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December 7, 2018

Tort Liability of Churches for Clergy Child Abuse after the Royal Commission: Implications of Developments in the Law of Vicarious Liability and Non-Delegable Duty

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**Melbourne Law School Obligations Group
Torts Conference 6-7 Dec 2018**

“Tort Liability of Churches for Clergy Child Abuse after the Royal Commission:
Implications of Developments in the Law of Vicarious Liability and Non-Delegable Duty”.
Neil Foster*

While the Royal Commission into Institutional Responses to Child Sexual Abuse has made a number of recommendations concerning a range of Australian institutions, some of the most difficult issues concern the liability of Christian churches. While the churches are committed to being part of a statutory recompense scheme, there seems no doubt that general tort liability will remain for some victims, and in relation to churches there are a number of unresolved problems. Questions surrounding corporate personality and who may be sued need to be answered. In particular, however, there is still some uncertainty in Australian law as to whether sexual abuse committed by clergy can be sheeted home to churches under the principles of vicarious liability or non-delegable duty. This paper explores these issues, including recent statutory responses, and suggests some ways forward for common law courts.

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The work of the Royal Commission into Institutional Responses to Child Sexual Abuse will reverberate for many years into the future. Set up in response to justified political pressure following horrific revelations of child abuse in institutions which had been meant to provide care and nurture, one of the most shocking areas was the revelation of the extent of abuse that had taken place in churches. Clearly much has been done, and is continuing to be done, to change practices and the culture of churches to ensure that the risk of these terrible crimes happening again is reduced as far as possible. But for those who were impacted by these actions, one role that the law can play is to provide recognition and, to the extent that money can do so, suitable compensation for these wrongs.

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This paper aims to provide a review of the current Australian law applicable to civil actions by victims of child abuse at the hands of those working for churches in particular, with attention to the common law mechanisms by which liability can be sheeted home to the wider organisations in charge of those churches. Of course, the Royal Commission also identified abuse that had occurred in “secular” institutions as well- government homes and orphanages, general community youth organisations, and others. But providing compensation for abuse in churches raises a number of unique difficulties and seems worthy of separate comment.

There are a number of hurdles to overcome before any victim of historical child abuse can recover appropriate common law compensation.¹ Some of those hurdles may be overcome by concessions made by churches 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, the difficulty occasioned if the institution concerned does not have “legal personality”, and the vital question (given that many of the abusers will not be wealthy or, in many cases, even alive) as to what principles of liability can be used to connect the abusers to the institutions. We will consider some of the other hurdles, and recent solutions, briefly, before turning to the main focus of this paper, the relevant liability principles.

A. Preliminary hurdles

(1) The question of “legal personality”

The hurdle of “legal personality” is particularly an issue in relation to actions against large 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 lay behind the dismissal of the action by John Ellis in *Trustees of the Roman Catholic Church v Ellis* (2007) 70 NSWLR 565, [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.²

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. In *PAO v Trustees of the Roman Catholic Church for the Archdiocese of Sydney* [2011] NSWSC 1216, 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 conducted, had no control over the running of the school, which was left to the Brothers.

In a number of subsequent cases churches have conceded the point, rather than relying on the *Ellis* decision.³ In its *Redress and Civil Litigation Report* (2015) (“*Redress Report*”), delivered some time before its final Report in Dec 2017, the Royal Commission recommended as follows:

¹ Of course, for some victims, the recent introduction of a Government-backed “redress” scheme will be adequate and is a welcome development. The statutory redress scheme is discussed briefly below, but as will also be noted, there is still an ongoing role for common law actions in some cases, which are the focus of this paper.

² A similar decision had previously been made in *Archbishop of Perth v ‘AA’ to ‘JC’* (1995) 18 ACSR 333, cited in *Ellis*.

³ For a decision prior to *Ellis* where such a concession was made in relation to a Baptist church, see *Robinson v Baptist Churches of New South Wales Property Trust* [1999] NSWCA 226.

We consider that state and territory governments should introduce legislation to provide that, where a survivor wishes to commence proceedings for damages in respect of institutional child sexual abuse where the institution in question is alleged to be an institution with which a property trust is associated, then unless the institution nominates a proper defendant to sue that has sufficient assets to meet any liability arising from the proceedings:

- the property trust is a proper defendant to the litigation
- any liability of the institution with which the property trust is associated arising from the proceedings can be met from the assets of the trust.

Following this recommendation, provision has now been made in Victoria and NSW for this solution to be adopted.

In **Victoria**, the *Legal Identity of Defendants (Organisational Child Abuse) Act 2018* (Vic) commenced operation on 1 July 2018.⁴ Its purpose seems clearly to provide a suitable defendant where an organization is associated with a trust which would otherwise not be formally liable; in other words, to overcome the *Ellis* problem. It operates where a Non-Government Organisation (NGO) controls one or more “associated trusts” and allows access to those trust funds to pay a claim for child abuse- see s 4(2)(c). The NGO itself may nominate a trust to be the “proper defendant” for these purposes, or if they do not, then the court may determine this matter- ss 7, 8. Section 9 of the Act explicitly empowers trustees to make payments in relation to child abuse claims, whether or not such payments would be otherwise authorized by the deed or other provisions setting up the trust.

These provisions are designed to operate in conjunction with other provisions added to the *Wrongs Act 1958* (Vic) by the *Wrongs Amendment (Organisational Child Abuse) Act 2017* (Vic). These provisions, to be discussed in more detail below, commenced on 1 July 2017, added Part XIII, “Organisational Liability for Child Abuse” to the *Wrongs Act*, and attach liability to organisations for child abuse committed by certain individuals.

In **NSW** the *Civil Liability Act 2002* was amended by the *Civil Liability Amendment (Organisational Child Abuse Liability) Act 2018*, adding Part 1B, “Child Abuse- Liability of Organisations”. These provisions, which commenced on 26 October 2018 and apply to child abuse perpetrated after that date, attach liability to organisations in two different ways discussed in more detail below. Division 4 of Part 1B, which allows access to the funds of property trusts either as designated by the relevant unincorporated organisations, or ordered by a court, had not yet commenced at the time of finalising this paper. But when these provisions commence, they will operate in a similar way to the Victorian provisions noted above. An unincorporated organisation may be sued for child abuse as if it had legal personality.⁵ It may nominate an “entity” with funds as a “proper defendant” to bear responsibility.⁶ If it does not do so, the court may itself order that an “associated trust” be appointed as such; this will be a body over which the unincorporated organisation has significant influence, or some other connection.⁷

These provisions, while as yet untested, do seem to solve the main problems encountered as a result of the *Ellis* decision. Importantly, the transitional provisions inserted by the amending legislation mean that this new liability of associated trusts and other bodies “extends to child abuse proceedings in respect of abuse perpetrated before the commencement of that Division”. So, victims who may have previously been unable to sue, may now be able to do so, especially in light of the abolition of the next hurdle to be considered, limitations of action provision.

⁴ The presence of a “fall-back” commencement of 1 May 2019 in s 2(2) may mean that initially it was thought necessary to delay commencement, but that seems not to have happened.

⁵ New s 6K.

⁶ New s 6L.

⁷ New s 6N.

(2) Limitations periods

Another problem besetting claims for clergy child abuse has been the fact that in many cases these acts were committed some time ago. It was then necessary for claimants to seek formal permission to start a civil action many years after the formal limitation period had expired.

In Victoria, Division 5 of Part IIA of the *Limitation of Actions Act* 1958 (Vic), inserted by the *Limitation of Actions Amendment (Child Abuse) Act* 2015 (Vic), in effect abolished limitation periods for actions relating to child abuse from 1 July 2015.

In NSW the abolition of the limitation period for child abuse claims took place as a result of the enactment of the *Limitation Amendment (Child Abuse) Act* 2016, adding new s 6A to the *Limitation Act* 1969 from 17 March 2016.⁸

In a recent decision applying the new law, in *Anderson v The Council of Trinity Grammar School* [2018] NSWSC 1633 (24 October 2018), Rothman J allowed proceedings to continue in relation to events which were said to have occurred 40 years ago. His Honour said that, with the abolition of the limitation period, the question to be determined was whether the court should dismiss the claim pursuant to an inherent jurisdiction to avoid an unfair trial:

[16] Nevertheless, as the defendant submits, the amending legislation clarifies that the powers reposed in the Court to dismiss certain proceedings summarily on the basis that those proceedings are an abuse of process or cannot be fairly prosecuted, because of delay, continues to operate. It is for the Court to determine whether the plaintiff's claim can be heard, without it being an abuse of process or without an unfair prejudice to either party.

