Neutral Citation Number: [2012] EWCA Civ 938

Case No: B3/2011/3210

IN THE COURT OF APPEAL (CIVIL DIVISION)
ON APPEAL FROM HIGH COURT OF JUSTICE
QUEEN'S BENCH DIVISION
MR JUSTICE MACDUFF
HQ09 CX03679

Royal Courts of Justice
Strand, London, WC2A 2LL

Date: 12/07/2012

Before:

LORD JUSTICE WARD
LORD JUSTICE TOMLINSON
and
LORD JUSTICE DAVIS

- -

Between:

JGE	Respondent
- and -	
The Trustees of the Portsmouth Roman Catholic Diocesan Trust	Appellant

- -
- -

Lord Faulks QC and Mr Nicholas Fewtrell (instructed by CCIA Services Ltd) for the appellant
Miss Elizabeth-Anne Gumbel QC and Mr Justin Levinson (instructed by Emmott Snell & Co) for the respondent

Hearing date: 17th May 2012

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Approved Judgment

Lord Justice Ward:

1. This appeal gives rise to a troublesome question of vicarious liability. The preliminary issue which falls for decision is "whether in law the second defendant [the Trustees of the Portsmouth Roman Catholic Diocesan Trust] may be vicariously liable for the alleged torts of Father Baldwin", a parish priest in the diocese. On 8th November 2011 Mr Justice MacDuff determined that issue in favour of the claimant.

The background

2. The claimant, who should remain anonymous, was born on 20th November 1963 so she is now 48 years of age. In May 1970 when she was 6 ½ years old, she was placed in a children's home run by the nuns of a convent which was subject to the direction and control of the English Province of Our Lady of Charity, the first named defendant. There she remained for two years before being returned to her mother. The particulars of claim allege that whilst she was there she was beaten by the nun in charge of the home and she claims damages from the Sisters of Charity.

3. The particulars of claim also allege that the second defendants "operated and/or managed and/or were responsible for" a church in the diocese and that "at all material times Father Wilfred Baldwin was the parish priest at the church" and that "accordingly Father Baldwin was in the service of the second defendants and subject to their direction and control." It is said that Father Baldwin was regularly invited or permitted by the nuns to visit the children's home and did so in the course of his duties as a priest for the second defendants. Whilst a resident at the home the claimant was a parishioner of the church. It is then alleged that she was sexually abused and assaulted by Father Baldwin forcing the claimant to perform oral sex on him and masturbate him. Father Baldwin also allegedly performed sexual acts on the claimant and raped her many times, including on the day of her first holy communion when Father Baldwin raped the claimant in the robing room at the church after conducting the service. The particulars of claim allege that the second defendants entrusted the safe keeping and care of the claimant to Father Baldwin, delegated those tasks to him and undertook their care and safekeeping of the claimant through the services of Father Baldwin. But, and this is the important allegation for present purposes, it is also alleged that the sexual abuse and assaults perpetrated by Father Baldwin were committed in the course of or were closely connected with Father Baldwin's employment/duties and that, in the premises, the second defendants are vicariously liable for the sexual abuse by Father Baldwin and for the injury and damage which the claimant suffered as a result.

4. In fairness to the second defendants I should set out their defence. Although it is admitted that the parish church was a part of the Roman Catholic Diocese of Portsmouth, the second defendants deny that they ever managed, operated or were responsible for the church, the responsibility resting at all material times with the parish priest. It is denied, moreover, that Father Baldwin was at the material time the parish priest at the church for he did not assume that office until in or around September 1972, some months after the claimant had left the children's home. The second defendants say that at the material time Father Baldwin was in fact working as the Vocations Director in an altogether different part of the diocese. Their case is that:

> "Neither they nor the incumbent bishop had any power to remove Father Baldwin from the priesthood, any power to move or remove Father Baldwin from his office against his will other than in accordance with the process set out in the Code of Canon Law (which requires proof of a grave cause under canon law) nor any power to give directions as to how that office was to be carried out as the requirements appertaining to any particular office are set out in the universal and particular canon law applying to the office concerned. The Second Defendants and/or the incumbent bishop could only issue guidelines for the whole Diocese through Episcopal decrees (usually promulgated through letters sent to all the clergy) and only exercised oversight or vigilance as to how universal and particular canon laws were being carried out in each parish and how far each priest was fulfilling responsibilities of office through periodic visitation of each parish (specified in canon law as being at least once every five years)."

Thus it is denied that Father Baldwin was in the service of the second defendants: he was at all times following his vocation and calling as a priest. It is denied that he abused or assaulted the claimant as alleged or at all. Relevantly to this appeal, it is denied that the second defendants are vicariously liable for the acts or omissions of priests in the diocese: a priest is the holder of an office not an employee of the second defendant.

5. The case was virtually ready for trial when a case management conference was fixed before Master Eyre. By then there was another case also managed by Master Eyre where the Roman Catholic Church was alleged to be responsible for the acts of one of its parish priests. Sadly for the Church there have been other occasions when the Church has had to answer for assaults committed by its clergy. Hitherto the Church's responsibility for the actions of its priests was challenged on the basis only that the acts were outside the scope of the "employment" of the priest. This case, and the other one that was before Master Eyre, are apparently the first in which the first stage of vicarious liability is challenged, namely whether the relationship between the priest and the Church (I use the word "Church" loosely) is such that the principle of vicarious liability may attach if the tortious acts of the priest were within the scope of the relationship. Lord Faulks QC wishes it to be plainly understood that in raising this new defence, the Church does not in any way at all condone any misconduct by their priests: on the contrary any sexual abuse is regarded as an abhorrence. Master Eyre considered this merited the trial of a preliminary issue and so he ordered in the terms set out at [1] above. The first defendant has played no part in the trial of that preliminary issue.

6. I am far from convinced that trying a preliminary issue is the best way to deal with questions of this sort. Since both stage 1 and stage 2 are fact sensitive and since, per Hughes LJ in *Various Claimants v The Catholic Child Welfare Society and the Institute of Brothers of the Christian Schools & ors* [2010] EWCA Civ 1106 at [37], "It is a judgment upon a synthesis of the two which is required", it would have been far better to have dealt with the two stages together. The nature of the relationship between the bishop and the priest must have some effect on the ambit of the acts

which are within the scope of that relationship. There is on the pleadings the unresolved dispute as to whether Father Baldwin was the parish priest at the time the assaults were alleged to have been carried out, the defendants alleging he was deployed elsewhere in the parish, and although the parties are keen for this judgment to cover his position both as a priest and as the vocations director, I am reluctant to assume that they are in the same position. The evidence is silent as to the relationship between the bishop and his vocations director; we know little about what exactly the vocations director is appointed to do and for my part I confine myself to the terms of the issue as defined by the Master and by the pleadings. Others will have to decide if and when the question arises whether this judgment is capable of establishing that the bishop is "never, never" free of responsibility as opposed to "well then, hardly ever" (with apologies to the right good Captain of HMS Pinafore).

