the litigation was that the Archbishop indeed was an employee of the Association- see *Greek Orthodox Community of SA Inc v Ermogenous* [2002] SASC 384 (26 November 2002). Still, as Doyle CJ said, the facts of the particular case were fairly unusual, and it would not be appropriate at all to conclude that henceforth all clergy in Australia were employees.

[9]The issue of whether the contract between the appellant and the respondent is one of employment is not an issue that warrants the grant of leave to appeal. The issue involves the application of well established principles. Although well established, their application to particular circumstances can give rise to difficulty. If anything, that is a reason for caution in granting leave to appeal to raise such a point. Admittedly, the circumstances to which those principles are to be applied in the present case are out of the ordinary. But, to my mind, **no general principle will be established in this case for cases involving a contractual relationship between a minister of religion and a church or an entity that in some way retains a minister to exercise his or her ministry.** Each case will turn on its own facts, and the most that can be determined in this case is the correct application of the relevant principles to the facts of this case. And, for what it is worth, **I think it likely that cases involving the key elements of this case are unlikely to occur at all often.** In short, a grant of leave to appeal will involve a close examination of the application of established principles to particular facts, and will not lead to the establishment of any relevant or helpful general principle. That in itself is a reason not to grant leave to appeal, or to rescind leave to appeal. (emphasis added)

In cases where churches, and sometimes other institutions, have been concerned not to signal an employment relationship, sometimes the word “stipend” has been used instead of salary. The word has been regarded as implying a regular payment made for support that does not involve an obligation of “obedience” to orders of the person paying. One of the features of the relationship between a minister and the congregation in which they are placed, of course, is that it is unlike a traditional employment situation, since on most views of the matter, the minister is supposed to provide “spiritual leadership” of some sort, and not just take the orders of the members of the congregation. So, to take an example from the New Testament, see *Hebrews 13:17*:

Obey your leaders and submit to them, for they are keeping watch over your souls, as those who will have to give an account. Let them do this with joy and not with groaning, for that would be of no advantage to you.

The view that congregational leaders or elders are to be respected and submitted to, of course, does not preclude the view that they ought to receive some money so that they can devote their time to the ministry.<sup>22</sup>

So the result of *Ermogenous* seems to be that in Australia, at any rate, it will not normally be assumed that a clergyman simply has a “spiritual” and not legal relationship with the body that engages him or her, or controls their work. Hence it is

<sup>22</sup> See eg Paul writing in 1 *Corinthians* 9:1-14, although while supporting the view that gospel preachers should be paid by the people benefitting from the ministry, also notes that occasionally such preachers might decline to exercise this right in order to allow effective ministry among those who can’t afford to pay, or where payment might be unhelpful.

interesting to see that Mason P in *Trustees of the Roman Catholic Church v Ellis* [2007] NSWCA 117 said:

[32] ...[It is not] necessary to decide whether a priest in the Roman Catholic Church who is appointed to a Parish is an employee in the eye of the law or otherwise in a relationship apt to generate vicarious liability in his superior.

33 Patten AJ observed (at [67]) that *Lepore* alone would not prevent the Trustees being directly and vicariously liable for a failure to institute and maintain proper systems and controls. I am prepared to proceed on a similar basis, although I would express it slightly differently so as to allow for the argument ventilated in this Court about a limited reading and application of *Lepore*. I shall therefore assume that there is factually and legally an arguable case that Father Duggan's superiors in the 1970s (including the Archbishop of the day) might on some basis be vicariously accountable for his intentional torts. I shall also assume that members of the Church hierarchy (including the former Archbishop) who were responsible for Father Duggan's appointment and supervision and for processing complaints of misconduct would arguably have been personally accountable in law for their alleged neglect. See generally Stauffer and Hyde, "The Sins of the Fathers: Vicarious Liability of Churches" (1993) 25 *Ottawa Law Rev* 561. It is wrong to see holding an ecclesiastical office as necessarily incompatible with a legal relationship capable of giving rise to some incidents of an employment relationship (see generally *Ermogenous v Greek Orthodox Community of SA Inc* (2002) 209 CLR 95; *Percy v Board of National Mission of the Church of Scotland* [2005] UKHL 73; [2006] 2 AC 28).

However, in the circumstances of *Ellis* it was not the previous Archbishop who was being sued, it was the current Archbishop, who had no connection with the priest at the time; and the Property Trust had no control over the priest's actions and was clearly not his employer. So while this carefully worded paragraph leaves open the possibility of "some incidents of an employment relationship", it by no means decides that priests all work under contracts of employment (or, indeed, under contracts at all.) And these concessions did not lead to liability of the Archbishop or the Property Trust in *Ellis's case*.

The view that some ministers may have a purely "spiritual" and not "legal" relationship with their church is, however, supported by the latest decision involving Methodist ministers in the UK, *The President of the Methodist Conference v Preston* [2013] UKSC 29 (15 May 2013).

Some brief background in previous decisions is necessary, however, before we come to *Preston* itself. The case is part of an odd trio of top-level decisions in the UK concerning the employment of clergy, all involving ministers whose names began with "P",<sup>23</sup> two of which involved the Methodist Church and one the Church of Scotland.

In *President of the Methodist Conference v Parfitt* [1984] 1 QB 368, the first decision, involving the Methodist Church (a "non-established" Protestant denomination having its origins in the ministry of John Wesley), the House of Lords held the minister concerned was not an employee. Reasons differed but at least one of the significant factors was the "spiritual" character of the work.

In *Percy v Board of National Mission of the Church of Scotland* [2006] 2 AC 28 the plaintiff was an "associate minister" of the Church of Scotland (which is something like the "established" church in Scotland, and corresponds to what in Australia we would call the Presbyterian Church), and wanted to bring a sex discrimination claim under the relevant legislation. The legislation did not hinge on

<sup>23</sup> A completely irrelevant but odd feature of the cases, which does however sometimes make it hard to remember which case is which! The fact that the three names are chronologically in alphabetical order may make it easier...

the standard “employee” criterion- it was a bit broader, referring to someone who “contracted personally to execute any work or labour”, and so the decision could be confined to that specific phrase. Nevertheless, the House of Lords reviewed the history of the employment status of clergy and explicitly held that there should be no “presumption” that a minister held a non-contractual position; that each case needed to be resolved by a careful review of the specific arrangements. In Ms Percy’s case the details of her job offer and other conditions meant that it was a contractual arrangement.

Finally, then, in *Preston*, the issue of Methodist ministers came up again. The Supreme Court did not directly depart from *Percy*, but it has to be said that the feel of the decision is quite different. The majority (Lady Hale dissented) looked carefully at the various documents and arrangements under which Ms Preston had been appointed as a Methodist minister in charge of a local church, and concluded that when viewed together they did not show a contract had been entered into. A candidate for the ministry had to be ordained by a Session of the church and was then “stationed” where the Church needed them to operate. Formally they could be sent anywhere they were required, the Church not needing their consent to the posting. They could not resign their “connexion” at will, needing permission of a central Church body. Their ordination was to a “life-long presbyteral ministry of word, sacrament and pastoral responsibility”- see [17].