In the circumstances his Honour took the view that there was sufficient extant evidence to allow the claim to proceed to trial. (This included the fact that the perpetrator of the abuse had recently been tried and convicted in a criminal court.)

By contrast, in a decision under the similar Victorian provisions, *Connellan v Murphy* [2017] VSCA 116, the Court had declined to allow the trial to proceed where the events had allegedly occurred 49 years previously, in circumstances where the plaintiff claimed to have known the defendant for only a week, and almost all evidence going to whether the incident actually occurred had now disappeared.

B. Attaching Liability to Churches

But even if there is a proper defendant to sue, and the action is not out of time, 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 take any 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

⁸ Like other extensions of the limitation period in this area around Australia, this extension applies of course to causes of action that arose before commencement of the amendment, and whether or not any other limitation period previously applying had expired. Space prevents a full review of this legislation, but as far as I can tell it seems that all Australian jurisdictions have now abolished limitation periods for child abuse claims. For example, see *Limitation of Actions (Institutional Child Sexual Abuse) and Other Legislation Amendment Act* 2016 (Qld), with various Parts commencing on 1 March 2017; *Civil Liability Legislation Amendment (Child Sexual Abuse Actions) Act* 2018 (WA), commenced on 1 July 2018, inserting s 6A into the *Limitation Act* 2005 (WA).

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 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.⁹ The High Court of Australia noted in *Hollis v Vabu* [2001] HCA 44:

[32]... It has long been accepted, as a general rule¹⁰, 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.¹¹

There was an attempt by McHugh J in the High Court in the early part of the 21st century to reformulate the rules relating to liability for the actions of non-employees, where his Honour argued that “representative agents” ought to create vicarious liability.¹² 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.¹³

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.¹⁴ The difference may be illustrated using the following diagrams.

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

⁹ Widgery LJ in *Salsbury v Woodland* [1970] 1 QB 324 at 336G describes the proposition as “trite law”.

¹⁰ See the observations of Brennan J in *Burnie Port Authority v General Jones Pty Ltd* (1994) 179 CLR 520 at 575.

¹¹ *Northern Sandblasting Pty Ltd v Harris* (1997) 188 CLR 313 at 329-330, 366.

¹² See *Hollis v Vabu* (2001) 207 CLR 21 and *Scott v Davis* (2000) 175 ALR 217.

¹³ 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.

¹⁴ See eg the comments of Lady Hale in *Woodland v Essex County Council* [2013] UKSC 66 at [33]: “They are conceptually quite different.” See N Foster “Convergence and Divergence: the Law of Non-delegable Duties in Australia and the United Kingdom” in A Robertson & M Tilbury, *Divergences in Private Law* (Oxford: Hart, 2016) for an overview of the NDD principle.

The Vicarious Liability Question

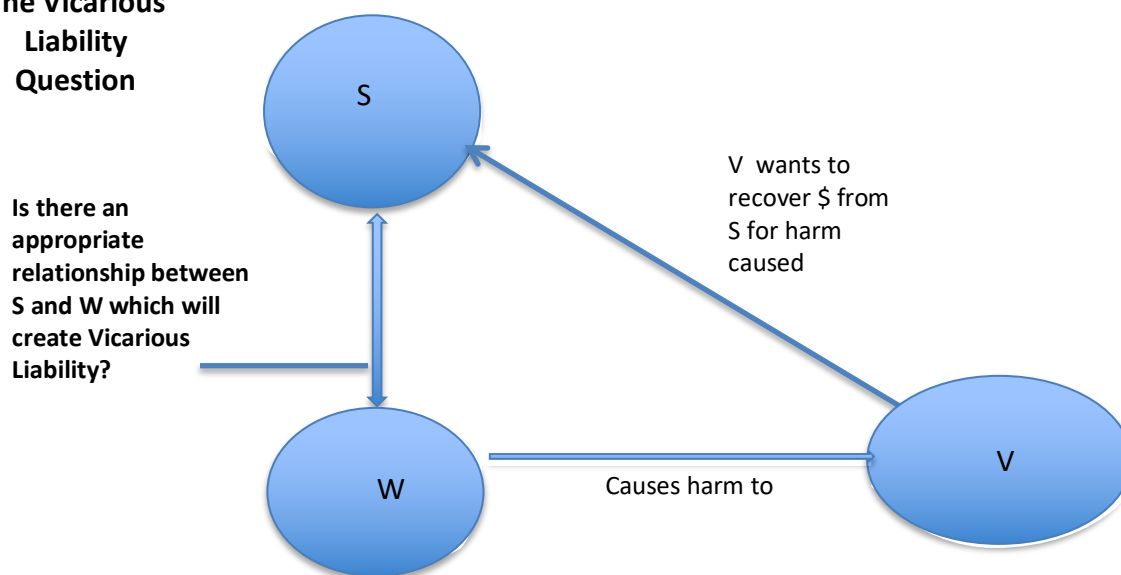


Figure 1: The Vicarious Liability Question

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?)¹⁵ However, the next diagram involves a different question.

The Non-delegable Duty Question

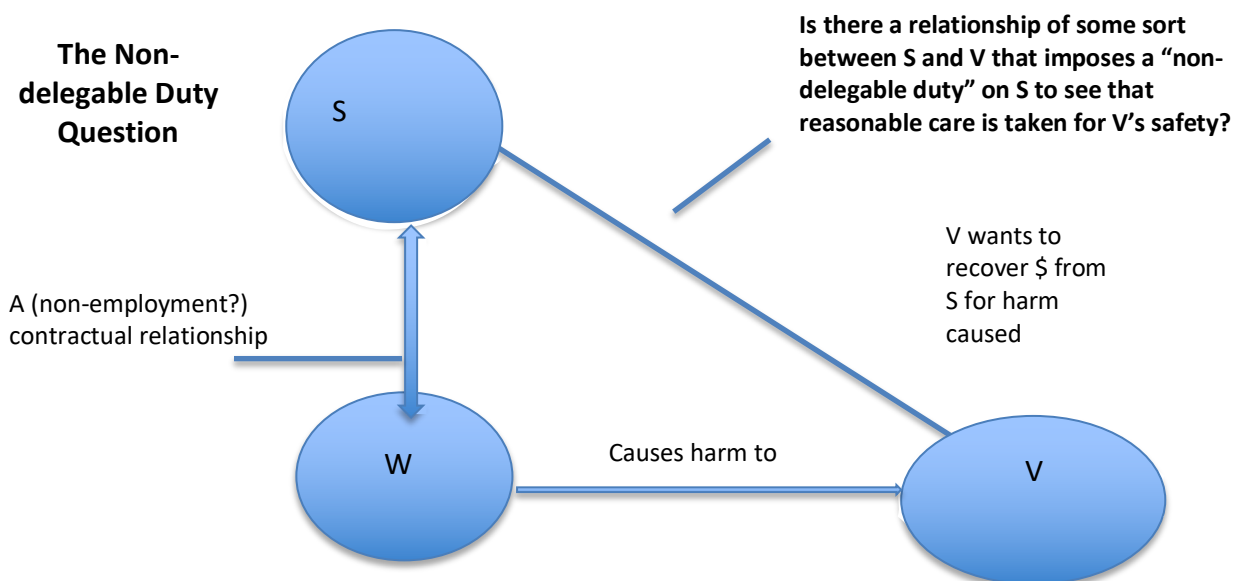


Figure 2: The Non-Delegable Duty Question

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

¹⁵ 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.

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.

In 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.¹⁶ (emphasis added)

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.

Beuermann well sums up the points made above in a recent article:

There are two discrete forms of strict liability for the wrongdoing of another in tort which respond to different relationships: **vicarious liability** which responds to the relationship between the defendant employer and the third party employee who wrongfully injured the claimant; and liability for breach of a **'non-delegable duty of care'** (or more accurately, 'conferred authority strict liability') which responds to the relationship between the defendant and the claimant and the fact that the defendant conferred authority to direct the conduct of the claimant upon the third party who wrongfully injured the claimant.¹⁷ (emphasis added)

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

(2) Action for Negligence

(a) Common law negligence

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

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*¹⁸ 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 of carelessness, *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

¹⁶ Citing *Cassidy v Ministry of Health* [1951] 2 KB 343.