7. The Reverend Stephen Morgan gave evidence on the second defendants' behalf. He was the head of the department for Finance and Property at the Diocese of Portsmouth and the secretary to the Diocesan Trustees and Finance Council. He explained that the Diocese of Portsmouth (which is one of 22 in England and Wales) covers the counties of Berkshire, Hampshire, the Isle of Wight, part of Dorset and the Channel Islands. There are 96 parishes in the diocese, with about 400 souls in each parish. Bishop Derek Worlock, later the Archbishop of Liverpool, was the bishop at the material time. He died in February 1996. Father Baldwin is also deceased. The bishop customarily invited the priests he needed to move to a meeting at which he informed of them of their new appointment. The priest was able to decline to take up that appointment. When the moves were agreed the clergy would be informed but no formal letters of appointment were sent and there were no terms and conditions other than those imposed by the Church's canon law. An announcement would be made by the bishop to the whole diocese by way of a letter *Ad Clerum*. Priests did not receive a stipend or indeed any financial support from the diocese. Parishes were responsible for generating their own income to support their parish priest. A parish's income comprised almost always exclusively the charitable donations collected at Mass. Those monies were paid into a "parish account" which the parish priest was responsible for maintaining. He would withdraw funds from that parish account to pay for his basic living expenses which would be determined by each priest according to his own needs. For tax purposes priests have at all material times been considered to be office holders and have not been subject to the PAYE regime for income tax.

8. Since the canon law was material, each side took expert advice. Monsignor Gordon Read, Chancellor of the Roman Catholic Diocese of Brentwood and Judicial Vicar there since 1986, gave evidence for the second defendants and Dr Helen Costigane, a lecturer at Heythrop College, University of London, was called for the claimant. There was broad agreement between them. The Code of Canon Law promulgated in 1917 was the Code in force at the material times. As for the structure of the Roman Catholic Church, bishops are appointed by the Pope who, as Bishop of Rome, shares orders as bishop. Bishops are ultimately responsible to the Pope though they have full independent authority over their own dioceses. They are not delegates of the Pope. The diocese comprises the people within a defined territory who have been entrusted to the care of a bishop as pastor. Since the law of England and Wales does not recognise the Catholic Church as a legal entity in its own right, but sees it as an unincorporated association with no legal personality, the diocese usually establishes a charitable trust to enable it to own and manage property and otherwise conduct its

financial affairs in accordance with domestic law. The defendant Trust is such a charity. Each parish is in canon law a separate legal entity so that, for example, any property belongs to the parish rather than the diocese. In canon law the position of parish priest is an ecclesiastical office which is of its nature perpetual and to which successive individuals are appointed. The effect is that subject to the oversight of the bishop, and any diocesan laws and regulations, the responsibility for running a parish rests on the parish priest. He is not a delegate of the bishop and does not receive instructions from him on how to run the parish. The bishop exercises oversight through periodic visitation of the parish which should be at least once every five years. It is possible for the bishop to transfer a priest from the parish against his will should the circumstances so require but only by carrying out the process set out in the Code of Canon Law. Thus the bishop may lawfully remove any parish priest from his parish whenever his ministry suffers injury, even without grave fault on his part, or is rendered ineffective by reason of any of the causes recognised in law or for any other similar reason. The procedure for the removal of a parish priest must be followed. That process in effect allows the parish priest to have recourse to the Congregation for the Clergy in Rome if dissatisfied with the decision the bishop. The day to day responsibilities of the parish priest are to reside in the parochial house, celebrate the divine services, minister to the sick and those close to death and "watch with diligence lest anything contrary to faith or morals is passed on in his parish, especially in public and private schools". As for the relationship between the bishop and the priest, while the priest owes his bishop reverence and obedience, he exercises his ministry as a co-operator and collaborator rather than someone who is subject to the control of his superior as would be the case in the employment field. They agreed that while there are penalties prescribed by canon law and while those are not akin to those seen in situations of managerial supervision in secular employment, they would have to leave it to the court to decide to what extent these may be interpreted in terms of "close supervision" or "control".

9. When cross-examined Dr Costigane said:

> "There is no direct control in the sense the bishop is checking what a priest does every single day, but there is a level of control in the sense that if certain things don't happen then action could be taken or, for example, if he starts reading out the Koran instead of the Bible, there would be an issue there, I think. So in terms of levels of control I think it is a question of understanding what is meant by "control" in terms of direction. I would say, that is the key; and also "vigilance" as well."

She agreed with Lord Faulks QC for the defendants that there was a process to follow if the bishop wished to dismiss a priest or remove him:

> "Q. You cannot just go through and say, as it were, "I am terminating your office", there is a strict procedure?
>
> A. There is a procedure, yes.
>
> Q. And that is dealt with in a little more detail by Monsignor Read, and I think you accept he is right about that?

A. Yes.

Q. And there has to be grave cause, I think?

A. Yes."

10. Monsignor Read told the court that:

> "To remove someone from the office of parish priest there is a set procedure set out in the Code of Canon Law, both in the 1917 Code and the present Code. Basically that involves the Bishop having sufficient cause to remove a priest. It does not necessarily imply fault, it might be for health reasons that the priest is unwilling to acknowledge. He will ask him to resign, and if he declined then he would weigh the matter with two assessors who are appointed for that purpose. If he was minded to persevere in asking the priest to resign then he would do so, he would invite the priest to submit his reasons for not resigning and any evidence that he might wish to produce in favour of his argument and he would then, once again, weigh the matter with the two assessors. If he were determined to remove the priest at that point then he would issue a decree to that effect, but the priest concerned would have the right of recourse to Rome against his decision."

He repeated his written opinion that:

> "Neither the bishop nor the priest would regard their relationship as having legal consequences or as one that would be adjudicated by the civil courts. The means of financial support provided for a parish priest is largely dependent on the free will offerings of the faithful. In a poor parish he may well have little disposable income or even go hungry. The office of parish priest is in the gift of the bishop and is not something that is advertised or can be applied for. The priest is not free to choose where to go but must accept the direction he is given. On the other hand, once he has been appointed he has great freedom in how he carries out the responsibilities attached to his office. …
>
> Of course it is for the court to decide whether at the material time Fr Baldwin was parish priest of …, but for the reasons I have given my opinion is that in terms of Roman Catholic canon law, belief and practice, Fr Baldwin's relationship with the bishop or the Trustees of the Diocese of Portsmouth would not be considered that of an employee but rather that of the holder of an ecclesiastical office as described in the 1917 Code of Canon Law."

11. Cross-examined by Mr Levinson for the claimant, he agreed that all clerics but especially presbyters (priests) are bound by a special obligation to show reverence and

obedience to their own Ordinary (bishop) and that was not a toothless obligation because as set out at Canon 2331:

> "Whoever pertinaciously does not obey the Roman pontiff or a proper Ordinary or other competent authority shall be punished with appropriate penalties."

When he wrote in his written opinion that the diocesan bishop exercised no direct control over the way in which parish priests fulfil their office, he meant by "direct" that "he (the bishop) would not give detailed instructions as how they were to exercise the role of parish priest to them as individuals but rather issue norms through the *Ad Clerum* to the clergy as a whole, as particular policy or things of that kind. If it came to the bishop's attention that a priest was in breach of ecclesiastical law, he would have the right and duty to take action."

The judgment

12. Accepting that vicarious liability involved the synthesis of two elements, stage 1 being the relationship between the employer and the employee and stage 2 being whether the act was within the scope of the employment, MacDuff J. considered that he had to look at the way the law had developed in both areas and that the reasoning behind decisions at stage 2 were "entirely relevant to stage 1." That analysis showed that the test which has emerged at stage 2 is whether the employee's torts were so closely connected with his employment that it would be just and fair to hold the employer vicariously liable.

13. As for stage 1, he recorded Lord Faulks QC's concession on the second defendants' behalf that vicarious liability can be founded on a relationship other than employment. Thus the argument before him centred on whether the relationship here was "akin to employment".