The comments at [19] reflect the difference between “salary” and “stipend” noted above:

Section 80 of the standing orders provides for the “support and maintenance” of ministers. Under standing order 801, all ministers in active work and all stationed probationers are entitled to a **stipend** throughout their ministry, including periods of unlimited duration when they may be unable to perform their duties on account of illness or injury. In addition, they are entitled under standing order 803 to a manse to serve as a home and as a base for their ministry. **Neither the stipend nor the manse are regarded by the Methodist Church as the consideration** for the services of its ministers. They regard them as a method of providing the material support to the minister without which he or she could not serve God. In the Church’s view, **the sale of a minister’s services in a labour market would be objectionable, as being incompatible with the spiritual character of their ministry**. (emphasis added)

As noted previously, Lady Hale dissented. It has to be said, I think, that it is more likely that her Ladyship’s view would be followed in an Australian court, than that of the majority. As she notes, while it can be conceded that the work of a minister is of a “spiritual” nature, that is not inconsistent with there being legal relationships in place- eg see [36]. She also notes that it would be unthinkable that if a minister were denied payment of his or her stipend at all, or were threatened for no reason with eviction from their “manse” (church provided accommodation), that the courts would not come up with a legal remedy. While Lord Sumption (for the plurality) at [28] dismissed this argument as irrelevant to the present case, suggesting that probably some remedy would be found in the law of trusts, I think her Ladyship is correct to say that the existence of legal remedies in this area do point to a contractual basis for the arrangement.

So, in sum, the argument that clergy enjoy only a “spiritual” and not a legal basis of engagement may be supported in some cases; though it seems a bit hard to believe that an Australian court today would, in light of the comments in *Ermogenous*, rule the same way except in a very unusual situation.

## **(2) The position may be an “office” subject to public law, not private law obligations**

Another possibility is that a clergyman might be viewed as the holder of an “office”. Lord Sumption probably provides the best recent overview of this concept in *Preston* at [4]:

[The] distinction between an office and an employment... is that an office is a position of a public nature, filled by successive incumbents, whose duties were defined not by agreement but by law or by the rules of the institution. A beneficed clergyman of the Church of England is, or was until recent measures modified the position, the paradigm case of a religious office-holder. But at an early stage curates in the Church of England were recognised as having the same status for this purpose: see *In re Employment of Church of England Curates* [1912] 2 Ch 563. The position of other ministers was taken to be analogous. In *Scottish Insurance Commissioners v Church of Scotland* (1914) SC 16, which concerned an assistant minister in the United Free Church of Scotland, Lord Kinnear said at 23 that the status of an assistant minister “is not that of a person who undertakes work defined by contract but of a person who holds an ecclesiastical office, and who performs the duties of that office subject to the laws of the Church to which he belongs and not subject to the control and direction of any particular master.” In *Diocese of Southwark v Coker* [1998] ICR 140, the Court of Appeal held that a stipendiary assistant curate was not an employee. They held that his duties were derived from his priestly status and not from any contract. Both Mummery LJ (at 147) and Staughton LJ (at 150) considered that there was a presumption that ministers of religion were office-holders who did not serve under a contract of employment.

In general it seems unlikely that cases in Australia would be decided on this “public law” basis, as neither the Anglican Church nor any other church is “established” in the sense that the Church of England is. Interestingly the High Court in *Ermogenous* did seem to use the word “office” in perhaps a more generic sense in the following comments:

[31] In the present case, any conclusion that the appellant was appointed to an **office, let alone an ecclesiastical office**, would depend upon the conclusions that are to be reached, first about who it was that appointed or engaged him, and secondly, about what was the entity or organisation within which the “office” existed. Both of those issues require consideration of the structures of the organisation in which the office is said to exist. In the *Curates Case* and in *Paul* those issues were readily resolved - by reference, in the former case, to the structures of a church by law established and, in the latter, by reference to the **internal rules of the church** under which the authority of an assistant minister derived from the licence given to him by the presbytery concerned. By contrast, the question for decision in the present matter required examination of whether “the church” was to be regarded as separate from the respondent and whether the appellant was appointed to an office identified and regulated only by the internal rules of that “church”. It should go without saying that those matters of church structure and governance may very well differ in the present case from those that exist in other churches and communities and that there can, therefore, be no automatic translation of what was decided in the *Curates Case* or *Paul* to the present. Whether a conclusion that the appellant had been appointed to an ecclesiastical office would preclude a conclusion that he served in that office under a contract of employment is a question we need not explore.

The final suggestion, that even in some sense a minister held an “office” under the internal rules of an organisation, that would not prevent the minister from being employed under a contract, seems to be the direction that the courts generally are leaning. Even in England, in *Preston*, Lord Sumption in the majority commented at [8] that “offices and employments are not always mutually exclusive categories”.

To similar effect is the conclusion of the English Court of Appeal in *JGE v The Portsmouth Roman Catholic Diocesan Trust* [2012] EWCA Civ 938 (12 July 2012). This is a decision some aspects of which I disagree with; but on the point of



employment it seems to be right. The decision concludes that a Roman Catholic priest was not an employee of the local bishop- see eg:

[29] Although it is perhaps trite to say it, these cases appear to me to establish that the following approach should be followed:

- (1) each case must be judged on its own particular facts;
- (2) there is no general presumption of a lack of intent to create legal relations between the clergy and their church;
- (3) a factor in determining whether the parties must be taken to have intended to enter into a legally binding contract will be whether there is a religious belief held by the church that there is no enforceable contractual relationship;
- (4) it does not follow that the holder of an ecclesiastical office cannot be employed under a contract of service.

[30] Applying those principles to the facts in this case, I am completely satisfied that there is **no contract of service in this case: indeed there is no contract at all**. The appointment of Father Baldwin by Bishop Worlock was made without any intention to create any legal relationship between them. Pursuant to their religious beliefs, their relationship was governed by the canon law, not the civil law. The appointment to the office of parish priest was truly an appointment to an **ecclesiastical office** and no more. Father Baldwin was not the servant nor a true employee of his bishop.<sup>24</sup>

### (3) *The minister may have a contract, but not a contract of employment*

Hence the result we see in the High Court in *Ermogenous*, that a minister of religion may well operate under a contract, even if they have “spiritual” duties.

[37] That the relationship between a minister of religion and the relevant religious body or group in which, and to which, he or she ministers is, at its root, concerned with matters spiritual is self-evidently true. That the minister's conduct as minister will at least be informed, if not wholly governed, by consideration of matters spiritual is likewise self-evident. It by no means follows, however, that it is impossible that the relationship between the minister and the body or group which seeks or receives that ministry will be governed by a contract...

In the circumstances the High Court concluded that the Industrial Magistrate had been entitled to find that a contract was in place. They reserved their opinion on whether it was a “contract of employment” or not- see [46]- although as we have noted that issue was decided in favour of the Archbishop really by default because the Full Court on referral deferred to the Industrial Magistrate’s findings of fact.

Acknowledging that it seems likely that an Australian court would find today that a minister of religion was employed under *some sort* of contract where there were formal arrangements in place for salary, tax, accommodation, etc, does this mean that all ministers are employees? In my view this is by no means the case. The fundamental “indicia” of employment still start with consideration of the notion of “control”. It may seem unlikely that a congregation that a minister was meant to be leading could be said to exercise “control”. Even denominational officers in general do not exercise a great deal of supervision over their ministers. So it seems to me unlikely that most ministers of religion would be regarded as employees.

Perhaps an example of this, although it is not precisely on this point, is the fact that in *Sturt v The Right Reverend Dr Brian Farran Bishop of Newcastle* [2012] NSWSC 400 (27 April 2012) Lindsay J, having referred to the cases discussed above, was not able to conclude on the evidence provided of “normal parish work” by the

<sup>24</sup> As we will discuss later in the semester, the court went on, however, to find that the Bishop was vicariously liable for sexual assault committed by the priest on the basis that the relationship between the priest and the Bishop was “akin to employment”.

two priests concerned that they were employees of the Bishop.<sup>25</sup> However, this was not crucial to the resolution of the case- the fact that the priests were not employees did not imply that their challenge to the disciplinary procedures could not be heard; that challenge proceeded on the basis that they had the equivalent of a “property” right in their office of priest, and hence had a sufficient interest to challenge the relevant procedures.