¹⁷ C Beuermann, "Up in *Armes*: The need for a map of strict liability for the wrongdoing of another in tort" (2018) 25/1 *Torts Law Jnl* 1-24. The reference to Beuermann's preferred description of the NDD action as dealing with "conferred authority" is further explained in her articles "Vicarious liability and conferred authority strict liability" (2013) 20/3 *Torts Law Journal* 265-274, and "Tort law in the employment relationship: A response to the potential abuse of an employer's authority" (2014) 21 *Torts Law Journal* 169-194.

¹⁸ *Commonwealth of Australia v Introvigne* (1982) 150 CLR 258.

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.)¹⁹

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*²⁰ and *Meridian Global Funds Management Asia Ltd v Securities Commission*.²¹)

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 situations.

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 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.

¹⁹ For discussion of the competing theories of vicarious liability, see Luntz & Hamblly (8th ed, 2017) at [17.4.1]-[17.4.11], *Fleming's Law of Torts* (10th ed) at [19.20].

²⁰ [1972] AC 153, 170 ('*Tesco*').

²¹ [1995] 2 AC 500, 506 ('*Meridian*').

Another example of an Australian decision applying NDD for negligence to schools is *Harris v Trustees of the Roman Catholic Church for the Archdiocese of Sydney* [2011] NSWDC 172, 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 skiing 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).²²

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*²³ 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.
- (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.²⁴

Lady Hale agreed in an essentially concurring judgment, citing in support an article by Beuermann.²⁵ 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

²² This decision was upheld on appeal *sub nom Perisher Blue Pty Limited v Harris* [2013] NSWCA 38, 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.

²³ *Woodland v Swimming Teachers Association* (sub nom *Woodland v Essex CC*) [2013] UKSC 66, [2014] AC 537 (SC).

²⁴ *Ibid*, at para [23].

²⁵ *Ibid*, at [33], citing C Beuermann, 'Vicarious liability and conferred authority strict liability' (2013) 20/3 *Torts Law Journal* 265-274.

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.²⁶

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, for example, being a form of “personal injury” under s 11), and no aggravated or exemplary damages could be awarded, pursuant to s 21. This means that there are good practical reasons to explore the availability of an action in battery based directly on the actions of the abuser, or some other option which avoids the application of the CLA limitations. A battery 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 subject to the CLA limitations. (And it has been made clear in *Zorom Enterprises Pty Ltd v Zabow* [2007] NSWCA 106 at [13]-[14] that neither is an action against an employer who is vicariously liable for such an intentional tort subject to the CLA.)

It should be noted that, since the commencement of the relevant provisions of the *Civil Liability Amendment (Organisational Child Abuse Liability) Act 2018* (NSW) (“OCAL Act”) on 26 October 2018, s 3B(1)(a)(ia) has the effect that, while the rest of the CLA in its damages-limiting provisions does **not** apply to child abuse claims, the new Part 1B “Child abuse--liability of organisations” does of course apply to such claims.

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 the first instance decision in *A, DC v Prince Alfred College Incorporated* [2015] SASC 12 where Vanstone J ruled that the College was not in breach of its direct duty of care, summarised at [166].

(b) Statutory deemed negligence

As well as providing a mechanism to identify a “proper defendant”, the recent enactment of the OCAL Act in NSW has now added a statutory version of negligence liability to the *Civil Liability Act 2002* (NSW) (“CLA”).

Division 2 of Part 1B is headed “Duty of organisations to prevent child abuse”. Section 6F is the operational part of that Division:

6F Liability of organisation for child abuse by associated individuals

- (1) This section imposes a duty of care that forms part of a cause of action in negligence.
- (2) An organisation that has responsibility for a child must take reasonable precautions to prevent an individual associated with the organisation from perpetrating child abuse of the child in connection with the organisation’s responsibility for the child.
- (3) In proceedings against an organisation involving a breach of the duty of care imposed by this section, the organisation is presumed to have breached its duty if the plaintiff establishes that an

²⁶ *Trustees of the Roman Catholic Church for the Diocese of Bathurst v Koffman* [1996] Aust Torts Reports 81,399.

individual associated with the organisation perpetrated the child abuse in connection with the organisation's responsibility for the child, unless the organisation establishes that it took reasonable precautions to prevent the child abuse.

(4) In determining, for the purposes of this section, whether an organisation took reasonable precautions to prevent child abuse, a court may take into account any of the following:

- (a) the nature of the organisation,
- (b) the resources reasonably available to the organisation,
- (c) the relationship between the organisation and the child,
- (d) whether the organisation has delegated in whole or in part the exercise of care, supervision or authority over a child to another organisation,
- (e) the role in the organisation of the individual who perpetrated the child abuse,
- (f) the level of control the organisation had over the individual who perpetrated the child abuse,
- (g) whether the organisation complied with any applicable standards (however described) in respect of child safety,
- (h) any matter prescribed by the regulations,
- (i) any other matter the court considers relevant.

(5) In this section:

child abuse, of a child, means sexual abuse or physical abuse of the child but does not include an act that is lawful at the time it takes place

In effect, where an organisation undertakes the care of a child, and someone "associated with" the organisation commits an act of child abuse, then that organisation will be deemed to have breached the duty of care in the law of negligence imposed by s 6F(2), to "take reasonable precautions to prevent an individual associated with the organisation from perpetrating child abuse of the child". The presumption of a deemed breach (in effect a reversal of the usual onus of proof) can be rebutted if the organisation establishes that it did indeed take reasonable precautions.

In Victoria, there are now similar provisions in the *Wrongs Act 1958* (Vic)- see s 91.²⁷ The provisions are not identical, however, and it will be interesting to see whether slight variations in wording result in different outcomes.

(3) Action for Battery

We turn now to options available to hold an organisation strictly liable for an act of sexual battery committed on a child.

(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 Brodrigg* (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 21.²⁸ However, the situation of clergy is unusual

²⁷ Added by the *Wrongs Amendment (Organisational Child Abuse) Act 2017* (Vic) and applying to acts committed after 1 July 2017.

²⁸ For a more detailed discussion see Foster (2nd ed, 2016) *WHS Law in Australia*, ch 3; *Stewart's Guide to Employment Law*.

and warrants more detailed comment. Historically there have been a range of different views taken about the “employment” status of members of the clergy.

In the main Australian case in this area, *Ermogenous v Greek Orthodox Community of SA Inc* [2002] HCA 8; 209 CLR 95 (“*Ermogenous*”) 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.

The decision in *Ermogenous* provides an overview of this whole area, and we may take the different categories discussed there as a guide to some of the different options in Australia 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 meant 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, holding that a minister of the Anglican church was employed on a “spiritual basis”.²⁹

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

²⁹ 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.

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 the difference between “salary” and “stipend” is noted.)

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. The High Court referred the matter back to the Full Court of the Supreme Court of SA. In the end, having looked at the matter again, the Full 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. 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, unlike a traditional employment situation, 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.³⁰

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 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, as noted above, 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.)

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

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”,³¹ 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

³⁰ See eg Paul writing in 1 *Corinthians* 9:1-14, who, although 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.

³¹ 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...

“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 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 seems 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, however, 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 if 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 was the conclusion of the English Court of Appeal in *JGE v The Portsmouth Roman Catholic Diocesan Trust* [2012] EWCA Civ 938. 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.³²

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

The result, then, that we see in the High Court in *Ermogenous*, was 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 SA 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? 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. It seems unlikely that most ministers of religion would be regarded as employees.

For example, in *Sturt v The Right Reverend Dr Brian Farran Bishop of Newcastle* [2012] NSWSC 400 Sackar J, having referred to the cases discussed above, was not able to conclude on the evidence provided of “normal parish work” by the two priests concerned that they were employees of the Bishop.³³ 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.³⁴

³² 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”.

³³ 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*!)

