THE ELLIS DEFENCE
How the catholic church evades liability

By Dr Andrew Morrison RFD SC

The Commonwealth Royal Commission into Institutional Responses to Child Sexual Abuse has heard harrowing and convincing evidence of misconduct by a number of institutions, including the Salvation Army, YMCA, Scouting Australia and the Roman Catholic Church. There are remedies available at common law against all the institutions except the Roman Catholic Church. >>
In the two weeks of testimony devoted to the John Ellis case, there was convincing evidence that the Church had added legal abuse to the sexual abuse suffered by Mr Ellis and that the inappropriate and unjust decisions, including the choice of the Church's lawyers to run a knowingly false case that he was not abused, emanated from Cardinal Pell. The obvious failings and inadequacy of the Towards Healing process have now been explored and Cardinal Pell has agreed to make himself available for evidence in respect of the Victorian equivalent, the Melbourne Process, in a subsequent hearing.

It is to be expected that the Royal Commission will issue interim recommendations in respect of legislative change concerning the liability of the Church for the misconduct of its clergy and others. This article addresses some of the issues arising and anticipates what the recommended response may be.

LIABILITY OF THE ROMAN CATHOLIC CHURCH IN AUSTRALIA

In Trustees of the Roman Catholic Church for the Archdiocese of Sydney v Ellis & Anor, it was held that while all the property of the Church was held by the trustees in each diocese who were incorporated under 1936 NSW legislation, those trustees were not responsible for the conduct of clergy and there was no legal entity available to be sued in respect of that misconduct, apart from the clergy themselves. In this particular case, the clergyman was dead. There was evidence before the Royal Commission that it was unlikely that Catholic Church Insurance would indemnify clergy or any bishop who covered up abuse.

Subsequently, in PAO, BJH, SBM, IDF and TMA v Trustees of the Roman Catholic Church for the Archdiocese of Sydney & Ors, it was affirmed, following the decision in Uttinger v The Trustees of the Hospitalier Order of St John of God Brothers, that while trustees might own the property of schools there was no legal entity available to be sued, at least in respect of non-independent Catholic schools (which educate 18 per cent of all children in Australia).

In the past, the Roman Catholic Church in Australia had treated its trustees as the appropriate body to be sued, but John Ellis and those who came after him were the unfortunate victims of a change of policy consequent upon Cardinal Pell's wish to protect Church finances. In England and Wales, the Church accepts that its trustees are its secular arm and are the appropriate body to be sued. In other jurisdictions, such as Canada, the United States, and Ireland, the Church is treated as a Corporation Sole and thus is liable to be sued as a statutory corporation. That was held not to be available in the Ellis case, and the usual remedies against an unincorporated association were not available because the Church is amorphous and has a membership that cannot readily be determined.

Remarkably, the Catholic Education Office, despite receiving hundreds of millions of dollars in state and commonwealth grants, is itself not a legal entity; and the schools to which the money is paid are also not commonly legal entities capable of being sued. It seems extraordinary that organisations that receive taxpayers' money, employ teachers, make payments to the ATO and clearly owe a duty of care to pupils do not constitute a legal entity capable of being sued for future and past abuse.

At the Royal Commission, Cardinal Pell was asked about the assets of the Church and its capacity to meet common law claims against it. The Archdiocese of Sydney, which has been the principal diocese using the Ellis argument (other bishops have taken a far more Christian view of their obligations) has, according to the evidence, enormous assets and a substantial fund, the earnings of which would alone be sufficient to meet all foreseeable claims.

VICARIOUS LIABILITY

One aspect of the Ellis defence is the question of whether or not the Roman Catholic Church is vicariously liable for its clergy. The Church claims that the clergy are employed by the parish (which lacks a legal entity or financial resources), and it further claims that it is not responsible for criminal actions which are not in the course of employment.

In State of NSW v Lepore, the plaintiff was a seven-year-old pupil in a government school, assaulted by a teacher in a storeroom adjoining a classroom in 1978. The assault had a sexual element. His action against the Department of Education failed at first instance but his appeal to the NSW Court of Appeal was successful on the basis of a non-delegable duty of care. On appeal by the State of NSW to the High Court, it was held that a 'non-delegable duty' did not amount to strict liability. However, relevant findings had not been made at first instance and a re-trial was ordered.