A case which illustrates that similar issues arise in non-Christian religious contexts is *Singh v Management Committee of the Bristol Sikh Temple* [2012] UKEAT 0429 11 1402 (14 Feb 2012) where the Employment Appeal Tribunal was wrestling with the issue of whether a “volunteer” *granthi* (temple priest) supported purely by the offerings of the congregation, and who lived rent-free at the gurdwara, was an “employee” or not. The matter was sent back to a first instance Tribunal for further fact finding.

See more recently the question in *Hasan v Redcoat Community Centre* (East London Employment Tribunal, 2013, unrep) as to whether an imam at a mosque was an employee, noted in Cranmer (2013A)- relevant issues included that there are often more than one imam at a mosque, and their terms of engagement may vary quite sharply from one mosque to another. In the circumstances the ET found that the imam was an employee.

#### **(4) The minister might be an employee**

I said previously that I thought it unlikely that most ministers of religion would be regarded as employees. A decision of the Victorian County Court, however, is directly contrary to my view. In *McDermid v Anglican Trusts Corporation for the Diocese of Gippsland & McIntyre* [2012] VCC 1406 (20 December 2012) the issue was whether a priest working in the Anglican Diocese of Gippsland could sue either his Bishop or the Church Property Trust for statutory compensation for psychological harm he claimed to have suffered due to bullying. Success depended upon him establishing that he was a “worker” under the *Accident Compensation Act* 1985 (Vic).

The County Court Judge, O’Neill J, reviewed the arrangements for the priest to be licensed by the local Bishop. He agreed that the Property Trust, which arranged for payment of his stipend, could not be his employer as it exercised no control whatsoever over his appointment or activities- see [42]. His Honour also regarded as irrelevant the fact that s 12 of the Act allowed certain persons to be “deemed” to workers of a religious organisation if regulations were made. (To be frank, this alone in my view is reason to doubt the correctness of the decision. The section clearly seems to assume that at least some religious personnel will not be “workers” under the common law definition of employee. But his Honour said that it left open the option that ministers could be employees at common law.)

His Honour correctly cited *Ermogenous* and *Percy* for the proposition that clergy could be said to enter into a contractual relationship. However, having reviewed the circumstances of the appointment and the nature of the bishop’s relationship to the priest, his Honour concluded not only that there was an intention to enter a contract, but also that it was a contract of service which made the priest an employee- see eg para [80]. I must say, having read this section of the judgment, it

<sup>25</sup> See paras [65]-[86] of the judgment. The decision that an employment relationship had not been established was partly based on a complete lack of detailed evidence about the daily activities of the priests; but was no doubt in part based on the usual way the relationship has been regarded (while of course carefully avoiding anything like a “presumption”, as that has now been excluded by *Ermogenous*!)



seems to be that, while formally separating the two issues of “contract” and “contract of service”, his Honour could be said to run the two issues together very closely. My view would be that this decision is appealably wrong. As a decision of the County Court it is not a decision of any precedential value, even in Victoria, let alone in other jurisdictions of Australia.

The crowning element of the judgment that demonstrates its problematic nature (in my view) is the discussion that his Honour then turns to at [81] ff: if the priest was an employee, who was his employer? It was not the Property Trust who paid him; it was not the Appointments Advisory Board, which had recommended his appointment to the Bishop. It was not the Bishop’s Advisory Board, nor could it be said to be “the Diocese” or “the local parish” – these were non-existent entities, of course, as unincorporated associations (all the Anglicans in Gippsland, or all the Anglicans in the area covered by the local parish.) While his Honour explicitly said at [85] that it was not “a process of elimination”, the fact is that the Bishop was the only other plausible legal person once the others were discounted!

To be frank, that is no way to identify an employer. Once a blind alley like this has been reached, it might be suggested that a wrong turning was taken a few corners ago. The difficulty in identifying an employer to my mind illustrates the problems with the conclusion that the priest was an employee.

This is not to say that the view might not be reached in some cases that a minister is an employee, of course. An example from the UK (post-*Percy*, of course) is the decision of the Court of Appeal in *New Testament Church of God v Stewart* [2008] ICR 282. (However, it has to be said that this decision was handed down prior to that in *Preston*, which case as noted seems to represent something of a swing back toward “non-contractual” analysis of a minister’s relationship with an appointing body.)

Another decision which is problematic, in my view, is that of the UK Employment Appeal Tribunal in *Sharpe v The Worcester Diocesan Board Of Finance Ltd & Anor (Jurisdictional Points: Worker, employee or neither)* [2013] UKEAT 0243\_12\_2811 (28 November 2013). This involved the “classic” case of a Church of England clergyman, one who held a “benefice” which means that he had the “freehold” right over the rectory. Given the decision of the UK Supreme Court in *Preston* that a Methodist minister was not appointed on a contractual basis, one would have thought that the position of a beneficed Anglican clergyman was even clearer. However, in what I regard as an odd decision, the EAT (Cox J, sitting alone) held that the trial judge who had found that Rev Sharpe was not an employee, had applied the wrong legal tests (even following *Preston*) and sent the matter back for more fact-finding.

Her Honour held, for example, that the trial judge’s preliminary consideration of whether there was a contract with the Bishop (who was one of the parties alleged to be the employer) was in error, in effect saying that the correct approach was to consider the detailed terms of any documents or exchanges between the parties. In my view the trial judge’s analysis seems to have been correct that the Bishop was never entering into a contractual arrangement; one of the interesting features of appointment to a “benefice”, as medieval as it sounds, is that it is still necessary for the appointment to be recommended by the private landowner who is the Patron of the benefice, and here that is what happened. So the Bishop was giving his approval to a recommendation by the Patron, in an unusual set of arrangements which did not at all look like a standard contract.

In short, I doubt that this decision is really correct, and it will be very interesting to see what view the trial judge comes to when he reconsiders the situation. The EAT decision has been criticized on a number of grounds; one commentator, Jones, even notes that the rector concerned cannot have had an action for “unfair dismissal” (which is why the issue came up) because as a beneficed freeholder he could not have been dismissed! (So his claim for “implied dismissal” must fail.)

Cranmer, in his note on the case, concludes:

Finally, if the basic reason why Hayley Preston lost in the Supreme Court was that it is the corporate understanding of the Methodist Church that it is not in a contractual relationship with its ministers, why should the judgment in *Sharpe* have ignored the fact that it is the corporate understanding of the Church of England that it is not in a contractual relationship with its freehold incumbents (or, indeed, with clergy on common tenure)? As Philip Jones **points out** over at *Ecclesiastical Law*, “the EAT missed a factual distinction of critical importance to Mr Sharpe’s dismissal claim. *Ms Percy and Ms Preston did not have the parson’s freehold*”.<sup>26</sup>

In short, it seems fairly clear that in Australia at least a cleric in charge of a local congregation will not usually be an employee. Hence under the historically accepted law of vicarious liability their supervisor, such as a bishop, will not be vicariously liable for their wrongdoing.

## (ii) Vicarious Liability for non-employed clergy- UK developments

However, recent developments in the UK have seen a change in this situation in that country, worth noticing because it may have implications for Australian law in the future.