³⁴ The weight of this finding, that Anglican clergy have sufficient “proprietary” interest in their posts for internal church disciplinary procedures to be justiciable before the secular courts, may be affected by later decisions which seem to suggest to the contrary. In *Harrington v Coote* (2013) 119 SASR 152, [2013] SASCFC 154 Kourakis CJ (with the agreement of the rest of the Court) held that one ground for holding that the question of the validity of disciplinary action against an Anglican clergyman was justiciable, was the “stipend” which the position involved (see para [23]). However, the more recent decision of the NSW Court of Appeal relating to dismissal of a professional horse trainer, *Agricultural Societies Council of NSW v Christie* [2016] NSWCA 331,

A UK 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 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

It was concluded above to be unlikely that most ministers of religion would be regarded as employees. A decision of the Victorian County Court, however, seems to provide a counter-example. In *McDermid v Anglican Trusts Corporation for the Diocese of Gippsland & McIntyre* [2012] VCC 1406 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. (It may be suggested that this is reason enough 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]. It is submitted 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. This decision, in light of authorities previously discussed, seems wrong. As a decision of the County Court, of course, it is in any event not a decision of any precedential value, even in Victoria, let alone in other jurisdictions of Australia.

holds that the mere receipt of income will not give jurisdiction to a court to interfere in the internal arrangements of a “voluntary association”. Nor would an impact on “reputation” alone give such jurisdiction (a ground that had been referred to in *Sturt* as an independent ground for jurisdiction, but was actually rejected as such in *Harrington*, at [19].) See also *Live Group Pty Ltd v Rabbi Ulman* [2017] NSWSC 1759, where Sackar J was forced, in light of the decision in *Christie*, to retreat from his previous findings in *Sturt* and held at [87] that neither “reputation” nor “livelihood” could, without more, be used as a basis of jurisdiction in considering the affairs of a voluntary organisation (there, a local Jewish congregation.) For further comment on these matters see a paper by the Hon Keith Mason, “Clergy Status in the Age of the Royal Commission” (2018, Robin Sharwood Lecture in Church Law, available at <https://www.trinity.unimelb.edu.au/getattachment/about/news-media/news/Trinity-host-Robin-Sharwood-Lecture-series/CLERGY-STATUS-IN-THE-AGE-OF-THE-ROYAL-COMMISSION.pdf.aspx?> . See also *DEF v Trappett* [2016] NSWSC 1698, holding that there were no contractual or other rights enjoyed by a Roman Catholic priest which gave the court power to inquire into an alleged breach of Canon Law (following *Christie*).

Another feature of the judgment that demonstrates its problematic nature 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 seems to have been the only other remaining 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 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 other cases that a minister is an employee. An example from the UK (post-*Percy*) 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 case where this issue was raised was the decision of the UK Employment Appeal Tribunal in *Sharpe v The Worcester Diocesan Board of Finance Ltd (Jurisdictional Points: Worker, employee or neither)* [2013] UKEAT 0243_12_2811. 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 an odd decision, the EAT (Cox J, sitting alone) held that the trial judge who had found that the 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.

The 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" 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.

The trial decision was, correctly, overturned on further appeal in *Sharpe v The Bishop of Worcester* [2015] EWCA Civ 399. The Court noted that the Rev Sharpe had not been simply appointed to his position by a resolution of the local Parish Council or decision of the Bishop; he was an "office-holder", holding a "benefice", which is a parish appointment under a system dating back many centuries in which a local land-holder, the "patron", has the right to nominate a member of the clergy to the position in the parish.

There is a fascinating review of the law of "advowsons" (an "advowson" was the old name for the right to nominate a clergyman to a parish) and how it has changed over the years in the judgement of Lewison LJ. He notes that:

[155] Historically the incumbent's income came from the glebe. Some benefices were richly endowed and gave their patrons considerable powers of patronage and advancement. In *Pride and Prejudice* Mr Collins fawns on Lady Catherine de Burgh because she had the gift of the living.

In the circumstances where the Rev Sharp had only been appointed after nomination by the local “patron”, where he had signed no agreement with the Bishop or the Parish Council, and where most of his duties were prescribed by the law of the church rather than by agreement with anyone, the Court of Appeal held that he was not an employee, and indeed had no contract with anyone. He had legal obligations, flowing from ecclesiastical law, but no contractual obligations. Hence he was unable to rely on the provisions of unfair dismissal legislation relating to employees and “workers”, in complaining about events which led up to him being forced (as he said) to resign from his parish.

Russell Sandberg notes that the decision, while it reaffirms in the particular circumstances the unusual status of a beneficed clergyman, essentially reaffirms the approach which has developed in clergy employment cases in the UK in recent years: that there is no longer any broad “presumption” that a cleric cannot have a contract or be an employee, and that the particular circumstances of each case need to be considered.³⁵ He notes:

Twenty-first century cases have shown that ministers of religion *can* be employees: *it all depends on the facts*. This means that the traditional placing of ministers of religion on a list in employment law textbooks of those offices that are not usually regarded as “employees” is now questionable. Ministers of religion are now in the same position as anyone else who wants to prove employment status: they need to point to a contract of employment and, since at least *Percy*, it has been clear that the simple facts that they are “employed by God” or hold an ecclesiastical office would not on their own mean that they would not be found to be employees.

As we have seen, this is now very close, if not identical to, the situation in Australia.

The situation is similar in other parts of the Western world. In its decision in *Károly Nagy v Hungary* [2015] ECHR 1051 the European Court of Human Rights upheld as valid under European Human Rights law the decision of a Hungarian court that Mr Nagy, a Reformed Church pastor, could not pursue a claim for unfair dismissal in the secular courts, because he was not in a contractual relationship with the Church.³⁶

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.³⁷ 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. (In fact, as we will see, these changes have already had an impact on the wording of recent legislation).

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

³⁵ Sandberg, Russell “Not a Sharpe Turn: a note on *Sharpe v Bishop of Worcester*” in *Law & Religion UK*, (4 May 2015), <http://www.lawandreligionuk.com/2015/05/02/not-a-sharpe-turn-a-note-on-sharpe-v-bishop-of-worcester/>.

³⁶ Frank Cranmer “Case-law on churches, religion and employment” (August 2016)- document produced for the Churches’ Legislation Advisory Service (UK) available at http://www.churcheslegislation.org.uk/files/publications/Employment_of_church_workers_August_2016.pdf at para 30. A further appeal to the Grand Chamber of the ECtHR was dismissed: see Frank Cranmer, “*Károly Nagy v Hungary*: the Grand Chamber judgment” in *Law & Religion UK*, 15 September 2017, <https://www.lawandreligionuk.com/2017/09/15/karoly-nagy-v-hungary-the-grand-chamber-judgment/>.

³⁷ Of course, the fact that in some circumstances, legislation, for convenience, may “deem” a member of the clergy to be an employee will not resolve the determination of the issue at common law. See, for example, the deeming provision for worker’s compensation purposes in the *Workplace Injury Management and Workers Compensation Act 1998* (NSW) - Schedule 1, clauses 17 & 18.

can have more than one employer in relation to the same activity.³⁸ 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 employee, on the basis that the relationship was “sufficiently close” or “akin” 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, 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.

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 of course include clergy (those for whom the “akin to employment” category seems to have been invented).³⁹

But the “akin to employment” concept has now been broadly interpreted even in non-clerical contexts: see *Cox v Ministry of Justice* [2016] AC 660, [2016] UKSC 10, where the employed catering manager of a prison was injured by the carelessness of a prisoner who had been told to assist in manually unloading a truck. The manual work was required because a goods lift had failed.

Lord Reed, for the court, adapted some criteria set out by Lord Phillips in the *CCWS* case noted previously to set out the following test at [24]:

[A] relationship other than one of employment is in principle capable of giving rise to vicarious liability where harm is wrongfully done by an individual who carries on activities as an **integral part of the business activities carried on by a defendant and for its benefit** (rather than his activities being entirely attributable to the conduct of a recognisably independent business of his own or of a third party), and where the commission of the wrongful act is a **risk created by the defendant** by assigning those activities to the individual in question (emphasis added)

While frankly acknowledging at [28] that this test uses “criteria [that] are insufficiently precise to make their application to borderline cases plain and straightforward”, his Lordship thought this test was now required by authority, not just in child sexual abuse cases but in all cases. Hence here the Crown were vicariously liable for the harm committed by the prisoner:

³⁸ 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.