The case was enlivened by recent superior court decisions in Canada and England. In Bazley v Curry and Jacob v Griffiths, the Canadian Supreme Court had expressed the view that the Salmond test for vicarious liability of employers for employee acts did not preclude liability for criminal actions and sexual assaults. The traditional (Salmond) test was that the employer was vicariously liable for employee acts authorised by an employer or unauthorised acts so connected with authorised acts that they may be regarded as modes (albeit improper modes) of doing authorised acts. Thus, employers for more than 100 years have been held liable for thefts by employees from customers. The fundamental question traditionally was whether the wrongful act was sufficiently related to the employer's aims. The Canadian Supreme Court espoused a close connection test, which said that it was relevant whether power, intimacy and vulnerability made it appropriate to extend vicarious liability even for acts that were manifestly criminal. This approach was adopted by the House of Lords in England in Lister & Ors v Hasley Hall Ltd, where the plaintiffs were residents at a school for boys with emotional and behavioural difficulties. The defendant employed a warden who routinely sexually abused the boys. Overturning the Court of Appeal decision below, the House of Lords unanimously held that the plaintiff should succeed, applying the close connection test, and found the defendant vicariously liable for the acts of criminal and sexual assault by its employee.
In *Lepore* in the High Court, Gleeson CJ referred to the sufficient connection test. Where there is a high degree of power and intimacy to commit sexual abuse, this may provide a sufficient connection between the sexual assault and the employment to make it just to treat such contact as occurring in the course of employment.  

Gaudron J held that where there is a close connection between what was done and what that person was engaged to do, vicarious liability might arise and an employer may be estopped from denying liability for deliberate criminal acts of an employee. McHugh J took the approach of the majority in the Court of Appeal that a non-delegable duty meant strict liability. Kirby J agreed with the approaches in Canada and the United Kingdom and would have found for the plaintiff on the basis of vicarious liability on the close connection test. Gummow, Hayne and Callinan JJ would not extend vicarious liability to deliberate criminal acts, but Gummow and Hayne JJ agreed with the majority that a re-trial was required.

Accordingly, there was a majority of 4:3 for the proposition that the plaintiff could succeed in respect of criminal acts, but no clear agreement as to why. The action was sent back for re-trial but ultimately settled on satisfactory terms.

In *Trustees of the Roman Catholic Church for the Diocese of Sydney and Pell v John Ellis*, the NSW Court of Appeal held that there was no legal entity capable of being sued and that, because priests are not employees, there can be no vicarious liability. The High Court refused special leave to appeal.

Overseas, however, the law has moved on. In a 2010 case in the UK, *Maga v The Trustees of the Birmingham Archdiocese of the Roman Catholic Church*, the plaintiff had been sexually abused by Father Clonan in 1975 and 1976 when he was aged 12 or 13. The claimant's father complained to another priest and the Archdiocese was ultimately found negligent in not pursuing the matter. However, at first instance it was held that the Archdiocese owed the claimant no duty of care and was not vicariously liable for Father Clonan's sexual abuse of the claimant.

On appeal, Lord Neuberger MR in the Court of Appeal upheld the trial judge's finding that the claimant was not out of time to sue, and he held that the finding of sexual abuse was supported by the evidence. He followed the close connection test of the House of Lords in *Lister*, which meant the wrongful conduct may fairly and properly be regarded as having been done in the ordinary course of the employee's employment. This was so, even though the claimant was not himself a Roman Catholic, because Father Clonan had obtained access to him through his clerical garb and youth work. Vicarious liability was therefore established. Longmore and Smith LJ, also applying the close connection test, agreed.

In *JGE v The English Province of Our Lady of Charity and The Trustees of the Portsmouth Roman Catholic Diocesan Trust*, the preliminary issue was whether the trustees of the Roman Catholic Church could be liable to the plaintiff for sexual abuse and rape by a Roman Catholic clergyman now deceased. This occurred between 1970 and 1972 when the plaintiff was a young child in a children's home run by an arm of the Church in Hampshire. The defendant contended that the clergyman was not its employee and the relationship was not akin to employment. It argued that the action should be struck out because vicarious liability could not arise. Significantly, however, the Roman Catholic Church in England and Wales accepted that its trustees stood in the shoes of the bishop for present purposes, and that for the purposes of litigation its trustees holding its property were its secular arm and were a proper defendant if vicarious liability arose. MacDuff J noted the test for vicarious liability had changed to give precedence to function over form and that the old approach in *Trotman v North Yorkshire County Council* was no longer the law. Vicarious liability does not depend on whether employment is technically made out. It is true that the relationship between the Church and priests contains significant differences from the normal employer/employee relationship. These differences include the lack of the right to dismiss, little by way of control or supervision, no wages and no formal contract. However, MacDuff J noted that the Canadian Supreme Court, in *Doe v Bennett & Ors*, held a bishop vicariously liable for the actions of a priest who had sexually abused boys within his parish. Employment was not conceded, but the priest had taken a vow of obedience to the bishop and the bishop exercised extensive control over the priest, including the power of assignment, the power of removal and the power to discipline him. In these circumstances, the Court held that the relationship was 'akin to employment' and sufficient to make the bishop vicariously liable.
In England and Wales the Church accepted that its Trustees holding its property were its secular arm and were a proper defendant if vicarious liability arose.

vicariously liable. MacDuff J dismissed the strike-out application.