These developments have gone along with another change in the law of VL, which relates to the question whether there can be more than one person vicariously liable for a single wrongful act. This question is closely connected to the question whether an employee can have more than one employer in relation to the same activity.<sup>27</sup> The traditional view has been for many years that a person can only have one master at a time. But in recent years in the UK this has changed. The steps may be briefly summarized as follows:

- In *Viasystems (Tyneside) Ltd v Thermal Transfer (Northern) Ltd* [2005] EWCA Civ 1151; [2005] 4 All ER 1181 the English Court of Appeal held that there can be more than one person who is vicariously liable for the same wrong committed by an employee.
- In *JGE v The Trustees of the Portsmouth Roman Catholic Diocesan Trust* [2012] EWCA Civ 938 the Court of Appeal held that a bishop could be vicariously liable for wrongs committed by a priest, even though the priest was not an

<sup>26</sup> Cranmer, Frank “Clergy employment and *Sharpe v Worcester DBF*” (7 Dec 2013) <http://www.lawandreligionuk.com/2013/12/07/clergy-employment-and-sharpe-v-worcester-dbf/> . It seems that an appeal is on foot in the English Court of Appeal, which began argument on 15 Feb 2015: see <http://www.bbc.com/news/uk-england-hereford-worcester-31320959> .

<sup>27</sup> Of course there is no doubt that one can have different employers at the same time if one has a number of part-time jobs. Someone can cook fries for McDonald’s on Tuesdays and KFC on Wednesdays. But the question arises as to whether one can be employed by both in relation to the same batch of fries!

employee, on the basis that the relationship was “sufficiently close” to employment.

- In *The Catholic Child Welfare Society & Ors v Various Claimants & The Institute of the Brothers of the Christian Schools & Ors* [2012] UKSC 56 [2013] 1 All ER 670, [2012] UKSC 56 (21 November 2012) the Supreme Court accepted that there could be “dual” vicarious liability, and was able to find the head of the de la Salle order vicariously liable for sexual assaults committed by a brother of the order, despite the fact that the brother was not an employee of the order, and despite the fact that the brother was an employee of another group at the time.
- It should be noted, on the “dual vicarious liability” point, that recently the NSW Court of Appeal has held that there is no such doctrine in this State- see *Day v The Ocean Beach Hotel Shell Harbour Pty Ltd* [2013] NSWCA 250. This decision, in a careful judgment from Leeming JA, holds that there are significant dicta from the High Court of Australia on the point,<sup>28</sup> which cannot be overcome by a lower court at the moment.

The result of these well-meaning, but in my respectful opinion misguided, UK decisions is that vicarious liability has now been expanded, not just in child abuse cases but in all cases, to cover those who may be in a relationship with someone else “akin” to employment- which would include clergy. Liability is now also potentially dual, so that one can presumably find a “traditional” employer vicariously liable for an act, while finding an extended “quasi-employer” also vicariously liable for very same act.

Whatever the merits of these developments (and I accept that those acting for abused plaintiffs will see some merits in them), it seems clear to me that at the moment they will not be readily accepted in Australia. The High Court of Australia has in recent decades wrestled with the limits of vicarious liability in three significant decisions, and the result was to reaffirm the traditional limits of the doctrine as applying only to employer/employee relationships, and not to extend the doctrine to “representative agents” as argued for by McHugh J in particular.<sup>29</sup> The NSW Court of Appeal seems correct to say that there are clear High Court dicta<sup>30</sup> preventing the adoption of a “dual vicarious liability” rule at the moment. So in the absence of a revisiting of these matters by the High Court, these recent decisions in the UK will have limited impact in this country.

### (iii) Scope of employment for intentional tort liability

The first element to be established for VL being an employment relationship, the second element is to show that the tort was committed “in the course” of the employment. While carelessness, even gross carelessness and stupidity, has been accepted as generally falling within the scope of “trying to do the job”, it becomes

<sup>28</sup> See *Oceanic Crest Shipping Company v Pilbara Harbour Services Pty Ltd* [1986] HCA 34; (1986) 160 CLR 626, at 641, 646, and 685.

<sup>29</sup> See the decisions in *Scott*, *Hollis* and *Sweeney* noted above.

<sup>30</sup> Above, n 28.

harder to accept an intentional tort, especially an act of sexual or physical battery aimed at personal gratification, as a part of any legitimate job.

In the classic decision of the High Court in *Deatons Pty Ltd v Flew* (1949) 79 CLR 370, where a barmaid threw a glass of beer at a customer, there was no vicarious liability; Dixon J commented:

it was an act of passion and resentment done neither in furtherance of the master's interests nor under his express or implied authority, nor as an incident to, or in consequence of, anything the barmaid was employed to do (at 381).

Cases of intentional acts of sexual assault on minors, then, raise very difficult issues if this principle is applied. But in recent years the courts have recognised that there are situations where vicarious liability may apply in the case of intentional torts, and child sexual abuse in particular.

In the House of Lords decision in *Lister v Hesley Hall Ltd* [2001] UKHL 22 a boarding school was held vicariously liable for assaults committed by the warden of a boarding house, on the basis that the wrong was “closely connected” with the employment- see Lord Steyn at paras [24]-[28]. This decision followed the earlier Canadian Supreme Court in *Bazley v Curry* [1999] 2 SCR 534 to similar effect.

In *Dubai Aluminium* [2002] UKHL 48 the House of Lords affirmed this general “close connection” test; Lord Nicholls said:

23... Perhaps the best general answer is that the wrongful conduct must be **so closely connected** with acts the partner or employee was authorized to do that, for the purpose of the liability of the firm or the employer to third parties, the wrongful conduct *may fairly and properly be regarded* as done by the partner while acting in the ordinary course of the firm's business or the employee's employment. [bold emphasis added]

Lord Hobhouse put it this way:

129... But the circumstances in which an employer may be vicariously liable for his employee's intentional misconduct are not closed. All depends on the closeness of the connection between the duties which, in broad terms, the employee was engaged to perform and his wrongdoing.

The issue has now, of course, dealt with in Australia by the High Ct in *NSW v Lepore* [2003] HCA 4. The case involved an alleged sexual assault by a teacher on school premises and in school hours (similar issues were raised in 2 Queensland cases heard at same time.)

The NSW Court of Appeal had found the State liable not on basis of vicarious liability but due to a “non-delegable duty of care”; it seems likely that counsel thought that the decision in *Deatons v Flew* would stand in the way of a vicarious liability argument succeeding. But the majority of the High Court (with the exception of McHugh J) considered the issue whether vicarious liability was established.

All of these judges held that it is possible for there to be vicarious liability for an intentional tort, citing some old and well-established cases on fraud and theft.<sup>31</sup>

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<sup>31</sup> *Lloyd v Grace, Smith & Co* [1912] AC 716, and *Morris v C W Martin & Sons Ltd* [1966] 1 QB 716, discussed by, for example, Gleeson CJ at paras [44]-[48] of the *Lepore* judgement. For comment on the *Lloyd* case (fraud committed by a solicitor's clerk for which the solicitor held liable) see M Lunney, “Insurance and the Liability of the Legal Profession: A Case Study” (1995) 16 *Legal History* 94-106.

But when it came to setting out the appropriate test to determine whether an employee has been acting “in the course of their employment” for an intentional tort, it seems there were at least three different views taken by the judges who considered this issue.

- **Kirby J** said that the appropriate test for vicarious liability in this context was, in accordance with the English and Canadian cases, to simply ask whether there is a “**sufficiently close connection**” between the employer’s enterprise and the wrongful conduct of the employee- see [273], [320]. While not agreeing entirely, **Gleeson CJ**, in asking the question of “sufficient connection” at para [74], seemed to support a similar test.<sup>32</sup>
- **Gummow & Hayne JJ**, however, preferred to articulate the test in terms drawn directly from the judgement of Dixon J in *Deatons v Flew* (1949) 79 CLR 370- that vicarious liability should only attach to an employer where the wrongful conduct was done either in the **actual or apparent pursuit of the employer’s interests** or in the course of authority which the employer held the employee out as having- see [239].
- **Gaudron J** then seemed to suggest that the question was whether the employer is “**estopped**” from denying that the employee had authority to carry out the wrongful act in question- [130]. But this was not a narrow test; her Honour suggested that the fact that a teacher is allowed to chastise a child in a secluded area may amount to such an estoppel- [132].