³⁹ It is certainly the case that the phrase “akin to employment” to describe the relationship of a priest to their bishop can be found in the judgment of McLachlin CJ in the Supreme Court of Canada decision of *John Doe v. Bennett*, [2004] 1 SCR 436, 2004 SCC 17 at [27]. In that case the relationship between the priest and the “diocesan enterprise” managed by the bishop, including a property trust, was found to establish vicarious liability for sexual assaults committed by the priest.

[32]...The prison service carries on **activities in furtherance of its aims**. The fact that those aims are not commercially motivated, but serve the public interest, is no bar to the imposition of vicarious liability. Prisoners working in the prison kitchens, such as Mr Inder, are integrated into the operation of the prison, so that the activities assigned to them by the prison service form an **integral part** of the activities which it carries on in the furtherance of its aims: in particular, the activity of providing meals for prisoners. They are placed by the prison service in a position **where there is a risk** that they may commit a variety of negligent acts within the field of activities assigned to them. That is recognised by the health and safety training which they receive. Furthermore, they work under the direction of prison staff. Mrs Cox was injured as a result of negligence by Mr Inder in carrying on the activities assigned to him. The prison service is therefore vicariously liable to her. (emphasis added)

It seems very unlikely that an Australian court would extend vicarious liability so far. Another decision illustrating the extent of the “akin to employment” test is *Armes v Nottinghamshire County Council* [2017] UKSC 60.⁴⁰

The claimant was in a local authority’s care from early childhood until she was 18. The local authority placed her with two sets of foster parents, Mr and Mrs A and Mr and Mrs B. She was physically and emotionally abused by Mrs A and sexually abused by Mr B. She sought to claim against the local authority in respect of the abuse which she had suffered.

The Supreme Court, by a majority (Lord Hughes dissenting), held that the claim succeeded on the basis of vicarious liability. The Court concluded that the Council’s extensive involvement with the foster parents meant that the foster parents were undertaking an activity on behalf of the Council, with the attendant risk of abuse, and that the Council should be vicariously liable. There is also express mention of the Council being better placed to satisfy any claim than the foster parents.

A couple of paragraphs from Lord Reed’s judgment indicate the approach to the *Cox* factors:

60. Although the picture presented is not without complexity, nevertheless when considered as a whole it points towards the conclusion that the foster parents provided care to the child as **an integral part of the local authority’s organisation** of its child care services. If one stands back from the minutiae of daily life and considers the local authority’s statutory responsibilities and the manner in which they were discharged, it is impossible to draw a sharp line between the activity of the local authority, who were responsible for the care of the child and the promotion of her welfare, and that of the foster parents, whom they recruited and trained, and with whom they placed the child, in order for her to receive care in the setting which they considered would best promote her welfare. In these circumstances, it can properly be said that the torts committed against the claimant were committed by the foster parents in the course of an activity **carried on for the benefit** of the local authority...

63 In relation to the remaining issue, that of the ability to satisfy an award of damages, vicarious liability is only of practical relevance in situations where (1) the principal tortfeasor cannot be found or is not worth suing, and (2) the person sought to be made vicariously liable is able to compensate the victim of the tort. Those conditions are satisfied in the present context. Most foster parents have insufficient means to be able to meet a substantial award of damages, and are unlikely to have (or to be able to obtain) insurance against their own propensity to criminal behaviour. The local authorities which engage them can more easily compensate the victims of injuries which are often serious and long-lasting. (emphasis added)

Lord Hughes (in my view persuasively) dissents on this point, concluding:

91. Vicarious liability is strict liability, imposed on a party which has been in no sense at fault. It is necessary, and fair and just, when it applies to fix liability on someone who undertakes an activity, especially a commercial activity, by getting someone else integrated into his organisation to do it for him. Employment is the classic example, but other situations may be analogous. But the extension of strict liability needs careful justification. Once one examines the nature of fostering, its extension to that activity does not seem to me to be either called for or justified, but, rather, fraught with difficulty

⁴⁰ I acknowledge with gratitude that this summary draws upon a summary initially provided by my colleague James Lee, Reader in Law at King’s College London.

and contra-indicated. Accordingly, I would uphold the decision of the Court of Appeal and dismiss this appeal.

Armes is thus another significant step in the seemingly relentless expansion of the reach of vicarious liability in English Law.⁴¹

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.

It should be noted, on the “dual vicarious liability” point, that 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,⁴² which cannot be overcome by a lower court at the moment.

Whatever the merits of these UK 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 a common law claim 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, for example to “representative agents” as argued for by McHugh J in particular.⁴³ The NSW Court of Appeal seems correct to say that there are clear High Court comments⁴⁴ preventing the adoption of a “dual vicarious liability” rule at the moment. 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 as a matter of common law.

(iii) Vicarious Liability for non-employed clergy- NSW statutory change

However, in amending the law of NSW in response to the recommendations of the Royal Commission, the statutory law now contains a version of this expanded UK common law test. The NSW Parliament, by adding Part 1B to the *Civil Liability Act* 2002 through the OCAL Act, has created a new statutory form of vicarious liability, as well as an expanded form of negligence liability (previously discussed).

Division 3 of Part 1B is headed “Vicarious Liability of Organisations”. A new section provides an expanded definition of “employee” as meaning also someone who is “akin to an employee”:

6G Employees include persons exercising functions akin to employees

(1) In this Division:

employee of an organisation includes an individual who is akin to an employee of the organisation.

(2) An individual is **akin to an employee** of an organisation if the individual carries out activities as an integral part of the activities carried on by the organisation and does so for the benefit of the organisation.

(3) However, an individual is not **akin to an employee** if:

⁴¹ For a recent discussion of other UK cases applying the “akin to employment” test see the discussion in Andrew J Bell ““Double, double toil and trouble”: recent movements in vicarious liability” [2018] 4 *Journal of Personal Injury Litigation* 235-247, noting on this issue *Kafagi v JBW Group* [2018] EWCA Civ 1157 (contracted bailiffs working for justice services group were truly independent contractors and not in an “akin” relationship), and *Various Claimants v Barclays Bank* [2018] EWCA Civ 1670 (doctor engaged to conduct medical examinations of bank staff, charging a fee for each, conducting on own premises, working also for other companies, nevertheless held to be “akin” to an employee so bank liable for a large number of sexual assaults committed on female employees.)

⁴² See *Oceanic Crest Shipping Company v Pilbara Harbour Services Pty Ltd* [1986] HCA 34; (1986) 160 CLR 626, at 641, 646, and 685.

⁴³ See the decisions in *Scott*, *Hollis* and *Sweeney* noted above.

⁴⁴ Above, n 42.

- (a) the activities are carried out for a recognisably independent business of the individual or of another person or organisation, or
- (b) the activities carried on by the individual are the activities of an authorised carer carried on in the individual's capacity as an authorised carer.
- (4) The regulations may, despite subsections (2) and (3), prescribe circumstances in which an individual will be akin to an employee or not akin to an employee.
- (5) In this section:
authorised carer means a person who is an authorised carer within the meaning of the *Children and Young Persons (Care and Protection) Act 1998* other than a person who is an authorised carer only because the person is the principal officer of a designated agency.

It seems clear that the Parliament has adopted this unusual phrase to “pick up” the language used by the UK Supreme Court in cases noted above, and the definition picks up the language (“integral part”) used by Lord Reed in *Cox* at [24], quoted above. However, the Parliament seems to have deliberately chosen to exclude “foster parents” from the definition, possibly in response to the decision in *Armes*.

Applying both the traditional and the new statutory definition of “employee”, s 6H then creates a new form of statutory vicarious liability for child abuse:

6H Organisations vicariously liable for child abuse perpetrated by employees

- (1) An organisation is vicariously liable for child abuse perpetrated against a child by an employee of the organisation if:
 - (a) the apparent performance by the employee of a role in which the organisation placed the employee supplies the occasion for the perpetration of the child abuse by the employee, and
 - (b) the employee takes advantage of that occasion to perpetrate the child abuse on the child.
- (2) In determining if the apparent performance by the employee of a role in which the organisation placed the employee supplied the occasion for the perpetration of child abuse on a child, a court is to take into account whether the organisation placed the employee in a position in which the employee has one or more of the following:
 - (a) authority, power or control over the child,
 - (b) the trust of the child,
 - (c) the ability to achieve intimacy with the child.
- (3) This section does not affect, and is in addition to, the common law as it applies with respect to vicarious liability.
- (4) In this section:
child abuse means sexual abuse or physical abuse perpetrated against a child but does not include any act that is lawful at the time that it takes place.