14. He found the following matters to be uncontroversial:

> "29 (i) Within the Diocese of Portsmouth, priests are informed of their appointments verbally; these are then announced "*Ad Clerum*" in a circular letter sent out to the clergy. There are no terms and conditions other than those derived from canon law. Vacancies are not advertised and there is no form of contract, no offer and acceptance, and no terms and conditions. The appointment is subject only to the provisions of canon law.
>
> (ii) There is effectively no control over priests once appointed. Within the bounds of canon law, a priest is free to conduct his ministry as he sees fit, with little or no interference from the bishop, whose role is advisory not supervisory. A bishop has a duty of vigilance but is not in a position to make requirements or give directions. Although I was told that a parish visit would be every five years, it could have been more frequent. The bishop has no power of dismissal. Dismissal from office would have to be effected through the Church in Rome.

> (iii) At the time of these events, priests did not receive any financial support from the Diocese. Each parish was responsible for generating sufficient income to support its parish priest. Remuneration came mainly from the collection plate. The priest would withdraw the funds required to pay for his basic living expenses. There was no fixed amount payable and the priest would take what he decided was appropriate. Father Baldwin was considered to be an office holder by the Inland Revenue and was so treated for income tax and national insurance purposes.
>
> (iv) There is a joint statement of the canon law experts; and there is little between them. Within each diocese is a bishop whose appointment is from Rome. The bishop appoints a priest to each parish within the diocese. The bishop must exercise Episcopal vigilance. There is clearly some element of control within this, although there is nothing in the way of penalty or enforcement; the purpose is to oversee and advise. The bishop may redeploy the priest in another parish if the latter consents.
>
> (v) There are a number of differences between the relationship and a standard contract of employment. The priest owes the bishop reverence and obedience but he exercises his ministry as a co-operator and collaborator rather than as someone who is subject to the control of his superiors. There are various requirements made of the priest by canon law with provisions as to prescribed penalties; but the experts agree that "*these are not akin to those seen in situations of managerial supervision in secular employment*". Matters such as duties, financial support and time away from the parish are left to the general provisions of canon law.
>
> (vi) It seems to me clear that – as Lord Faulks QC submitted – a bishop and priest would not regard their relationship as being one that could be adjudicated upon by the civil courts; and Father Baldwin would have been considered as the holder of office rather than an employee of the defendants."

15. As to whether this was an employment relationship, he held:

> "30. In so far as the defendants submit that this relationship differed from employment in a number of ways, I am able to agree. There are many significant differences; lack of the right to dismiss; little by way of control or supervision; no wages and no formal contract.
>
> 31. I have to determine whether the vicarious responsibility may attach to the relationship between Father Baldwin and the defendants notwithstanding that it was a relationship which differed in significant respects from a relationship of employer and employee. …"

16. Then he considered *Doe v Bennett & ors* [2004] ISCR 436, a decision of the Supreme Court of Canada, and decided:

> "34. I have no hesitation in adopting that approach [the approach set out in paragraph 20 of the judgment of McLachlin CJ in *Doe*]. There is a "close connection test" at both stage 1 and stage 2. At stage 2 the close connection is between the tortious act and the purpose and nature of the employment/appointment. At stage 1 the closeness of the connection is between "*the tortfeasor and the person against whom liability is sought*". …
>
> 35. … There are, it seems to me, crucial features which should be recognised. Father Baldwin was appointed by and on behalf of the Defendants. He was so appointed in order to their work; to undertake the ministry on behalf of the defendants for the benefit of the Church. He was given full authority of the defendants to fulfil that role. He was provided with the premises, the pulpit and the clerical robes. He was directed into the community with the full authority and was given free reign to act as representative of the Church. He had been trained and ordained for that purpose. He had immense power handed to him by the defendants. It was they who appointed him to the position of trust which (if the allegations be proved) he so abused.
>
> 36. Why, one may ask, does it matter that some of the features of a classic contract of employment do not apply here? What is the relevance to the concept of vicarious liability, for example of the lack of a formal agreement with terms and conditions; or of the manner of remuneration; or of the understanding that the relationship was not subject to adjudication by the secular courts? Those features may have relevance in a different context, but not to the question of whether, in justice, the defendant should be responsible for the tortious acts of the man appointed and authorised by them to act on their behalf."

17. Thus he concluded that it was "the nature and closeness of the relationship which is the test at stage 1". He said:

> "42. Of particular relevance to stage one will be the nature and purpose of the relationship: whether tools, equipment, uniform or premises were provided to assist the performance of the role; the extent to which the one party has been authorised or empowered to act on behalf of the other; the extent to which the tortfeasor may reasonably be perceived as acting on behalf of the authoriser. This is not an exhaustive list. Every case will be fact specific and other factors will become apparent as and when they occur. The extent to which there is control, supervision, advice and support will be of relevance but not determinative. Where the tortfeasor's actions are within the

> control and supervision of the third party, the relationship will be the closer. Control is just one of the many factors which will assist a judge to the just determination of the question. That question will be whether on the facts before the court, it is just and fair for the defendant to be responsible for the acts of the tortfeasor – not in some abstract sense, but following a close scrutiny of (i) the connection and relationship between the two parties and (ii) the connection between the tortious act and the purpose of the relationship/employment/appointment.
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> 43. In this case, the empowerment and the granting of authority to Father Baldwin to pursue the activity on behalf of the enterprise are the major factors. In my judgment, whether or not the relationship may be regarded as "*akin to employment*" the principal features of the relationship dictate that the Defendants should be held responsible for the actions which they initiated by the appointment and all that went with it. Accordingly, this preliminary issue is determined in favour of the Claimant."

Discussion

Introduction

18. I start with a problem that troubles me. Who is the real defendant? There was some understandable confusion about whom to sue and the claimant's solicitors sought clarification from the second defendants' solicitors. It was agreed that the Trustees of the Portsmouth Roman Catholic Diocesan Trust be named as nominal defendants for the Roman Catholic Bishop of Portsmouth who, at the material times between 1970 and 1972 was the late Derek Worlock, and/or the trustees in office at that time whose identity was unknown when the claim was brought. The case has proceeded effectively against the Bishop though it is the trustees who will be covered by the relevant insurance should liability be established. Intuitively one would think that, as a priest is always said to be "a servant of God", the Roman Catholic Church itself would be the responsible defendant. But the Church has no legal personality and cannot be party. I shall therefore concentrate on the Bishop. The central question for decision is whether the bishop employed Father Baldwin and, if not, was the relationship between them akin to employment.

Vicarious liability – its origins and its ordinary application

19. Although in his interesting article *A Theory of Vicarious Liability* (2005) Alberta L.R 1, p.2, J.W. Nevers introduces his paper saying, "Vicarious liability occupies a mysterious place in the common law", it remains firmly entrenched in tort law despite speculation about the need for some rationalisation and reform. It imposes liability on D (the Defendant) to compensate C (the Claimant) for the damage suffered by C caused by the negligent or other tortious act of A (the Actor) even though D is not personally at fault at all. It is thus a form of strict liability. That may seem harsh on D. As O.W. Holmes observed (5 Harv. L. R 1, 14): "I assume that common sense is opposed to making one man pay for another man's wrong, unless he actually has brought the wrong to pass according to the ordinary canons of legal responsibility."

That view may account for the alternative theory (for which there is some academic support and which may be gaining ground) for fixing D with personal liability by extending the range of non-delegable duties for which he is responsible. So how did this apparently unjust rule develop and, more importantly, what is the ambit of the rule today?