When faced with a plethora of different views, it has to be said that the comment of Lord Phillips in *The Catholic Child Welfare Society v Various Claimants & The Institute of the Brothers of the Christian Schools* [2012] UKSC 56, [2013] 1 All ER 670 seems fairly apt: at [82] his Lordship said-

[T]he High Court of Australia, when considering whether a school authority could be vicariously liable for sexual assault committed on a pupil by a teacher, has shown a bewildering variety of analysis: *New South Wales v Lepore* [2003] HCA 4; 212 CLR 511.

How is an Australian court, then, to deal with this “bewildering variety”?

One option is to ask whether the act was both “closely connected” with the employer’s enterprise, *and* done in actual or apparent pursuit of the employer’s interests. (With respect to Gaudron J, her Honour’s estoppel view does not seem to have commanded a great deal of subsequent support.) But of course a problem arises if one test is satisfied and the other not! Still, at the moment, and unless and until the High Court itself revisits the issue, that seems to be the best way forward.

It is perhaps partly the lack of clarity that may explain (though it does not, in my respectful opinion, justify) the decision in *A, DC v Prince Alfred College Incorporated* [2015] SASC 12 (4 Feb 2015). A pupil there had been sexually abused by a “house master” in a boarding school situation. Some of this abuse had taken place in the dorm after lights were put out. The duties of the house master included supervising the boy’s showering, going to bed, and lights out (see [172]). The overall description seems to fit precisely the sort of case where vicarious liability for sexual assault had been found in the UK and Canada. And yet Vanstone J concluded that there was no vicarious liability. Her Honour seems to base her finding on the fact that

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<sup>32</sup> In addition, while not technically deciding the issue of vicarious liability, McHugh J’s comments at [166] suggest he would have supported the “sufficiently close connection” test.

while the above-mentioned duties were laid down as the responsibility of house masters, very few of the house masters actually carried them out, leaving a large part of the work to prefects- see [173]. (And yet it seems that the wrongdoer here was actually carrying out those duties!)

Her Honour also made the point at [175] that the role of general supervision was “very far from amounting to a duty to engage in intimate physical behaviour with a student,” followed by a quote from the *Withyman* case (noted below) about the situation of an ordinary “day” teacher. With respect, these comments seem misguided. No-one argues that teachers in these situations ever have a “duty” to engage in intimate contact. It is the opportunity created by the conferred authority which creates the vicarious liability. And the situation of a boarding house master is clearly distinguishable from that of a teacher who simply sees a student at school during the day. It seems that her Honour’s decision on this point may be appealable.

The matter continues to be discussed in other common law jurisdictions. In **New Zealand** the NZ Court of Appeal (the final appellate court in that country now) held in *S v Attorney-General* [2003] 3 NZLR 450 that the NZ Government could in some circumstances be vicariously liable for sexual abuse committed by foster-parents, with whom children had been placed. These carers, of course, were not even employees; the decision seems to have apparently been made on the basis of “agency”.

But more recently in *A v Roman Catholic Archdiocese of Wellington* [2008] NZCA 49 the same Court held that the church was not responsible for abuse committed by temporary holiday-carers. There is an interesting recent article by Morgan suggesting that the issue of vicarious liability for foster-parents needs to be reconsidered.<sup>33</sup>

Elsewhere, in *O’Keefe v Hickey* [2008] IESC 72 the Supreme Court of **Ireland** held that the government could not be held vicariously liable for sexual assault committed by a teacher at a church school. While the school operated under government guidelines, the teacher was *not* an employee of the state. The judgment of one of the members of the Court, Hardiman J, was forthright in stating that *Bazley* was in any case wrong, and that even if the teacher had been an employee there would have been no vicarious liability for sexual assault; but there was no majority of the Court on the point, and it was *obiter* since a majority agreed that the teacher was not an employee. More recently, however, in a single judge decision in *Hickey v McGowan* [2014] IEHC 19 (24 Jan 2014)<sup>34</sup> O’Neill J distinguished the reasoning of the earlier decision and found the Marist Brothers order vicariously liable for sexual abuse committed by a Brother who was at the time also formally employed by a State school (adopting the “dual liability” theory noted previously.)

In *K v Minister of Safety and Security* [2005] ZACC 8 the **South African** Constitutional Court held that the government were vicariously liable for a rape committed by three police officers, who had offered the victim a lift in their car while on official duties. The “close connection” test was affirmed- see [44]. The later decision in *F v Minister of Safety and Security* [2011] ZACC 37 extended vicarious liability even to an off-duty police officer where the police car was used as part of the event leading to the sexual assault of a 13 year old girl.

<sup>33</sup> See Phillip Morgan, “Ripe for reconsideration: foster carers, context, and vicarious liability” (2012) 20 (2) *Torts Law Journal* 110-144.

<sup>34</sup> So far as I can ascertain, the “Hickey” in this decision was quite unrelated to the Hickey in the earlier decision.

In *Reference re Broome v Prince Edward Island*, 2010 SCC 11 (1 April 2010) the Supreme Court of **Canada** ruled that a Provincial Government was not vicariously liable for alleged sexual abuse committed in private children's homes- the Province did not employ the workers in the homes, and there was not a sufficiently "close connection" to impose vicarious liability- see eg [64].

Vicarious liability for assault committed by a clergyman was established in *Maga v Trustees of the Birmingham Archdiocese of the Roman Catholic Church* [2010] EWCA Civ 256 (16 March 2010). A claim was made against the church for sexual abuse committed by a priest who had been given a "youth worker" role, and met the plaintiff at a "disco" he had organised, and later developed the relationship by getting him to do odd jobs around the house. Significantly, it was assumed for the purposes of this litigation that the priest was an "employee" of the diocese- actually as has been seen already there is quite a bit of doubt about that proposition, but the point was not taken here.

The trial judge had found that there was not a "sufficiently close connection" to the church, as the boy had not attended church services nor was a member of the local congregation. The Court of Appeal overturned this decision; the connection was to be found in a number of features of the relationship: the very fact that the priest wore clerical garb and worked in the community with the authority of the church gave him a position of trust which he had abused; the priest had been designated to work with young people; he had met the plaintiff at a church-sponsored disco; and some of the abuse occurred in his premises which were church-owned and provided for use by clergy.

Lord Neuberger MR also noted at [46] that another feature of the case was that the priest had a "duty to evangelise", and hence it was part of his job to meet people who were not already members of the church. The other members of the Court of Appeal agreed generally with the judgment, but stressed that even where a church did not impose such a duty, it would still be possible to find vicarious liability where the body "clothe[d] the priest or pastor with the ostensible authority to create situations which the priest or pastor can and does then subvert for the purposes of abuse"- per Smith LJ at [95].

In the *JGE* case noted above (*JGE v The Trustees of the Portsmouth Roman Catholic Diocesan Trust* [2012] EWCA Civ 938), which was generally approved in the later *CCWS* decision, the Court of Appeal ruled that priests working in the diocese were in position "sufficiently akin" to employment that the Diocese could be held vicariously liable for their actions. They also held that the relationship between their work and the harm done was "sufficiently close" for this to be established; the priest had been placed in a position of power and trust by the bishop, and the bishop had sufficient general control over what the priest did to be held responsible.