The terms of this provision, directed in effect to the traditional question of the “scope” of liability, pick up previous language from the UK, but also in particular rely very heavily on the High Court judgment in *Prince Alfred*, discussed below. Clearly it will apply to churches as well as to other unincorporated entities. The provision seems very close to the position that has already been reached by the common law on the “scope” issue, but in case there is any difference preserves the operation of the common law in sub-section (3).

(iv) Scope of employment for intentional tort liability

Returning to the common law, then: once the first element is established for VL, an “employment” relationship, the second element to be made out is 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 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 was then 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 two 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.⁴⁵

But when it came to set 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.⁴⁶

⁴⁵ *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.

⁴⁶ 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.

- *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.

For a number of years Australian courts, then, had to attempt to deal with this “bewildering variety”.

One option was 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 did 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, that was the general approach in the absence of further guidance from the High Court.

In the meantime, in the UK, the predominant approach was the “close connection” test. But some decisions of the UK Supreme Court in that area reveal to my mind the unhelpful breadth and uncertainty of this test.

In *Mohamud v W M Morrison Supermarkets Plc* [2016] AC 677, [2016] UKSC 11 a customer who simply went into a service station to ask if they did printing, was savagely attacked and beaten by the salesman, Mr Khan, who was behind the counter. The Court of Appeal held (at [2014] EWCA Civ 116) 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].

The Supreme Court, however, in its 2016 appeal decision, over-turned the Court of Appeal and held that there was a sufficiently “close connection” between what the worker was employed to do, and the harm he committed. Lord Toulson articulated the test in this way, at [44]-[45]:

The first question is what functions or ‘field of activities’ have been entrusted by the employer to the employee, or, in everyday language, what was the nature of his job. As has been emphasised in several cases, this question must be addressed broadly...

Secondly, the court must decide whether there was sufficient connection between the position in which he was employed and his wrongful conduct to make it right for the employer to be held liable under the principle of social justice ... The cases in which the necessary connection has been found ... are cases in which the employee used or misused the position entrusted to him in a way which injured the third party.

Here Mr Khan’s job was to ‘attend to customers and to respond to their inquiries’- see [47]. He injured the customer in events which flowed directly on from those activities.

However, it seems clear that the result in *Mohamud* is inconsistent with the outcome and reasoning in the Australian decision in *Deatons v Flew*, and there was always going to be a serious question as to whether it would be followed in this country. The High Court, in its decision in *Prince Alfred College Inc v ADC* (2016) 90 ALJR 1085, [2016] HCA 37, clearly held that it does not represent the law of Australia.⁴⁷

In *A, DC v Prince Alfred College Incorporated* [2015] SASC 12, a pupil 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 seemed to fit precisely the sort of case where vicarious liability for sexual assault had been found in the UK and Canada. And yet the trial judge Vanstone J concluded that there was no vicarious liability. Her Honour seemed to base her finding on the fact that 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 seemed 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.

Her Honour’s decision was then overturned on appeal to the Full Court of the Supreme Court of South Australia.⁴⁸ But the final result of the litigation was reached in an appeal to the High Court, which affirmed the outcome laid down by the trial judge, but for different reasons.

The majority (French CJ, Kiefel, Bell, Keane and Nettle JJ) conducted a detailed review of vicarious liability for intentional torts, and in light of the previous confusion about the *ratio* of *Lepore*, proposed a new test for the question of “scope” in these cases.

The test, which drew on the discussion in *Deatons v Flew*, relies on the distinction between the employment simply providing an “**opportunity**” for the employee to commit a tort (in which case there is no sufficient connection), or whether it can be said that the employment provides the “**occasion**” for the tort and hence a connection is established. (Nothing is to be gained by the critique that these two words in common parlance cannot be so clearly distinguished. In effect the High Court has simply adopted these as labels for the circumstances in which VL for intentional torts will, and will not, arise. The important issues are the tests to be adopted to determine whether there was merely an “opportunity” for wrongdoing, and no VL, or an “occasion” for such, in which case VL will be established.)

See the following comments:

[80] In cases of the kind here in question, the fact that a wrongful act is a criminal offence does not preclude the possibility of vicarious liability. As *Lloyd v Grace, Smith & Co* shows, it is possible for a criminal offence to be an act for which the apparent performance of employment provides the **occasion**. Conversely, the fact that employment affords an **opportunity** for the commission of a

⁴⁷ For a review of some recent decisions in the UK on the question of “close connection” following *Mohamud*, see Andrew J Bell ““Double, double toil and trouble”: recent movements in vicarious liability” [2018] 4 *Journal of Personal Injury Litigation* 235-247, noting in particular *Various Claimants v Wm Morrison Supermarkets PLC* [2018] EWCA Civ 2339 (22 Oct 2018) (liability where disgruntled employee unlawfully published private details of other employees) and *Bellmann v Northampton Recruitment Ltd* [2018] EWCA Civ 2214 (liability where argument after work-sponsored Christmas party over work-related issues led to battery.)

⁴⁸ *A, DC v Prince Alfred College Inc* [2015] SASCFC 161.

wrongful act is not of itself a sufficient reason to attract vicarious liability. As *Deatons Pty Ltd v Flew* demonstrates, depending on the circumstances, a wrongful act for which employment provides an **opportunity** may yet be entirely unconnected with the employment. Even so, as Gleeson CJ identified in *New South Wales v Lepore* at 544, [67], and the Canadian cases show, the role given to the employee and the nature of the employee's responsibilities may justify the conclusion that the employment **not only provided an opportunity but also was the occasion** for the commission of the wrongful act. By way of example, it may be sufficient to hold an employer vicariously liable for a criminal act committed by an employee where, in the commission of that act, the employee used or took advantage of the position in which the employment placed the employee vis-à-vis the victim.

[81] Consequently, in cases of this kind, the relevant approach is to consider **any special role that the employer has assigned to the employee and the position in which the employee is thereby placed** vis-à-vis the victim. In determining whether the apparent performance of such a role may be said to give the "**occasion**" for the wrongful act, particular features may be taken into account. They include **authority, power, trust, control and the ability to achieve intimacy with the victim**. The latter feature may be especially important. Where, in such circumstances, the employee takes advantage of his or her position with respect to the victim, that may suffice to determine that the wrongful act should be regarded as committed in the course or scope of employment and as such render the employer vicariously liable.

The majority went on at [82]-[83] to say that *Lister* was an example of providing an "occasion" for a tort, which hence gave rise to vicarious liability ("the role assigned to the warden in that case placed him in such a position of power, authority and control vis-à-vis the victims as to provide not just the opportunity but also the occasion for the wrongful acts which were committed"); but *Mohamud* was simply a case where the employee was given a "opportunity", unconnected essentially with the work he was doing, to commit a tort, and hence there should have been no vicarious liability in that case.

In the circumstances arising in *Prince Alfred*, then, the Court said that neither the Full Court, nor the trial judge, had been addressing the correct issues.

[84] In the present case, the appropriate enquiry is whether Bain's role as housemaster placed him in a position of power and intimacy vis-à-vis the respondent, such that Bain's apparent performance of his role as housemaster gave the occasion for the wrongful acts, and that because he misused or took advantage of his position, the wrongful acts could be regarded as having been committed in the course or scope of his employment. The relevant approach requires a careful examination of the role that the PAC actually assigned to housemasters and the position in which Bain was thereby placed vis-à-vis the respondent and the other children

As it turned out, however, the majority took the view that the passing of time and a previous settlement meant that the limitation period should not have been extended. The matter was not sent back for further hearing.

The other members of the Court, Gageler and Gordon JJ, at [130] accepted the new test for vicarious liability set out by the majority but noted that the details of how it operates will have to be worked out in other decisions in the future.⁴⁹

The question of determining when an act of sexual battery will be within the "scope of employment" has been, and continues to be, discussed in other common law jurisdictions. In **New Zealand** the NZ Court of Appeal 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,

⁴⁹ For comment on the *Prince Alfred* HCA decision, see the excellent review article by Stephen Todd, "Personal liability, vicarious liability, non-delegable duties and protecting vulnerable people" (2016) 23(2) *Torts Law Journal* 105-138, esp pp 124-126, and an article by Anthony Gray, "Liability of Educational Providers to Victims of Abuse: A Comparison and Critique" [2017] SydLawRw 8; (2017) 39(2) *Sydney Law Review* 167. (I have to say, however, that I am not persuaded that the attempt made here to "redefine" the law of vicarious liability as part of the law of agency is successful.)