20. Although Pollock claims to have been the first to coin the phrase (see *Pollock-Holmes Letters,* vol i, p. 333), its origins are buried deep in the medieval law. It seems to have started in circumstances where the master had expressly commanded his servant to commit a wrong and it developed to encompass acts done by implied command. "Every act which is done by a servant in the course of his duty is regarded as done by his orders and consequently is the same as if it were the master's own act", *Bartonshill Coal Co v McGuire* (1858) 3 Macq 300, 306 per Lord Chelmsford . The traditional, but hard- worked, phrases *respondeat superior* and *qui facit per alium facit per se* may have been apposite then, though as Lord Reid acidly observed in *Stavely Iron & Chemical Co Ltd v Jones* [1956] AC 627, 643, "the former merely states the rule badly in two words, the latter merely gives a fictional explanation of it." Salmond credits Sir John Holt (1642-1710) with the beginning of the adaptation of those ancient notions to the needs of a modern society. As the Chief Justice said, "Seeing somebody must be a loser by this deceit, it is more reasonable that he, that employs and puts his trust and confidence in the deceiver, should be the loser than the stranger", *Hern v Nichols* (1700) 1 Salk 289. By the end of the eighteenth century there was a shift away from the notion of implied command arising from the relationship of master and servant. In its place grew an acceptance by the middle of the next century, aided by the great Victorian judges and the recognition of a changing and developing industrial society, that the existence of the master/servant relationship was itself enough to impose liability on the master if the servant was acting within the scope of his employment. Lord Brougham explained, "The reason I am liable is this, that by employing him I set the whole thing in motion; and what he does, being done for my benefit and under my direction, I am responsible for the consequences of doing it." So it should be: the master has the "deeper pockets" per Willes J. in *Limpus v L.G.O. Co* (1862) 1 H. & C. 526, 539.

21. That was the established law on which we cut our teeth. We learnt that disputes about vicarious liability centred on two questions. First (the stage 1 with which we are concerned in this appeal), the issue was whether this was a true relationship of employer/employee (the notion of master/servant having become "obsolete" per Lord Steyn in *Mahmud v B.C.C.I.* [1998] A.C. 20, 45/46, though "servant" remains hard to eradicate from the language as in the time-honoured pleading "his servants or agents…"). Secondly, our stage 2, the enquiry was whether A was acting within the scope of his employment or whether he was on a frolic of his own. At the first stage the contrast has traditionally been made between the relationship the employer had with his employee and the one he had with an independent contractor. The analysis examined the difference between a contract of service and a contract for services. Control became the important factor. Was D instructing A how to do the work or contracting with him as to what work was to be done? But control has not survived as the crucial criterion for establishing vicarious liability and other tests for distinguishing the employee from the independent contractor developed as I must explain later in this judgment at [64] to [69] when considering whether vicarious liability can be extended to a quasi employee who is in a relationship with his

"employer" which is only *akin* to employment. Although there is no dispute about it, I must, for the sake of painting the full picture, consider whether there was any contract of service between Father Baldwin and his bishop.

Is a priest an employee?

22. It is common ground that the answer to that question is 'No'. MacDuff J. concluded that the relationship between Father Baldwin and his bishop differed from employer/employee in significant ways, but how significant the differences are must await further discussion. There are a string of cases involving the employment position of ministers of religion of many denominations and, in order to see the picture in the round, it is worth reviewing them, if only shortly.

23. Whether or not there is a contract of service between a minister of religion and his church was most recently authoritatively considered in *Percy v Church of Scotland Board of National Mission* [2005] UKHL 73[2006] AC 28. Mrs Percy was an ordained minister of the Church of Scotland and it was held that since the appointment offered to, and accepted by her entitled her, inter alia, to a salary, to reimbursement of her travelling expenses and to accommodation and other benefits in return for her performing the duties of an associate minister, the agreement between her and the Board displayed an intention to create legal relations between the parties enforceable in the event of breach and constituted a contract personally to execute work within the meaning of section 82(1) of the Sex Discrimination Act 1975. It should be noted, however, that "employment" is there defined to mean either "a contract of services … or a contract to perform any work or labour …"

24. Lord Nicholls of Birkenhead examined the earlier cases and said:

> "7. The existence of a contract of service between a minister of religion and his church is a question courts have considered on several occasions. In *In Re National Insurance Act 1911: In Re Employment of Church of England Curates* [1912] 2 Ch 563, 568, 569, Parker J held that a curate in the Church of England was not employed under a 'contract of service' within Part I (a) of the First Schedule to the National Insurance Act 1911: "the position of a curate is the position of a person who holds an ecclesiastical office, and not the position of a person whose rights and duties are defined by contract at all". Thus Parker J contrasted the position of an office holder and a person whose functions are defined by contract.
>
> 8. In *Scottish Insurance Comrs v Church of Scotland* (1914) SC 16 the Court of Session reached the same conclusion regarding assistants to ministers, not to be confused with associate ministers, of the Church of Scotland. Applying the "control" test used in identifying a contract of employment, an assistant to a minister was not subject to the control and direction of any particular master. An assistant holds an ecclesiastical office and performs his duties subject to the laws of the church: Lord Kinnear, at p 23. Lord Kinnear added that in any event there was difficulty in identifying exactly who was

the assistant's employer. Lord Johnstone noted that employment must be under a contract of service. A contract of service assumes an employer and a servant. It assumes the power of appointment and dismissal in the employer, the right of control over the servant in the employer, and the duty of service to the employer in the servant. There was no one who occupied that position. The contract in which the assistant was engaged was more a contract for services than a contract of service: pp 26-27.

9. The Court of Appeal decision in *President of the Methodist Conference v Parfitt* [1984] QB 368 concerned an unfair dismissal claim brought by a Methodist minister. The issue was whether the parties had entered into a contract of service. The court held that having regard to all the circumstances it was impossible to conclude that any contract, let alone a contract of service, came into being between a newly ordained minister and the Methodist Church when the minister was received into full connection.

10. The same question arose for decision by your Lordships' House in *Davies v Presbyterian Church of Wales* [1986] 1 WLR 323. The case concerned an unfair dismissal claim by a minister of the Presbyterian Church of Wales who had been inducted pastor of a united pastorate in Wales. Lord Templeman delivered the leading speech. He held that the claimant could not point to any contract between himself and the church. The book of rules did not contain terms of employment capable of being offered and accepted in the course of a religious ceremony.

11. The same issue arose again in *Diocese of Southwark v Coker* [1998] ICR 140, this time in the context of an unfair dismissal claim by an assistant curate of the Church of England. Again the claimant failed. Mummery LJ analysed the reason underlying the absence of a contract between a church and a minister of religion in these cases as lack of intention to create a contractual relationship. He said, at p 147, that the special features surrounding the appointment and removal of a Church of England priest as an assistant curate, and surrounding the source and scope of his duties, preclude the creation of a contract "unless a clear intention to the contrary is expressed". Mummery LJ noted that under the employment protection legislation the relevant right of an employee is not to be dismissed by his employer. He then considered and rejected one by one the possible candidates for the role of employer in that case. The Diocese of Southwark was not a legal person with whom a contract could be concluded. The Church Commissioners paid Dr Coker's stipend and the Diocesan Board of Finance made the necessary

> arrangements for the payment. But neither of them appointed him, removed him or had power to control the performance of his services. It was not contended that either of Dr Coker's vicars had a contract with him. That left only the bishop of the diocese. The bishop had legal responsibility for licensing the appointment of assistant curates and the termination of their appointments. But that relationship was "governed by the law of the established church, which is part of the public law of England, and not by a negotiated, contractual arrangement": p. 148."