We have already seen that in the *Catholic Child Welfare Society v Various Claimants & The Institute of the Brothers of the Christian Schools* [2012] UKSC 56 ("*CCWS*") case noted previously, Lord Phillips found that the Institute were vicariously liable for sexual assault committed by individual brothers (where the school in question was a residential school for "troubled" boys):

[92] Living cloistered on the school premises were vulnerable boys. They were triply vulnerable. They were vulnerable because they were children in a school; they were vulnerable because they were virtually prisoners in the school; and they were vulnerable because their personal histories made it even less likely that if they attempted to disclose what was happening to them they would be believed. The brother teachers were placed in the school

to care for the educational and religious needs of these pupils. Abusing the boys in their care was diametrically opposed to those objectives but, paradoxically, that very fact was one of the factors that provided the necessary close connection between the abuse and the relationship between the brothers and the Institute that gives rise to vicarious liability on the part of the latter.

Closer to home, in *Withyman bht Withyman v NSW and Blackburn* [2013] NSWCA 10, the question was whether the State of NSW was liable for harm caused by a teacher, Ms Blackburn, employed by the State, who had sex with her 17 year old intellectually impaired student, Mr Withyman. While at one point the issue was framed as if it related to “non-delegable duty”, in fact it was clearly a case of vicarious liability (involving as it did an employed teacher) and the decision of the Court applied the *Lepore* principles in determining whether or not the State could be vicariously liable.

Here there was no “residential component” to the care at the school; the only argument that could really be run as to heightened risk of sexual assault was that, as it was a school set up to care for intellectually disabled students, there was a high degree of “caring” shown by the teachers. But the Court of Appeal, as had the trial judge, rejected any vicarious liability of the school for the sexual misconduct; per Allsop P:

[142] No attempt was made in the evidence to focus in detail upon the duties of a teacher such as Ms Blackburn in building emotional bonds with students. It can be accepted that Ms Blackburn's teaching style had a degree of gentle, forgiving familiarity with her students. That, however, is not a factor that promotes a risk of sexual intercourse.

[143] That the children at the school were or may have been more emotionally vulnerable than ordinary school students may perhaps be accepted. But the enterprise of teaching and guiding the young, even using gentle and forgiving familiarity does not create a new ambit of risk of sexual activity. Sexual activity is as divorced and far from the gentle caring teacher's role as it is from the stern, detached disciplinarian's. The connection and nexus was not such as to justify imposition on the State for Ms Blackburn's, apparently out of character, sexual misconduct. The school did not create or enhance the risk of such by her duties.

How have other cases in NSW applied *Lepore*? An early attempt can be seen in *Gordon v Tamworth Jockey Club Inc* [2003] NSWCA 82. A volunteer who was assisting at a race meeting was suddenly and violently assaulted by a cleaner working on the course who had become drunk. The Court of Appeal referred to the discussion in *Lepore* but concluded that employer was not vicariously liable on whatever view was taken of the decision- the cleaner was not engaged in “keeping order” or in any other sense doing what he had been given authority to do.

16 Mr Cook's assault upon the appellant was not done in the intended pursuit of the respondent's interest or intended performance of his employment or in ostensible pursuit of the respondent's business or apparent execution of any authority which the respondent held out Mr Cook as having. At 602 [239] {in *Lepore*} Gummow and Hayne JJ said that for the purposes of that case it was enough to conclude that when an employer is alleged to be vicariously liable for the intentional tort of an employee, recovery against the employer on that basis should not be extended beyond the two kinds of case identified by Dixon J in *Deatons v Flew* to which reference has been made.

17 Kirby J was of the opinion that the more recent analysis by the High Court of the issue of vicarious liability, notably in *Scott v Davis* (2000) 204 CLR 333 at 369 and *Hollis v Vabu Pty Ltd*, suggests that Australian law has already moved in the direction now favoured by the courts in the United Kingdom and Canada thereby embracing liability even for acts the employer has not authorised “provided they are *so connected with* acts which the employer



has authorised, that they might rightly be regarded as modes – although improper modes – of doing them.” This has led in both Canada and the United Kingdom to a greater examination of the connection between the enterprise and the acts alleged to constitute wrong doing for which the employer should be liable; 616 [315] – [316]. To use language taken from the Canadian and United States cases in *Hollis v Vabu Pty Ltd* at 40 [42] it **could not**, in my opinion, be said that Mr Cook’s assault on the appellant was **conduct closely tied to a risk that the respondent’s enterprise had placed on the community or an accident which might fairly be said to be characteristic of the respondent’s activities.**

There have been a number of cases since *Lepore* involving “bouncers” and security guards at hotels and clubs. A controversial English example is *Mattis v Pollock* [2003] EWCA Civ 887, [2003] 1 WLR 2158. The owner of a nightclub was found to be liable to pay damages to a patron of the club who was stabbed by the club bouncer; the bouncer had been engaged in a fight with a group of customers, had left the premises to return home and collect a knife, and then returned to commit the assault! Despite the fact that the incident did not occur on the work premises, that some time had passed between the work-related fight and the later assault, and the fact that clearly the nightclub owner had no opportunity to prevent the bouncer’s action, the court held that it was so “closely connected” with the bouncer’s work that there should be vicarious liability.<sup>35</sup>

A similar but less controversial case in NSW was *Starks v RSM Security Pty Ltd* [2004] NSWCA 351. Mr Starks had drinking at the Bondi Hotel and playing a video game when approached by the security guard for the hotel, a Mr Wilson, and asked to leave. Mr Starks objected to being asked to leave, as he had not been bothering anybody; Mr Wilson then head-butted him, causing him serious injury. The court found that Wilson’s response was in no way necessary or excusable. The trial judge awarded damages against Wilson, but refused to award damages against his employers, the firm RSM, because he said that Wilson was acting in a way that went far beyond the “scope of his employment.”

The Court of Appeal disagreed and found the employer liable (following *Lepore*); per Beazley JA:

[24]...Although Mr. Wilson’s action in head-butting Mr. Starks was unreasonable, uncalled for, and not a usual mode for a security officer to use to persuade a customer to leave hotel premises, the fact is, Mr. Wilson acted in that way in the course of seeking to have Mr. Starks leave the premises. In my opinion, his action was so directly connected with his authorised acts that this case is one that falls on that side of the line that makes the employer vicariously liable.

The court distinguished *Deatons v Flew*, as there the barmaid was not employed to “keep order.” Other security guard cases applying similar tests are *Whitehouse Properties t/as Beach Road Hotel v McInerney* [2005] NSWCA 436,<sup>36</sup> *Ryan v Ann St Holdings Pty Ltd* [2006] QCA 271,<sup>37</sup> and *Sprod v Public Relations Oriented Security Pty Ltd* [2007] NSWCA 319.

<sup>35</sup> See R Weekes, “Vicarious Liability for Violent Employees” (2004) 63 *Cambridge Law Jnl* 53-64; P Giliker, “Making the right connection: Vicarious liability and institutional responsibility” (2009) 17 *Torts Law Jnl* 35-54, which critiques *Mattis*.

<sup>36</sup> Although note that this was a case where **both** the parties paying the bouncer were held to be vicariously liable! But now see *Day* previously noted where this aspect of the decision must be taken to be over-ruled.

<sup>37</sup> Discussed in C Crawford, “Bouncers and Vicarious Liability” (Nov 2006) *Proctor* 23-24.

In *Sprod Ipp JA*, who gave the leading judgment, commented on the difficulty of knowing what test to apply after *Lepore*, at [54]:

It is not easy to trace a certain and secure path through the dicta. The safest course is to attempt to apply all of them to the facts of the particular case. The answers that this course produces will assist in resolving the issue, particularly if the answers, or a substantial majority of them, are the same.

See also *Smith v Cheeky Monkeys Restaurant* [2009] NSWDC 257, and *Day v The Ocean Beach Hotel Shellharbour Pty Ltd* [2013] NSWCA 250 (5 August 2013), discussed above on the issue of dual vicarious liability, where the court agreed that the security firm which employed a guard who evicted a drunk patron by snatching the stool from beneath her (resulting in injuries) was vicariously liable for the actions of the guard, as it was clearly done as part of his employment, even if it went beyond what he was explicitly authorized to do- see [16].