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. (In *Reference re Broome v Prince Edward Island*, 2010 SCC 11 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].) Morgan suggested that the issue of vicarious liability for foster-parents needed to be reconsidered.⁵⁰ Such reconsideration in effect took place in *Armes*, noted above.⁵¹

Elsewhere, in *O’Keefe v Hickey* [2008] IESC 72 the Supreme Court of **Ireland** initially 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 the Canadian *Bazley* decision 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 19⁵² 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.)

On appeal in *Hickey v McGowan* [2017] IESC 6 the court⁵³ held that the “close connection” test from the UK should be followed in Ireland- see [26]. But contrary to the approach in *CCWS*, it could not be assumed that a large unincorporated religious order was as an entity necessarily able to be held vicariously liable for one of its members- see [46]-[52]

In the case of the Marist Brothers the court held that there was a close connection between the brothers and a shared mission of teaching such that there could be vicarious liability on behalf of *other members* of the order for wrongs committed in the course of teaching duties- see [38]. But the lack of “legal personality” of the Marist Brothers association meant that this liability only attached to individual members of the order, who were members at the time of the commission of the tort- see [56]. As a result, it was not simply a matter of automatically getting access to the trust funds of the order, and all members would have to be individually sued- see [57]. Still, since it seems likely that if an award of damages were made against the head of the Order, that the Order would dip into its funds to meet the claim, the result of the action seems fairly similar to finding the Order as a whole responsible.⁵⁴

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

⁵⁰ See Phillip Morgan, “Ripe for reconsideration: foster carers, context, and vicarious liability” (2012) 20 (2) *Torts Law Journal* 110-144.

⁵¹ Above, n 40.

⁵² So far as I can ascertain, the “Hickey” in this decision was quite unrelated to the Hickey in the earlier decision.

⁵³ O’Donnell J wrote the judgment for the majority, Denham CJ, MacMenamin J and Dunne J concurring.

⁵⁴ As we have seen above, these “legal personality” issues are being resolved in Victoria and (soon) in NSW by statutory provisions deeming trust funds of unincorporated churches to be available to satisfy such damages claims.

officer where the police car was used as part of the event leading to the sexual assault of a 13 year old girl.

It may be helpful to review some cases **specifically involving clergy and religious groups**, to provide examples of what was considered to be “in the course” of employment for the purposes of establishing vicarious liability for battery. While all of these cases were decided on formally different grounds to that laid down by the High Court in *Prince Alfred*, most would seem to have features which would amount to the satisfaction of the “opportunity” category and hence create vicarious liability in Australia today.

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. 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.⁵⁵

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 previously mentioned (*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. On the “scope” issue, 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

⁵⁵ Significantly, it was assumed for the purposes of this litigation that the priest was an “employee” of the diocese, so the nature of the relationship did not need to be considered. The “akin to employment” test was only developed in the next case to be discussed.

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.

Moving away from clergy to the school context, and 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 treated as a case of vicarious liability (involving as it did an employed teacher) and the decision of the Court applied the then-applicable *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.

A case concerning a religious school, *Erlich v Leifer* [2015] VSC 499 involved a sexual abuse claim relating to abuse of a female student by the female Principal of a conservative, religiously focused, Jewish school. The evidence was that the school was part of a very closely-knit religious community, and the Principal ran it very much as the primary decision maker and was highly respected in the local community. While there was some conflicting evidence about the power of the Principal, in the end the trial judge, Rush J in the Victorian Supreme Court, accepted that she had, and was seen to have, ultimate power. After allegations of the abuse came out, the School Board had a late-night committee meeting, following which the Principal and her family were put on a plane to Israel in the early hours of the morning and have not returned to Australia since. There are ongoing efforts to extradite her to face criminal charges in Victoria.

Rush J found the School liable on a couple of grounds, but one was vicarious liability. (His Honour at [119] rejected a submission that he should have found the School liable on the basis of non-delegable duty; this ruling was clearly correct on the current state of Australian law, as we will see below that *NSW v Lepore* holds that NDD cannot be applied to intentional torts.) His Honour had to choose from among the 3 possible ratios of the members of the High Court in *Lepore* who found that vicarious liability for intentional torts was possible, and he found that two were satisfied. He ruled that there was a relevant “close connection” between the duties of the Principal and opportunities for sexual activity with the girls- [128], and also that Gaudron J's suggestion of “estoppel” was satisfied- [130]. He acknowledged, however, that if the narrower “*Deatons*” ratio put

forward by Gummow and Hayne JJ were adopted, that would not be satisfied here- see [134]. But he chose to use mainly the “close connection” test and found vicarious liability.

Academic discussion of the UK “close connection” test has been mixed, though I will only refer to two examples.

A very interesting article by Giliker⁵⁶ 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,⁵⁷ 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)

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 had abused children entrusted to their care.

Beuermann’s article on this area is also very helpful;⁵⁸ 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.

(b) Non-delegable duty

Another option which 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 be, in particular in cases involving churches, to remove the need (even in a purely common law claim where the statutory deeming provisions did not operate) to determine whether a clergyman is an “employee”.⁵⁹ 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.

⁵⁶ P Giliker, “Making the right connection: Vicarious liability and institutional responsibility” (2009) 17 *Torts Law Jnl* 35-54.

⁵⁷ See Gleeson CJ in *Lepore* (2003) 212 CLR 511; 195 ALR 412; [2003] HCA 4; BC200300126 at [52]–[53].

⁵⁸ Above n 25.

⁵⁹ It should be remembered that the new “akin to employment” provisions in NSW law, for example, will only apply to wrongs committed after 26 October 2018. So, the common law may well be needed for some time in relation to historical wrongs. Note of course that, despite the welcome introduction of a statutory redress scheme for victims of institutional abuse, it may still be more advantageous to use the common law, and access to common law claims is still permitted unless and until an offer of redress under the statutory scheme has been accepted- see *National Redress Scheme for Institutional Child Sexual Abuse Act 2018* (Cth) s 43. See also the comments in A Silink and P Stewart, “Tort Law Reform to Improve Access to Compensation for Survivors of Institutional Child Sexual Abuse” (2016) 39/2 *UNSW Law Jnl* 553 at 554 about the need for ongoing tort law reform in this area.

We have already noted that *Commonwealth of Australia v Introvigne*⁶⁰ 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*,⁶¹ 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;⁶² 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.⁶³

With respect to Lord Sumption, his Lordship’s comments on this aspect of *Lepore* in *Woodland*⁶⁴ 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.⁶⁵

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.⁶⁶

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.⁶⁷ It is essentially illogical to extend NDD to negligent acts and deny its application to intentional torts.⁶⁸

The High Court in *Prince Alfred* declined to revisit the question, although in terms which, it is submitted, leave the matter able to be reconsidered where appropriate submissions can be made. The majority said:

[36] So far as concerns the PAC’s non-delegable duty of care owed to the respondent, the respondent contends that *New South Wales v Lepore* was wrongly decided. However, submissions for the respondent do not address the matters required to invoke the authority of this Court to reconsider a previous decision (*Queensland v The Commonwealth* (1977) 139 CLR 585; [1977] HCA 60; *John v Federal Commissioner of Taxation* (1989) 166 CLR 417; [1989] HCA 5; *Wurridjal v The Commonwealth* (2009) 237 CLR 309; [2009] HCA 2; *Beckett v New South Wales* (2013) 248 CLR 432; [2013] HCA 17). They are addressed to arguments which were rejected by the majority in *New South Wales v Lepore*.

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

⁶⁰ *Commonwealth of Australia v Introvigne* (1982) 150 CLR 258.

⁶¹ *NSW v Lepore* (2003) 212 CLR 511.

⁶² *Ibid*, at [295].

⁶³ *Ibid*, see Gleeson CJ at [38]; Gummow & Hayne JJ at [265]; Callinan J at [339] agreeing with Gleeson CJ.

⁶⁴ Above, n 23.

⁶⁵ *Ibid*, at [21].