On appeal to the English Court of Appeal, Ward LJ referred to NSW v Lepore. In his view, applying the organisation test, the priest was part of the Church’s organisation and wholly integrated into the organisational structure of the Church’s enterprise. The priest was not an independent contractor and was more like an employee. He concluded the defendants were vicariously liable for misconduct, including criminal misconduct by a priest. Davis LJ took a similar view, Tomlinson LJ dissenting. The defendants were refused leave to appeal to the Supreme Court (replacing the House of Lords) because another case was about to deal with these issues.

That case was The Catholic Child Welfare Society & Ors (Appellants) v Various Claimants (FC) and The Institute of the Brothers of the Christian Schools & Ors (Respondents). At issue was who, if anyone, was liable for a large number of alleged acts of sexual and physical abuse of children at a residential institution for boys in need of care. The institution had been operated originally by the De La Salle Institute, known as Brothers of the Christian Schools, and operating as St William’s School. The appeal to the English Supreme Court required a review of the principles of vicarious liability in the context of sexual abuse of children. The claims were brought by 170 men in respect of abuse between 1958 and 1992. The Middlesbrough defendants had taken over the management of the school in 1973, inheriting the previous liabilities. They used a De La Salle brother as headmaster and contracted four brothers as employee teachers. The Middlesbrough defendants were held vicariously liable for the acts of abuse by those teachers, and this was not challenged on appeal. However, the Middlesbrough defendants challenged the findings below that the De La Salle order was not vicariously liable for the actions of its brothers and therefore liable to contribute in damages. The Middlesbrough defendants’ appeal seeking contribution had been rejected in the Court of Appeal, but leave was granted to appeal to the Supreme Court.

Lord Phillips (with whom the other members of the Court agreed), noted the views on vicarious liability expressed in the Court of Appeal in JGE and the impressive leading judgment of Ward LJ. The following propositions were said by Lord Phillips to be well established:

- It is possible for an unincorporated association to be vicariously liable for the tortious acts of its members.
- One defendant may be vicariously liable for the tortious act of another defendant, even though the act in question constitutes a violation of the duty owed and even if the act in question is a criminal offence.
- Vicarious liability can even extend to liability for a criminal act of sexual assault (Lister v Hesley Hall).
- It is possible for two different defendants to each be vicariously liable for the single tortious act of another defendant. [Note, however, that in NSW, the Court of Appeal, without reference to the English Supreme Court decision, said in Day v The Ocean Beach Hotel Shell Harbour Pty Ltd that dual vicariously liability is not permissible at law.]

There were two issues before the Supreme Court. The first was whether the relationship between the De La Salle Institute and the brothers teaching at St William’s was capable of giving rise to vicarious liability. The second was whether the alleged acts of sexual abuse were connected to that relationship in such a way as to give rise to vicarious liability.

While it was relevant that the brothers who taught at the school were not contractually employed by the De La Salle Institute but rather by the Middlesbrough defendants, this did not preclude the De La Salle order being vicariously liable. As in JGE, the relationship was so close in character to one of employer/employee that it was just and fair to hold the employer vicariously liable. The relationship between teaching brothers and the Institute had many of the elements, and all the essential elements, of the relationship between employer and employee. It was relevant that the brothers passed on their wages to the De La Salle Institute and were there to promote the purposes of the De La Salle Institute.

Lord Phillips then turned to the argument that sexual abuse can never be a negligent way of performing duties under an employment-like relationship. He referred to JGE, Maga and NSW v Lepore (where the majority in the High Court left such liability open) although he described the four different sets of reasons in the majority as having ‘shown a bewildering variety of analysis’. He also referred to the Canadian decisions of Bazley v Curry, Jacobi v Griffiths and John Doe v Bennett, as well as the House of Lords in Lister v Hesley Hall and other cases. Surprisingly, he did not mention the NSW Court of Appeal decision in Ellis.