In *Howl at the Moon Broadbeach Pty Ltd v Lamble* [2014] QCA 74 (11 April 2014) a worker who was employed as a general cleaner at a club saw another employee being attacked and “laid in” with his long-handled metal dustpan, seriously injuring the plaintiff who was standing nearby. The employer claimed not to be vicariously liable as the worker had been explicitly told not to do “security” duties; but the court ruled that acting in response to an emergency, and in the interests of the employer, was sufficient to amount to him acting in the course of his employment.

*Lepore* has also been applied in a case of “horseplay” at work in Victoria, *Blake v J R Perry Nominees Pty Ltd* [2012] VSCA 122 (14 June 2012). There one worker kicked another worker in the back of the knee as a joke; the majority of the court held that the incident was not sufficiently “closely connected” with what the worker were paid to do. In dissent, however, Neave JA noted that the workers were both on the job, waiting for a ship to arrive at a port, and saw a sufficient connection.

In a recent UK decision, *Graham v Commercial Bodyworks Ltd* [2015] EWCA Civ 47 (5 Feb 2015), in another “horseplay” case, one worker had been doused by another with a flammable thinning agent and set on fire. Applying the UK and Canadian decisions, Longmore LJ (for the Court) held that there was not a close enough connection between the work and the wrong; while the work involved the use of the thinner, there was no encouragement to use it in this way!

A very interesting article by Giliker<sup>38</sup> argues that the best way of reading the cases on “close connection” is to see them as standing for a rule that imposes vicarious liability for intentional wrongs only where the job the employee is engaged to do involves the “protection” or “care” of either persons or property:

It is submitted that vicarious liability should be imposed for intentional torts only where the employee is engaged to perform duties of a protective or fiduciary nature which safeguard the interests of the employer or others... Vicarious liability for intentional torts should therefore only arise where the employee is entrusted with a protective or fiduciary discretion,<sup>39</sup> that is, where the employee is entrusted to protect the employer’s property, customers, employees, or specific individuals for whom the employer has taken responsibility. If this requirement is satisfied, then the court should examine whether the act in question was undertaken in the purported exercise of these duties. (at pp 53-54)

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<sup>38</sup> Above, n 35.

<sup>39</sup> See Gleeson CJ in *Lepore* (2003) 212 CLR 511; 195 ALR 412; [2003] HCA 4; BC200300126 at [52]–[53].

This view would have the advantages of excluding vicarious liability in a case such as *Mattis*, but allowing it to be recognised in most of the other cases where it has so far been recognised. (It would also explain the result in the “horseplay” cases, where one employee has not in any sense been entrusted with the care or protection of the other.) It is unclear whether the courts will be persuaded to take up this suggestion, but it would seem to clearly allow for recovery in cases where authority figures in the church or elsewhere had abused children entrusted to their care.

I have also previously noted Beuermann’s article on this area;<sup>40</sup> her suggestion for limiting the “scope of employment” is that an employer should only be vicariously liable where the employee was doing what they were “actually” directed to do (which would include implicit as well as explicit directions). This however means that she has to find another explanation for the “intentional tort” cases- see her discussion from p 191. While she may be able to offer plausible reasons for the outcome in most of those cases (eg at 192 that child sexual assault cases can be explained as examples of the equivalent of “non-delegable duty”, which we will consider shortly), whether this re-explanation of the cases will persuade the courts is not clear.

Finally on the question of vicarious liability for intentional torts, some other recent UK decisions demonstrate that the area is still very much developing. In *Wallbank v Wallbank Fox Designs Ltd* [2012] EWCA Civ 25 a factory manager gave same (quite reasonable) instructions to an employee, who responded by seriously assaulting him. The court found the employer company vicariously liable, in what has to be said is an odd decision, holding that the “close connection” test was satisfied because employment in a fast-moving factory gave rise to a risk of “friction” between employees and supervisors (as I say, I am not persuaded this is right).

In *Vaickuviene v J Sainsbury Plc* [2013] IRLR 792, a Scottish decision, one supermarket shelf stacker went into a frenzy of racial hatred and stabbed a fellow employee; the Court of Session held that there was no vicarious liability, and that simply placing employees near each other in a work place did not of itself increase or create a risk they would kill each other!

In *Mohamud v W M Morrison Supermarkets Plc* [2014] EWCA Civ 116 (13 Feb 2014) a customer who simply went into a service station to ask if they did printing, was savagely attacked and beaten by the salesman behind the counter. The Court of Appeal held that there was no vicarious liability, as the salesman had no responsibility for “keeping order” and the attack was simply motivated by racial hatred rather than by any aspect of the employment duties- see [49].

### **(b) Non-delegable duty**

Another option which in my view is worthy of further exploration in many child abuse cases is that of using the principle of “non-delegable duty” (NDD) to hold a church or other body liable where they have assumed the care of a child. The benefit of applying this doctrine would in particular in case involving churches, to remove the need to determine whether a clergyman is an “employee”. It would have the effect that where a church has placed a child under the authority of a clergyman, then the church could be held directly liable for a failure to properly care for the child.

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<sup>40</sup> Above n 18.

We have already noted that *Commonwealth of Australia v Introvigne*<sup>41</sup> holds that a school owes a “non-delegable” duty of care to children placed under its care, and that a school or other institution can be held strictly responsible for carelessness of a contracted carer. But what of a situation where a contracted carer commits an intentional act of sexual abuse?

The issue came up in *NSW v Lepore*,<sup>42</sup> where the intentional wrongful act was, as seen above, the alleged sexual assault of a student by a teacher. Kirby J declined to rule on this issue as the teacher was an employee;<sup>43</sup> with respect this seems doctrinally correct, but the rest of Court went on to decide the point. The decision of majority was effectively that there can be **no** breach of a non-delegable duty by an intentional wrongful act.<sup>44</sup>

With respect to Lord Sumption, his Lordship’s comments on this aspect of *Lepore* in *Woodland*<sup>45</sup> are liable to be misread. His Lordship in discussing *Lepore* said:

Several of [the High Court’s] members thought that vicarious liability was a simpler route to liability than a non-delegable duty of care. Nonetheless, by a majority of 4-3 (Gaudron, McHugh, Gummow and Hayne JJ) the Court held that the schools owed a non-delegable duty.<sup>46</sup>

While Gaudron and McHugh JJ did support the operation of non-delegable duty in the circumstances of the case (involving the intentional tort of battery), Gummow and Hayne JJ did not, refusing to extend the principle to an intentional act of sexual assault. Their Honours did not, however, express any doubt about the principle in *Introvigne* generally applying to carelessness; and so Lord Sumption is correct that on the question of an NDD applying between schools and pupils in relation to *carelessness*, *Lepore* supports that principle. But there was a 4-3 majority in the decision holding that NDD could not be applied to a case of intentional wrongdoing.<sup>47</sup>

This will lead, then, to different outcomes in case of a workplace assault, or an assault in a boarding school, depending on the employment status of the worker committing the assault. It is an odd and unjust outcome. This aspect of *Lepore* has been cogently criticised as ‘indefensible’ by Stevens.<sup>48</sup> It is essentially illogical to extend NDD to negligent acts and deny its application to intentional torts.<sup>49</sup>

So we are left in Australia with the unsatisfactory situation that an intentional tort cannot be sheeted home to a principal through the NDD principle, although

<sup>41</sup> *Commonwealth of Australia v Introvigne* (1982) 150 CLR 258.