⁶⁶ For the dissents see McHugh J at [136], Kirby J at [293], [309]-[314], and Gaudron J at [127].

⁶⁷ R Stevens, *Torts and Rights* (Oxford, OUP, 2007) at 122-123.

⁶⁸ 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*⁶⁹ were accepted in Australia, however, that might change the situation. It is also submitted that comments at various stages of the *Armes* litigation warrant careful consideration on this point.

Lord Sumption in *Woodland* 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.⁷⁰

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,⁷¹ none explicitly address the type of *intention* behind the wrong. A child being cared for in a church 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.⁷²

In her reference to Beuermann’s article,⁷³ 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.⁷⁴

In the *Armes* decision, the UK Supreme Court ruled that a local authority did not owe a “non-delegable duty” to children whom it had placed with foster parents, and hence were not strictly liable under the NDD doctrine.

The question put forward by Lord Reed, accepting the criteria set out in *Woodland* at [23], was said to be this:

[37] The critical question, in deciding whether the local authority were in breach of a non-delegable duty in the present case, is whether the function of providing the child with day-to-day care, in the course of which the abuse occurred, was one which the local authority were **themselves under a duty to perform** with care for the safety of the child, or was one which they were merely bound to arrange to have performed, subject to a duty to take care in making and supervising those arrangements. (emphasis added)

⁶⁹ Above, n 23.

⁷⁰ Ibid, at [12].

⁷¹ See above, text near n 24.

⁷² *Woodland*, above n 23, at [38]. See also her Ladyship’s similar remarks at para [28].

⁷³ Ibid in [33], citing C Beuermann, ‘Vicarious liability and conferred authority strict liability’ (2013) 20/3 *Torts Law Journal* 265-274.

⁷⁴ 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’.

After a careful review of the legislation setting out the Council's responsibilities, his Lordship concluded that the legislation allowed the authorities to **place the children with others** as a way of fulfilling their obligations, including family members of the child. (That is, they did not themselves have a "duty" to house the children in Council premises.) To impose strict liability on the Council for harm committed in these circumstances would undermine the aim of trying to provide care for the child from within their own family, as Council might be reluctant to agree to such arrangements

[45] If, however, local authorities which reasonably decided that it was in the best interests of children in care to allow them to stay with their families or friends were to be held strictly liable for any want of due care on the part of those persons, the law of tort would risk creating a conflict between the local authority's duty towards the children under section 18(1) and their interests in avoiding exposure to such liability. Furthermore, since a non-delegable duty would render the local authority strictly liable for the tortious acts of the child's own parents or relatives, if the child was living with them following a decision reasonably taken under section 21(2), the effect of a care order, followed by the placement of the child with his or her family, would be a form of state insurance for the actions of the child's family members (and, indeed, their friends, relatives and babysitters, if the child were left with them)

Hence, in these circumstances, his Lordship held that it was not appropriate to impose a non-delegable duty on the local authority

[49] For all these reasons, I conclude that the proposition that a local authority is under a duty to ensure that reasonable care is taken for the safety of children in care, while they are in the care and control of foster parents, is **too broad**, and that the responsibility with which it fixes local authorities is too demanding. (emphasis added)

Note, however, that Lord Reed did *not* rest his view on the issue of whether a non-delegable duty could apply in relation to an intentional tort. Nor did his decision mean that other organisations entrusted with the care of children should be exempted from NDD liability; arguably organisations like churches or police youth clubs, which undertake the occasional care of children, could be held liable under the NDD principle for assaults committed by clergy or youth leaders.

On the question of whether there could be liability under NDD for an intentional tort, there had been a difference of opinion at the Court of Appeal stage of the proceedings. In *NA v Nottinghamshire County Council* [2015] EWCA Civ 1139 (as it was known at the earlier stage) Burnett LJ rejected the NDD claim on the basis that the doctrine does not cover "intentional" torts, citing *Lepore* as persuasive at [35]. However, Lady Justice Black was much more hesitant to reject the NDD claim, and in particular refused to exclude all intentional torts from the scope of NDD - see [59]. Lord Tomlinson also explicitly refused to decide that issue—see [26].

In the Supreme Court in *Armes* there was strong support for Lady Black's view that NDD might be available in intentional tort cases. Lord Reed (with whom Lady Hale, Lord Kerr and Lord Clarke agreed) commented explicitly on this point as follows:

[51] **Nor am I able to agree that a non-delegable duty cannot be breached by a deliberate wrong:** see, for example, *Morris v C W Martin & Sons Ltd* [1966] 1 QB 716, a bailment case which was treated as a case of non-delegable duty in *Woodland*, para 7. On Burnett LJ's approach, the local authority would seemingly be liable if the foster parents negligently enabled a third party to abuse the child, but not if they abused her themselves. That can hardly be right. The judgment of the Privy Council in another bailment case, *Port Swettenham Authority v T W Wu and Co* [1979] AC 580, 591, is instructive:

"When, a bailee puts goods which have been bailed to him in the care of his servants for safe custody, there can be no doubt that the bailee is responsible if the goods are lost through any failure of those servants to take proper care of the goods ... *Cheshire v Bailey* [1905] 1 KB 237 laid down the startling proposition of law that a master who was under a duty to guard another's goods was liable if the servant he sent to perform the duty for him performed it so negligently as to enable thieves to steal the

goods, but was not liable if that servant joined with the thieves in the very theft. This proposition is clearly contrary to principle and common sense, and to the law: *Morris v C W Martin and Sons Ltd* [1966] 1 QB 716,740. Their Lordships agree with the decision in *Morris v C W Martin and Sons Ltd* and consider that *Cheshire v Bailey* mis-stated the common law.”

Lord Hughes, who dissented on the vicarious liability question, and held that the NDD doctrine did not apply to the local authority, nevertheless seems to have agreed with Lord Reed on the question as to whether the doctrine can apply to intentional torts:

[75] ... Liability under a non-delegable duty is, in effect, a liability to guarantee that others provide all reasonable care and, **it may well follow, abstain from deliberate tortious behaviour.** (emphasis added)

In short, it is submitted that there are good grounds for the High Court of Australia to revisit the question whether there can be NDD liability in relation to an intentional tort. 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 wrongdoing, 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 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 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. It is arguable that the development of the law in the area of vicarious liability for child sexual abuse by clergy, as traced above, from the decision of the UK Supreme Court in *Various Claimants v The Catholic Child Welfare Society* (‘CCWS’),⁷⁵ 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’,⁷⁶ 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*⁷⁷ (and accepted in Australia since *Introvigne*)⁷⁸ 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

⁷⁵ *The Catholic Child Welfare Society v Various Claimants* [2012] UKSC 56, [2013] 2 AC 1 (SC).

⁷⁶ *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.

⁷⁷ Above n 23, esp at [23].

⁷⁸ Above n 18.

vulnerable parties from harm regardless of the status of the person undertaking work on its behalf. (emphasis in original)⁷⁹

It is interesting to note that the logic of an NDD action being used in this area is reflected in the findings of the Institutional Sexual Abuse Royal Commission, which in its report on *Redress and Civil Litigation* (2015), recommended the introduction of what would be in effect a statutory non-delegable duty on institutions caring for vulnerable children.⁸⁰ While this has not so far been adopted by Parliaments (as noted above, the statutory models to date involve a reform to the law of negligence to “reverse the onus of proof”, and in the case of NSW a new statutory form of vicarious liability), the recommendation provides further support for a reform of the law in this area which might be achieved by the usual mode of reform of the common law.

In their significant review of these issues, Silink and Stewart have argued that any legislative reform should take the form of an extension of vicarious liability, rather than of the doctrine of non-delegable duty.⁸¹ It may be that their arguments lie behind the way that NSW has framed Division 3 of Part 1B of the CLA. With respect, for the reasons noted above, in my view the non-delegable duty doctrine, when properly understood, provides a better vehicle for incremental *common law* reform at least, than the seemingly untrammelled expansion of vicarious liability which has taken place in the UK.

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 defenceless victims should also be available. The law of vicarious liability, where employment relationships are clear, provides one avenue. Where statute has extended this doctrine to other relationships, that will be helpful. But common law liability will continue to be important for some years to come.

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.

⁷⁹ 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.

⁸⁰ See the discussion in the *Redress Report* at pp 483-493.

⁸¹ Above, n 59, at 564-570.