25. To that list can be added *Santokh Singh v Guru Nanak Gurdwara* [1990] ICR 209 where the Court of Appeal upheld an industrial tribunal's finding that a Granthi (priest) at a Sikh temple was not employed under a contract of service.

26. *Percy* was considered by this Court in *The New Testament Church of God v Stewart* [2007] EWCA Civ 1004. There the pastor was held to be employed by his church under a contract of service. His salary was paid by the national office and he was treated as an employee for income tax and national insurance purposes. Pill LJ considered paragraphs 23 and 24 of Lord Nicholls' speech in *Percy*, where Lord Nicholls dealt with the question whether or not there was a presumption against the parties having an intention to create legal relations and he contrasted cases where "without more, the nature of the mutual obligations, their breadth and looseness, and the circumstances in which they were undertaken, point away from a legally-binding relationship" with arrangements "which on their face are to be expected to give rise to legally-binding obligations." Pill LJ held:

> "[35] Lord Nicholls' reasoning at paragraph 23, is not that of overruling the earlier cases and *Davies* would not in any case be overruled unless expressly. What *Percy* does, however, establishes that the fact finding Tribunal is no longer required to approach its consideration of the nature of the relationship between a minister and his church with the presumption that there was no intention to create legal relations. The earlier cases, as explained, do not exclude that possibility; strong statements in *Percy* leave it open to employment tribunals to find, provided of course a careful and conscientious scrutiny of the evidence justifies such a finding, that there is an intention to create legal relations between a church and one of its ministers …"

27. Pill L.J. also went on to say:

> "47. The religious beliefs of a community may be such that their manifestation does not involve the creation of a relationship enforceable at law between members of the religious community and one of their number appointed to minister to the others, whether the appointment is by the local congregation or under an episcopal form of government. The law should not readily impose a legal relationship on members of a religious community which would be contrary to their

> religious beliefs. These beliefs and practices may be such, in the context of a particular church, that no intention to create legal relations is present. To take them into account does not involve any departure from ordinary contractual principles, especially in the light of Article 9 [of the European Convention on Human Rights].
>
> 48. … The religious beliefs held in a church may throw light on the nature of the relationship between it and its ministers."

28. Lord Nicholls' speech in *Percy* was also illuminating for its discussion on "Office holders and employees". He said:

> "15. The distinction between holding an office and being an employee is well established in English law. An important part of the background to this distinction is that in the past an employer could dismiss a servant without notice, leaving the servant with any claim he might have for damages for breach of contract. … By way of contrast, some office holders could be dismissed only for good cause. Thereby they were insulated against improper pressures. So the focus in master and servant cases was often on the question whether … there was an element of public employment or service, or anything in the nature of an office or status capable of protection: *Malloch v Aberdeen Corporation* [1971] 1 WLR 1578, 1595.
>
> …
>
> 17. … The distinction between holding an office and being an employee has long suffered from the major weakness that the concept of an "office" is of uncertain ambit. The criteria to be applied when distinguishing those who hold an office from those who do not are imprecise. In *McMillan v Guest* [1942] AC 561, 566, Lord Wright observed that the word "office" is of indefinite content. Lord Atkin suggested, at page 564, that "office" implies a subsisting, permanent, substantive position having an existence independent of the person who fills it, and which goes on and is filled in succession by successive holders. As Lord Atkin indicated, this is a generally sufficient statement of the meaning of the word. It is useful as a broad description of the ingredients normally present with any office.
>
> 18. … Holding an office, even an ecclesiastical office, and the existence of a contract to provide services are not necessarily mutually exclusive."

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.

Vicarious liability arising out of a relationship akin to employment

31. Because there is no relationship of employer/employee between them, then, if one is judging the question on conventional lines, the bishop is not vicariously liable for the tortious acts of the priest. But now we get to the nub of this appeal. Can the bishop be vicariously liable if the relationship is *akin* to employment? Can the law be extended that far? To answer those questions, I must deal with the following topics raised in the course of the wide-ranging submissions advanced by counsel: (1) the important case in the Canadian Supreme Court *John Doe v Bennett* [2004] 1 SCR 436, [2004] SCC 17; (2) the only reasoned English case relevant at stage 1, *Viasystems (Tyneside) v Thermal Transfer (Northern) Ltd* [2005] EWCA Civ 1151, [2006] QB 510; (3) the recent developments of the law at stage 2; (4) the policy considerations which inform the doctrine of vicarious liability; and, finally, drawing the threads together, (5) the search for principle.

(1) The Canadian Supreme Court case of John Doe

32. The Canadian Supreme Court had considered the application of the doctrine of vicarious liability to the tort of sexually assaulting children in *Bazley v Curry* (1999) 174 (4th) 45 and in *Jacobi v Griffiths* 174 DLR (4th) 71, important cases on the developing law at our stage 2, the scope of employment. I shall deal with them later at [47]. In *Doe* McLachlin C.J. delivering the judgment of the court said at paragraph 20, the passage on which MacDuff J relied:

> "In *Bazley,* the court suggested that the imposition of vicarious liability may usefully be approached in two steps. First, a court should determine whether there are precedents which unambiguously determine whether the case should attract vicarious liability. "If prior cases do not clearly suggest a solution, the next step is to determine whether vicarious liability should be imposed in light of the broader policy rationales behind strict liability": *Bazley*, at para. 15 … Vicarious liability is based on the rationale that the person who

> puts a risky enterprise into the community may fairly be held responsible when those risks emerge and cause loss or injury to members of the public. Effective compensation is a goal. Deterrence is also a consideration. The hope is that holding the employer or principal liable will encourage such persons to take steps to reduce the risk of harm in the future. Plaintiffs must show that the rationale behind the imposition of vicarious liability will be met on the facts in two respects. First, the relationship between the tortfeasor and the person against whom liability is sought must be sufficiently close. Second, the wrongful act must be sufficiently connected to the conduct authorised by the employer. This is necessary to ensure that the goals of fair and effective compensation and deterrence of future harm are met."

33. At paragraph 27 she said:

> "The relationship between the bishop and a priest in a diocese is not only spiritual, but temporal. The priest takes a vow of obedience to the bishop. The bishop exercises extensive control over the priest, including the power of assignment, the power to remove the priest from his post and the power to discipline him. *It is akin to an employment relationship*. The incidents of control far exceed those characterising the relationship between foster parents and the government ... and the priest is reasonably perceived as an agent of the diocesan enterprise. The relationship between the bishop and the priest is sufficiently close. Applying the relevant test to the facts, it is also clear that the necessary connection between the employer-created or enhanced risk and the wrong complained of is established." I have added the emphasis.

34. Over a period of almost two decades a Roman Catholic priest in Newfoundland sexually assaulted boys in his parishes. Two successive bishops and the archbishop failed to stop the abuse. The claimants, by then adults, sued the priest, the episcopal corporation of the diocese, the bishops and archbishop and even the Roman Catholic Church. The court treated the episcopal corporations as the secular arm of the bishop or archbishop for all purposes. The appeal centred on whether or not the corporation was vicariously liable for the priest's assaults.

35. Lord Faulks points out that the facts of that case are very different from the facts before us. Indeed they are. This was a very isolated rural community where the priest:

> "had enormous stature because of his position as parish priest, both to the boys and to their parents. The plaintiffs perceived him as a "god" — quite logically given his centrality in the community and the disparity in lifestyles between himself and his parishioners. As the school principal testified, "…people believed that the priest could turn you into a goat."