Lord Phillips (with the concurrence of the balance of the Supreme Court) said:

‘Vicarious liability is imposed where a defendant, whose relationship with the abuser put it in a position to use the abuser to carry on its business or to further its own interests, has done so in a manner which has created or significantly enhanced the risk that the victim or victims would suffer the relevant abuse. The essential closeness of connection between the relationship between the defendant and the tortfeasor and the acts of abuse thus involves a strong causative link.

These are the criteria that establish the necessary “close connection” between the relationship and abuse.'
In NSW, however, in PAO, BJH, SBM, IDF and TMA v Trustees of the Roman Catholic Church for the Archdiocese of Sydney & Ors, Hoben J held that the Sydney Archdiocese Trustees were not responsible for the Patrician Brothers Primary School Granville, whose property they held when the plaintiffs were sexually assaulted by a brother who was teaching at the school. All five claims were struck out.

So we see that in England, Canada, Ireland and the United States, the Roman Catholic Church has accepted or been held liable through its trustees for the criminal misconduct of priests or teachers. Only in Australia has a contrary view been taken in the Ellis decision (followed in the PAO decision). Those decisions sit ill with the views expressed in Lepore and are at odds with the rest of the common law world.

THE REMEDY

On 13 November 2013, the ‘Betrayal of Trust’ report of the Victorian Legislative Council Family and Community Development Committee was released. In it, the Committee recommended important civil law reforms, including:
- requiring all churches to have incorporated legal status so they can be sued;
- making churches vicariously liable for their personnel (including clergy and teachers); and
- removing the limitation period, which restricts access to justice. In NSW, a private member’s bill, the Roman Catholic Church Property Amendment (Justice for Victims) Bill 2014, has now undergone its Second Reading Speech in the Legislative Council. If passed, that legislation would have the effect of making an authority such as the trustees in each diocese vicariously liable for the actions of priests, teachers and others, and it would open a two-year window during which the limitation periods applicable in NSW would be suspended.

NON-DELEGABLE DUTIES

In State of NSW v Lepore, the view was expressed by the majority of judges that ‘non-delegable’ does not mean strict liability. In other words, the ‘non-delegable’ duty of care owed in respect of an employee is in fact delegable. That leads inevitably to the question: what content is there in such a duty?

In Lepore, it was said that the duty was only to take reasonable steps when delegating responsibility to others. However, the English Supreme Court in Woodland v Essex County Council held that where an organisation delegated part of its own duties, it could not avoid liability merely because it had no reason to suppose the delegate would abuse its trust. This was a case involving a school swimming activity, where poor supervision by staff at the local swimming pool meant that a child was found oxygen-deprived and permanently injured at the bottom of a pool.

This comes down ultimately to whether or not the activity delegated was part of the fundamental duties of the institution. There might thus be a distinction between simply facilitating children going to the local swimming pool and taking them there as part of a structured regime of instruction during school hours.

My view is that this is a question that requires reconsideration by the High Court in due course.

INSURANCE

The Victorian Legislative Council Committee Inquiry has made recommendations in respect of insurance and the matter is a live question before the Commonwealth Royal Commission. The matter is far from straightforward. Some organisations such as local junior sporting teams may find insurance too expensive to obtain. There was evidence before the Commonwealth Royal Commission in relation to the Ellis matter that Catholic Church Insurance might well decline indemnity in respect of criminal misconduct, whether by clergy or even by their supervising bishops. Obtaining insurance for criminal misconduct might be very difficult.

Thus, while insurance is sensible in theory, it is a very difficult challenge to make it useful or effective without precluding many socially desirable activities.

LIMITATION ACT 1969

The Victorian Legislative Council Committee recommended a lifting of the limitation period in that state, and the private member’s bill before the NSW Legislative Council provides for a two-year moratorium to permit old claims to be brought forward.

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FOCUS ON CHILDREN AND THE LAW

The lack of accountability of the Catholic Church was also highlighted in the May 2014 findings of the Special Commission of Inquiry into matters relating to the police investigation of certain child sexual abuse allegations in the Catholic Diocese of Maitland-Newcastle. The Special Commission of Inquiry found that a priest, Denis McAlinden, had sexually abused a substantial number of children and that Father Brian Lucas, General Secretary to the Australian Bishops Council (a senior and influential post) was aware of this but failed to report it to police. The failure by Lucas to report known sexual abuse to police has been complemented by the failure of the Special Commission to refer Lucas to the Director of Public Prosecution for consideration of prosecution.