<sup>42</sup> *NSW v Lepore* (2003) 212 CLR 511.

<sup>43</sup> *Ibid*, at [295].

<sup>44</sup> *Ibid*, see Gleeson CJ at [38]; Gummow & Hayne JJ at [265]; Callinan J at [339] agreeing with Gleeson CJ. It should be noted that in the recent decision in *A, DC v Prince Alfred College Incorporated* [2015] SASC 12 (4 Feb 2015) Vanstone J dismissed the claim based on NDD with little discussion, noting the passages in *Lepore* that have been mentioned here- see [108].

<sup>45</sup> Above, n 16.

<sup>46</sup> *Ibid*, at [21].

<sup>47</sup> For the dissents see McHugh J at [136], Kirby J at [293], [309]-[314], and Gaudron J at [127].

<sup>48</sup> R Stevens, *Torts and Rights* (Oxford, OUP, 2007) at 122-123.

<sup>49</sup> For some of the problems created by the view that NDD cannot apply to an intentional tort can be seen in the decision in *Nationwide News Pty Ltd v Naidu; ISS Security Pty Ltd v Naidu* [2007] NSWCA 377.

negligence can. If the recent UK decision in *Woodland*<sup>50</sup> were accepted in Australia, however, that might change the situation.

Lord Sumption summarises the main principles of NDD in his judgment:

Both principle and authority suggest that the relevant factors are the vulnerability of the claimant, the existence of a relationship between the claimant and the defendant by virtue of which the latter has a degree of protective custody over him, and the delegation of that custody to another person.<sup>51</sup>

None of these matters depend on the harm committed to the child who is owed such a duty being committed by *carelessness* as opposed to an *intentional* act of assault. Similarly, when the five factors noted above from para [23] in *Woodland* are considered,<sup>52</sup> none explicitly address the type of intention behind the wrong. A child being cared for in a boarding school, for example, is ‘vulnerable’ to intentional sexual assault; the school has assumed a duty to ‘protect the claimant from harm’ of all sorts; the child has no control over how that duty is realised; the school will commonly have delegated to the wrongdoer the care of the child. Even the fifth and final point, which refers to the wrongdoer being ‘**negligent** not in some collateral respect but in performance of the very function assumed by the defendant and delegated by the defendant to him’ (my emphasis), while it uses the word ‘negligent’, is really aimed at the question of whether the wrongdoer was behaving wrongfully in a core or a ‘collateral’ area.

Indeed, it may be that this type of flexibility in understanding the wording used is what Lady Hale is referring to in her concurring judgment in *Woodland*, where she notes that her agreement is:

subject of course to the usual provisos that such judicial statements are not to be treated as if they were statutes and can never be set in stone.<sup>53</sup>

In her reference to Beuermann’s article,<sup>54</sup> her Ladyship specifically picks up the point that it would have been possible in previous cases dealing with sexual assault of children to have adopted the logic of ‘non-delegable duty’ (what Beuermann refers to as ‘conferred authority strict liability’) rather than the principle of vicarious liability.<sup>55</sup>

The arguments presented in dissent in *Lepore* by McHugh J (acknowledged as one of Australia’s finest common law judges, especially in the area of workplace liability), should be accepted. His Honour noted that Australian law had long recognized the principle of non-delegable duty as it applied to schools and children. The duty is to see that reasonable care is taken for the safety of the children. This duty can be breached by intentional behaviour, just as it can be breached by the negligence. His Honour noted the English decision of *Morris v C W Martin & Sons Ltd* [1966] 1 QB 716, where a firm of furriers had been held liable for the theft of a fur by one of their employees. Accepting that the majority there had found the liability in the

<sup>50</sup> Above, n 16.

<sup>51</sup> Ibid, at [12].

<sup>52</sup> See above, text near n 17.

<sup>53</sup> *Woodland*, above n 16, at [38]. See also her Ladyship’s similar remarks at para [28].

<sup>54</sup> Ibid in [33], citing C Beuermann, ‘Vicarious liability and conferred authority strict liability’ (2013) 20/3 *Torts Law Journal* 265-274.

<sup>55</sup> Referring to ‘previous cases concerning harm suffered by school pupils’, the ones being discussed by Beuermann at 273 of her article being ‘the child sexual assault cases’.

doctrine of vicarious liability, he pointed out at [147] that Lord Denning MR had found the firm liable on the basis that “the bailee of the fur owed a non-delegable duty to take reasonable care of the fur”. This basis for the decision, of course, would clearly imply that there liability under the non-delegable duty doctrine can arise in connection with an intentional tort (there, the tort of conversion.)

It is submitted that this would be a sensible development of the law, and it is one that ought to be considered seriously by the High Court of Australia. There is no opportunity here to develop the point in any detail, but it is arguable that the development of the law in the area of vicarious liability for child sexual abuse by clergy, in the recent decision of the UK Supreme Court in *Various Claimants v The Catholic Child Welfare Society* (‘CCWS’),<sup>56</sup> has taken the law in that jurisdiction in unhelpful directions. The criterion for vicarious liability accepted in that decision, of a relationship ‘akin to employment’,<sup>57</sup> is so vague and potentially broad that it risks allowing a wide and uncontrolled expansion of strict liability for the wrongs of third parties. However, most if not all child sexual assault cases involving churches and schools would clearly fall within the criteria accepted now in *Woodland*<sup>58</sup> (and accepted in Australia since *Introvigne*)<sup>59</sup> for the existence of a non-delegable duty. That principle would provide a clear and appropriately limited avenue for recovery of compensation for the harms inflicted by persons in trusted positions of authority, without unduly stretching the boundaries of vicarious liability in yet another uncontrolled expansion. As noted above, it would also obviate the need to consider the complex issue of clergy employment status.

Tan offers a similar comment in his case note on *CCWS*, suggesting that NDD would provide a better basis for action in child abuse cases:

Perhaps the doctrine of non-delegable duty can better give effect to the policy reasons for finding liability through the imposition of a *direct* and *primary* duty on the enterprise to protect highly vulnerable parties from harm regardless of the status of the person undertaking work on its behalf. (emphasis in original)<sup>60</sup>

## Conclusion

The work of the Royal Commission, as well as the work of plaintiff lawyers acting for abuse victims for some years, has shown that there are clear cases where those entrusted with authority over children despicably abused that authority by engaging in sexual abuse for their own private gratification. Those victims should be compensated for that harm, and institutions, whether churches or others, held accountable for the terrible wrongs committed by those into whose control they placed children who had been entrusted into their care.

While actions for negligence against the institutions who should have been alert to these problems and taken more care are possible, actions holding these institutions directly accountable for the acts of sexual battery committed on

<sup>56</sup> *The Catholic Child Welfare Society v Various Claimants* [2012] UKSC 56, [2013] 2 AC 1 (SC).

<sup>57</sup> *Ibid*, at [47], citing the decision of the Court of Appeal in *E v English Province of Our Lady of Charity* (“JGE”) [2013] QB 722.

<sup>58</sup> Above n 16, esp at [23].

<sup>59</sup> Above n 11.

<sup>60</sup> D Tan, ‘For judges rush in where angels fear to tread...’ (2013) 21/1 *Torts Law Journal* 43-58, at 57. It would perhaps be better to use the word ‘direct’ to refer to actual negligence or wrongdoing, rather than to the sort of strict liability imposed by the NDD principle. But apart from this matter of terminology, I would endorse Tan’s comments.

defenceless victims should also be available. The law of vicarious liability, where employment relationships are clear, provides one avenue. This paper has argued that the law of non-delegable duty, which recognizes that institutions were directly accountable for harm caused by those entrusted with care of children on their behalf, should also be developed in Australia to allow actions to be based on these acts of intentional wrongdoing.

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