Nevertheless, it is an authority from a powerful court which commands respect even if it is not binding upon us.

(2) Viasystems (Tyneside) v Thermal Transfer (Northern) Ltd [2006] QB 510

36. This is the only recent English case to which our attention was drawn which has seen some development of the law of vicarious liability. The claimants engaged the first defendants to install air conditioning in their factory. The first defendants sub-contracted ducting work to the second defendants. The ducting work was being carried out by a fitter and his mate, supplied to the second defendants by the third defendants on a labour-only basis under the supervision of a fitter working for the second defendants, when the fitter's mate negligently caused the fracture of the fire protection sprinkler system, resulting in severe flood damage to the factory. In the court below it was assumed that only one of the second or third defendants could in law be vicariously liable for the negligence of the fitter's mate, not both. In the Court of Appeal counsel drew attention to the discussion in *Atiyah Vicarious Liability in the Law of Torts* (1967) in a chapter entitled "The Borrowed Servant" where it was suggested that both the general and the temporary employer could be vicariously liable for an employee's negligence. That was the issue which engaged the Court of Appeal.

37. Dealing with the question of dual vicarious liability, May LJ said this:

> "46. In summary, therefore, there has been a long-standing assumption, technically unsupported by authority binding this court, that a finding of dual vicarious liability is not legally permissible. An assumption of such antiquity should not lightly be brushed aside, but the contrary has scarcely been argued and never considered in depth. This is not surprising, because in many, perhaps most, factual situations, a proper application of the *Mersey Docks* [*Mersey Docks and Harbour Board v Coggins and Griffith (Liverpool) Ltd* [1947 AC 1] principles would not yield dual control, as it so plainly does in the present case. I am sceptical whether any of the cases from this jurisdiction which I have considered would, if they were re-examined, yield dual vicarious liability. …
>
> 48. Academic commentary tends to favour the possibility of dual vicarious liability, but feels that authority constrains it. Other jurisdictions have reacted variously, giving no clear lead. Their decisions range from articulating the assumption to favouring or adopting dual liability.
>
> 49. In my judgment, there is, in a modern context, little intrinsic sense in, or justification for, the assumption. …"

38. As for the test to apply, he held:

> "16. … To look for a transfer of a contract of employment is, in a case such as this, no more than a distracting device; in the present case a misleading one. [The fitter's mate's]

> employment was not transferred. The inquiry should concentrate on the relevant negligent act and then ask whose responsibility it was to prevent it. Who was entitled, and perhaps theoretically obliged, to give orders as to how the work should or should not be done? In my view, "entire and absolute control" is not, at least since the *Mersey Docks* case [*Mersey Docks and Harbour Board v Coggins & Griffith (Liverpool) Limited* [1947] AC 1], a necessary precondition of vicarious liability."

39. Rix LJ agreed but added his own gloss on the subject. He said:

> "55. The concept of vicarious liability does not depend on the employer's fault but on his role. Liability is imposed by a policy of the law upon an employer, even though he is not personally at fault, on the basis, generally speaking, that those who set in motion and profit from the activities of their employees should compensate those who are injured by such activities even when performed negligently. Liability is extended to the employer on the practical assumption that, inter alia, because he can spread the risk through pricing and insurance, he is better organised and able to bear that risk than the employee, even if the latter himself of course remains responsible; and at the same time the employer is encouraged to control that risk. For these purposes, issues have naturally arisen as to when the relationship of employer and employee, as distinct from that of employer and independent contractor, exists; or as to the doctrine of the course of employment, which seeks to set the scope and limits of the employer's liability. Over the years, the tests which have been adopted to answer these issues have developed in a way which has gradually given precedence to function over form.
>
> …
>
> 77. In my judgment, if consideration is given to the function and purposes of the doctrine of vicarious liability, then the possibility of dual responsibility provides a coherent solution to the problem of the borrowed employee. Both employers are using the employee for the purposes of their business. Both have a general responsibility to select their personnel with care and to encourage and control the careful execution of their employees' duties, and both fall within the practical policy of the law which looks in general to the employer to organise his affairs in such a way as to make it fair, just and convenient for him to bear the risk of his employees' negligence. I am here using the expression "employee" in the extended sense used in the authorities relating to the borrowed employee.
>
> ...

> 79. However, I am a little sceptical that the doctrine of dual vicarious liability is to be wholly equated with the question of control. … Once, however, a doctrine of dual responsibility becomes possible, I am less clear that either the existence of sole right of control or the existence of something less than entire and absolute control necessarily either excludes or respectively invokes the doctrine. Even in the establishment of a formal employer/employee relationship, the right of control has not retained the critical significance it once did. I would prefer to say that I anticipate that subsequent cases may, in various factual circumstances, refine the circumstances in which dual vicarious liability may be imposed. I would hazard, however, the view that what one is looking for is a situation where the employee in question, at any rate for relevant purposes, is so much a part of the work, business or organisation of both employers that it is just to make both employers answer for his negligence. What has to be recalled is that the vicarious liability in question is one which involves no fault on the part of the employer. It is a doctrine designed for the sake of the claimant imposing a liability incurred without fault because the employer is treated by the law as picking up the burden of an organisational or business relationship which he has undertaken for his own benefit."

40. As I read those judgments, two justifications for the extension of the employer/employee relationship are given: the first, per May L.J., who was entitled, and in theory, if they had the opportunity, obliged to control the workmen, and the second, per Rix L.J., was the employee in question so much part of the work, business or organisation of both employers that it was fair, just and convenient for both to bear the risk of the employee's negligence.

41. *Viasystems* has, I have discovered, been considered by this court in *Hawley v Luminar Leisure Ltd and ASE Security Services Ltd* [2006] EWCA Civ 18. Luminar operated a nightclub in Southend. They contracted with ASE for the provision of security services and under that contract provided the supply of "door supervisors", one of the doormen being Jeffrey Warren. He unlawfully assaulted the claimant, punching him so hard that he fell to the ground, fractured his skull and suffered permanent and serious brain damage. He alleged both Luminar and ASE were each responsible for Warren's tortious and deliberate act. The trial judge, Wilkie J, who tried the claim before *Viasystems* had been decided in this Court, held that "the control that Luminar had over ASE's employees was such as to make them temporary deemed employees of Luminar for the purposes of vicarious liability." Giving the judgment of the Court, Hallett LJ, with contributions from Latham and Neuberger LJJ, held that was a decision he was fully entitled to reach and one with which the Court of Appeal should not interfere. The Court did however discuss *Viasystems*. They noted the different approaches taken by May and Rix LJJ but did not choose between them. Every case was fact specific and many factors might be relevant. The question of control may not be wholly determinative but remained at the heart of the test to be applied. "Whatever approach one adopts we are not persuaded that on the facts of this case it

makes any difference." There was no discussion about the correctness of accepting the possibility of dual responsibility: all the Court seems to have said is:

> "86. Thus, although the law now apparently entitles this court to make a finding of dual vicarious liability for the reasons given we decline to do so."