Whether falling within the pre-1990 offence of misprision of felony or its post-1990 equivalent, s316 of the NSW Crimes Act, the Special Commission's findings of serious criminal offence, knowledge of the commission of such offences and failure to report to police meet all but one of the criteria for consideration of prosecution.

As the Special Commission of Inquiry found at [13.19] of its report:

There is sufficient evidence of each of the first three elements of the offence under Section 316 of the Crimes Act!

Why then, did the Special Commission of Inquiry not refer the Lucas case to the DPP? The answer given at [13.21] was that it was likely that in any potential future criminal proceedings, Lucas would be sufficiently able to raise the issue of 'reasonable excuse' on the basis that a witness to whom he spoke, AJ, did not want the matter reported to the police. However, AJ gave evidence to the Commission that:

'Father Lucas never asked me at any time if I wanted to take my complaint to the police. Equally I never raised it either, but then again I never got the chance with him, he just wanted the facts. It was a short three to five minute phone call.'

One would have thought that it would be a matter for a jury to decide whether the alleged reasonable excuse was available in these circumstances.

The same applies in respect of another witness, AL, with whom Lucas did not speak but about whom he was told by Sister Paula Redgrove. However, there was no direct evidence before the Commission from that witness.

The most serious and critical piece of information, however, is that Lucas met with McAlinden in February 1993 and, while he lacks a recollection and kept no notes (which was also the case in the Father F matter), the Special Commission of Inquiry found:

'... there is reliable evidence confirming that at the meeting McAlinden made admissions of having sexually abused children. Consistent with his stated practice, Lucas reported those admissions to Clarke.'

Why did not the Special Commission of Inquiry consider whether McAlinden's admissions to him were of themselves sufficient evidence to justify going straight to the police and that in respect of them, there was and could be no reasonable excuse for failing to do so?

In other words, there was a strong prima facie case for prosecution under s316 of the Crimes Act of Father Brian Lucas. This evidence did not require any witnesses to go to the police, though no doubt the police would have wished to interview some of the victims.

The Special Commission of Inquiry found that:

'From 1993 onwards, Lucas possessed information, including admissions of sexually abusing children, that would have been of interest to the police and would have facilitated a police investigation of McAlinden. Lucas failed to report McAlinden to the police. He should have done so in 1993, as should have the diocese.'

In respect of the knowledge which came directly from McAlinden, there is no obvious reasonable excuse and the Special Commission of Inquiry does not offer one. Nor does it give any basis for not referring his case to the DPP.

The Special Commission of Inquiry found, at [1.69] of its report, that Father Lucas, supported by the diocese, failed to have proper regard to the continuing risk McAlinden posed to children:

'In their conduct in connection with McAlinden in 1993, Lucas and the diocese failed to have proper regard to what should have been the overriding consideration – the protection of children.'

The Special Commission of Inquiry stands condemned for not referring Father Lucas to the DPP. The Attorney-General should do so forthwith.
begin'. This was based on a large number of interviews with victims.

The Commonwealth Royal Commission will have to deal with a bewildering variety of limitation regimes in the different states and territories. It may recommend a single regime in respect of child sexual abuse or more generally, or a moratorium to permit old claims to be brought forward.

In NSW at the moment, there are a variety of bases on which an extension of time can be sought, but the relevant limitation regime is that of the state or territory where the abuse occurred. See, for example, Graham Rundle v The Salvation Army (South Australia) Property Trust and Keith Ellis and Salvation Army (South Australia) Property Trust v Graham Rundle, where the NSW Court of Appeal affirmed an extension of time under the relatively liberal South Australian limitation regime for sexual abuse in a Salvation Army home in South Australia in the early 1960s.

This is yet another area of the law crying out for standardisation and liberalisation.

CONCLUSION

In my view, the approach likely to be recommended by the Commonwealth Royal Commission will incorporate the recommendations of the Victorian Legislative Council Committee:

• requiring all churches to have incorporated legal status so they can be sued;
• making churches vicariously liable for their personnel (including clergy and teachers); and
• removing the limitation period which restricts access to justice.

A national approach need not be awaited. Every state and territory has its own legislation in respect of the Roman Catholic Church, each of which will need to be individually and differently amended to achieve these outcomes.

The sooner the states and territories undertake this important task, so that one church and one church alone cannot evade its obligations and duty, the better.

In addition to this, careful consideration should be given to some form of insurance, taking into account the significant difficulties of this for some smaller organisations. And given the attitude of many insurers, the provision of insurance cover for criminal conduct may require legislative change.

Notes:

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