(3) Recent developments of the law at stage 2, the scope of employment

42. There have been a spate of recent cases where the courts have had to decide an employer's liability for sexual abuse committed by school masters and priests. In all these cases an employment relationship, our stage 1, was conceded and the question was whether the innocent employer should be responsible for the criminal acts of his employee. The law is established by *Lister v Hesley Hall Ltd* [2001] UKHL 22, [2002] 1 AC 215. There the claimants were resident in a boarding house attached to a school owned and managed by the defendants. Without their knowledge, the warden of the boarding school employed by them systematically sexually abused the claimants. The Court of Appeal held that the warden's acts could not be regarded as an unauthorised mode of carrying out his authorised duties. But that decision was reversed on appeal to the House of Lords. The ratio of the case is clear. Lord Steyn was of the opinion that the correct test was this:

> "27. My Lords, I have been greatly assisted by the luminous and illuminating judgments of the Canadian Supreme Court in *Bazley v Curry* 174 DLR (4th) 45 and *Jacobi v Griffiths* 174 DLR (4th) 71. Wherever such problems are considered in future in the common law these judgments will be the starting point. On the other hand, it is unnecessary to express views on the full range of policy considerations examined in those decisions.
>
> 28. Employing the traditional methodology of English law, I am satisfied that in the case of the appeals under consideration the evidence showed that the employers entrusted the care of the children in Axeholme House to the warden. The question is whether the warden's torts were so closely connected with his employment that it would be fair and just to hold the employers vicariously liable. On the facts of the case the answer is yes."

43. Lord Hutton agreed with Lord Steyn (see [52]). So did Lord Hobhouse of Woodborough (see [63]). Lord Clyde applied the same sort of test saying that:

> "37. … An act of deliberate wrongdoing may not sit easily as a wrongful mode of doing an authorised act. But recognition should be given to the critical element in the observation, namely the necessary connection between the act and the employment. … What has essentially to be considered is the connection, if any, between the act in question and the employment. If there is a connection, then the closeness of that connection has to be considered."

So too Lord Millett:

> "70. … What is critical is that attention should be directed to the closeness of the connection between the employee's duties and his wrongdoing and not to verbal formulae. This is the principle on which the Supreme Court of Canada recently decided the important cases of *Bazley v Curry* … and *Jacobi v Griffiths* which provide many helpful insights into this branch of the law and from which I have derived much assistance."

It is thus firmly established that the appropriate test is the closeness of the connection between the work the employee had been employed to do and the acts of abuse that he committed.

44. Lord Hobhouse, and even to some extent Lord Millett, added opinions which have given rise to some academic criticism. Lord Hobhouse said:

> "55. The classes of persons or institutions that are in this type of special relationship to another human being include schools, prisons, hospitals and even, in relation to their visitors, occupiers of land. They are liable if they themselves fail to perform the duty which they consequently owe. If they entrust the performance of that duty to an employee and that employee fails to perform the duty, they are still liable. The employee, because he has, through his obligations to his employers, adopted the same relationship towards and come under the same duties to the plaintiff, is also liable to the plaintiff for his own breach of duty. The liability of the employers is a *vicarious* liability because the actual breach of duty is that of the employee. The employee is a tortfeasor. The employers are liable for the employee's tortious act or omission because it is to him that the employers have entrusted the performance of their duty. The employers' liability to the plaintiff is also that of a tortfeasor. I use the word "entrusted" in preference to the word "delegated" which is commonly, but perhaps less accurately, used. Vicarious liability is sometimes described as a "strict" liability. The use of this term is misleading unless it is used just to explain that there has been no actual fault on the part of the employers. The liability of the employers derives from their voluntary assumption of the relationship towards the plaintiff and the duties that arise from that relationship and their choosing to entrust the performance of those duties to their servant. Where these conditions are satisfied, the motive of the employee and the fact that he is doing something expressly forbidden and is serving only his own ends does not negative the vicarious liability for his breach of the "delegated" duty."

Lord Millett said:

> "82. In the present case the warden's duties provided him with the opportunity to commit indecent assaults on the boys for his

> own sexual gratification, but that in itself is not enough to make the school liable. The same would be true of the groundsman or the school porter. But there was far more to it than that. The school was responsible for the care and welfare of the boys. It entrusted that responsibility to the warden. He was employed to discharge the school's responsibility to the boys. For this purpose the school entrusted them to his care. He did not merely take advantage of the opportunity which employment at a residential school gave him. He abused the special position in which the school had placed him to enable it to discharge its own responsibilities, with the result that the assaults were committed by the very employee to whom the school had entrusted the care of the boys."

45. The criticism is that the court did not take the opportunity to settle the guidelines between vicarious liability and personal liability, whether in negligence or for breach of non-delegable duties. For example in Tony Weir's 2002 edition of *Tort Law*, at p. 103 he writes: "The distinct analyses [vicarious liability and non-delegable duty] were not kept properly apart." *McBride and Bagshaw, Tort Law* 2nd edition, 2003 argue at p. 652:

> "[Their Lordships] could easily have found the defendants in *Lister* were *personally* liable to compensate the claimants for the harm they suffered as a result of being sexually abused by Grain. Their Lordships could easily have reached this conclusion using the device of a non-delegable duty of care. They could have ruled that "the defendants owed the claimants a non-delegable duty of care to look after them; the defendants gave Grain the job of looking after the claimants; and Grain put the defendants in breach of the non-delegable duty of care that they owed the claimants when, by sexually abusing the claimants, he failed to look after the claimants properly. It is hard to understand why the House of Lords did not decide *Lister* in this way – particularly as these were the *very* reasons why the House of Lords found there *was* a "sufficiently close connection" between the torts committed by Grain in the *Lister* case and what he was employed to do so as to make the defendants *vicariously* liable in respect of those torts."

I note that in the High Court of Australia in *New South Wales v Lepore* 195 ALR 412 Gummow and Hayne JJ say at para 208, "The analyses of Lord Hobhouse and Lord Millett have strong echoes of non-delegable duties." Gaudron J explained the Australian view at paras 123-125 as follows:

> "Ordinarily, if there is a material increase in a risk associated with an enterprise involving the care of children that is a foreseeable risk and, thus, it is the personal … duty of those who run that enterprise to take reasonable care to prevent that risk eventuating. …

> And if abuse occurs in circumstances in which an employee has seized an opportunity which could have been obviated by the use of reasonable care, the employer should be held directly liable.
>
> A residential institution or authority that does not take reasonable steps to institute a system such that its employees do not come into personal contact with a child or other vulnerable person unless supervised or accompanied by another adult should be held directly liable in negligence if abuse occurs in a situation in which there is neither supervision nor an accompanying adult. Further, it seems almost certain that, on that basis, there would be no different result in factually similar cases from those arrived at in *Bazley* and *Lister*. So, too, on that basis, it would be a breach of a personal … duty of care resulting in direct liability to allow an employee to share a bedroom with a child entrusted to his care, as was the case in *Trotman* [*v North Yorkshire CC* [1999] LGR 584, CA]."

I cannot but wonder whether May LJ's test of asking in *Viasystems* who was entitled and perhaps theoretically obliged to give orders as to how the work should or should not be done, does not also engage questions of personal or non-delegable duty. According to *Markesinis and Deakin's Tort Law,* 6th ed., p.700, Lord Hobhouse's formulation is "certainly unorthodox" but, they add,

> "there is much to be said for an analysis here which focuses on the defendant's overall responsibility for the care of the claimant."

These are all challenging observations beyond the scope of this judgment on this particular preliminary issue and we must await future developments. The bishop would undoubtedly be concerned to hear of a priest in his parish abusing little girls and may well have a duty to intervene and remove the priest from his parish to protect the victim but whether this concern for his parishioners, or even a general duty to be concerned about their welfare, can be transformed into a legal duty to take care when he has no reason to suspect harm is being or about to be suffered must remain a question for another day.

46. Be that as it may *Lister* is binding as to the test for stage 2 and has been applied in a number of cases: see for example *Maga v Archbishop of Birmingham* [2010] EWCA Civ 256, [2010] 1 WLR 1441 (sexual abuse by a priest) and *Various Claimants v The Catholic Child Welfare Society and the Institute of Brothers of the Christian Schools & ors* (sexual abuse by the brothers of the De La Salle Institute). There Hughes LJ, with a hint of the views of Rix LJ in *Viasystems* and Lord Hobhouse in *Lister*, said:

> "57. Nor do I think that vicarious liability on the part of the Institute can be derived on the basis that brother-teachers were carrying out its purposes and acting in the capacity of members of it. True, no doubt, that teaching was the mission of the Institute, and that the brothers were therefore, when teaching at St William's or anywhere else, furthering that mission, having

> been sent there for that purpose. True, clearly, that they were identifiably present clothed with the status of members of the Institute and subject to its discipline. It does not, however, follow, that the Institute was engaged in the business of running the teaching at St William's. Applying the first stage of the test proposed by *Lister*, the Institute had not undertaken a duty of caring for the pupils at St William's and then delegated or entrusted it to the brother-teachers. Those brothers who taught at St William's were not doing so on behalf of the other members of the Institute."

47. For completeness I must refer to the Canadian authorities *Bazley* and *Jacobi* which on the same day established the close connection test though the court reached different conclusions when applied to the facts of the two cases. In *Bazley* the Children's Foundation, a non-profit organisation, operated residential care facilities for the treatment of emotionally troubled children. The Foundation authorised its employees to act as parent figures for the children. Unfortunately the Foundation hired a paedophile who sexually abused one of the children in the home. The court saw its task as endeavouring to articulate a rule consistent with both the existing authority and the policy reasons for vicarious liability. The common theme in the existing authorities resided in the idea that where the employee's conduct was closely tied to a risk that the employer's enterprise had placed in the community, the employer would be justly held vicariously liable for the employee's wrong. But the court devoted itself extensively to the policy considerations, holding that vicarious liability has always been concerned with policy. As *Fleming The Law of Torts* 9th edition, 1998 puts it at p. 410, "[V]icarious liability cannot parade as a deduction from legalistic premises, but should be frankly recognised as having its place in a combination of policy considerations." Giving the judgment of the court McLachlin J found that the concern of the law was first and foremost to provide a just and practical remedy to people who suffer as a consequence of wrongs perpetrated by an employee. That, coupled with deterrence of future harm, usefully embraced the main policy considerations that had been advanced. "The idea that the person who introduces a risk incurs a duty to those who may be injured lies at the heart of tort law": [30]. Fairness demanded that the employment enterprise employing others to advance its own economic interest should bear the burden of providing a just and practical remedy for wrongs perpetrated by their employees. That is fair to the injured person. It is also fair to the employer because it is right and just that the person who creates the risk should bear the loss when the risk ripens into harm. So the court concluded:

> "[37] Underlying the cases holding employers vicariously liable for the unauthorised acts of employees is the idea that employers may justly be held liable where the act falls within the ambit of the risk that the employer's enterprise creates or exacerbates. Similarly, the policy purposes underlying the imposition of vicarious liability on employers are served only where the wrong is so connected with the employment that it can be said that the employer has introduced the risk of the wrong (and is thereby fairly and usefully charged with its management and minimisation). The question in each case is whether there is a connection or nexus between the

> employment enterprise and that wrong that justifies imposition of vicarious liability on the employer for the wrong, in terms of fair allocation of the consequences of the risk and/or deterrence.
>
> …
>
> [42] Applying these general considerations to sexual abuse by employees, there must be a strong connection between what the employer was asking the employee to do (the risk created by the employer's enterprise) and the wrongful act. It must be possible to say that the employer *significantly* increased the risk of the harm by putting the employee in his or her position and requiring him to perform the assigned tasks. …"

48. Although this case has received high praise (see Lord Steyn at [27] of *Lister* cited at [43] above), it has not escaped its share of understandable criticism. Fridman, "*The Course of Employment: Policy or Principle?"* (2002) 6 Newcastle Rev. 61 at 66 suggests that the approach of the Supreme Court represented "the triumph of policy over principle". In *Lister* Lord Steyn himself guardedly thought it "unnecessary to express views on the full range of the policy considerations" that dominated the Canadian cases. Lord Hobhouse was more forthright:

> "60. … The judgments contain a useful and impressive discussion of the social and economic reasons for having a principle of vicarious liability as part of the law of tort which extends to embrace acts of child abuse. But an exposition of the policy reasons for a rule (or even a description) is not the same as defining the criteria for its application. Legal rules have to have a greater degree of clarity and definition than is provided by simply explaining the reasons for the existence of the rule and the social need for it, instructive though that may be."

49. So much for the recent developments at stage 2, the scope of the employment. Whatever its flaws, the rule remains that there must be a close connection between the employment and the tortious act. Whether this stage 2 test is of any relevance or help in ascertaining whether the case comes within stage 1 is a matter to which I must return.

(4) The policy considerations which inform the doctrine of vicarious liability

50. The doctrine of vicarious liability does give rise to a clash of two broad policies upon which the law of torts is founded, one that there ought to be an effective remedy for the victim of another's wrongful act, and the other that the defendant should not generally be held liable unless he was at fault. Only policy considerations can explain the triumph of the former over the latter. Identifying the relevant strands of policy and evaluating their importance is not straightforward.

51. Longmore LJ observed in *Maga* at [81]:

> "Since this case is not covered by previous authority, it may be necessary to have in mind the policy behind the imposition of vicarious liability. That is difficult because there is by no means universal agreement as to what that policy is. Is it that the law should impose liability on someone who can pay rather than someone who cannot? Or is it to encourage employers to be even more vigilant than they would be pursuant to a duty of care? Or is it just a weapon of distributive justice? Academic writers disagree and the House of Lords in *Lister's* case did not give any definitive guidance to lower courts."

52. There is of course much instructive academic debate about the subject but it is, unfortunately, not possible fully to deal with it in this judgement. In *A Theory of Vicarious Liability* 2005 Alberta L.R. 1 referred to above J.W. Neyers conducts a perceptive analysis of the main rationales and examines the failures of the leading theories of control, compensation, deterrence, loss spreading and enterprise liability adequately to explain the doctrine of vicarious liability and its limits. It may be useful to summarise some of the main themes.

(a) Control is one of the traditional explanations of vicarious liability but as Atiyah points out, "control cannot be treated either as a sufficient reason for always imposing liability or as a necessary reason without which there should never be vicarious liability." A parent is not liable for the torts of his children though he controls them; absence of control is no longer a serious obstacle to liability.

(b) Compensation/deep pockets: this explanation is necessary to ensure that innocent claimants have a solvent defendant against whom they may recover as employers are likely to be wealthier and/or carry insurance. That does not adequately explain why the employer should not be liable for the wrongful acts of his independent contractor.

(c) Deterrence: in one form the theory argues that since larger economic units are in the best position to reduce accidents through efficient organisation and discipline of staff, the law is justified in making them vicariously liable. If this was the reason for the rule, then one would expect that the employer would be able to escape from "vicarious" liability by proving he was without fault (as he would be able to do, for example, in Germany). The notion of deterrence does not work well in the case of sexual predators who are deterred neither by potential criminal sanctions nor by more efficient administration of a church's affairs, so the imposition of liability on the church – whatever its rationale – will bear little relationship to deterrence.

(d) Loss-spreading: the idea here is that by fixing liability on the employer, the burden of the injury will be spread among his customers and insurers. That does not help explain why the employer of a domestic servant is vicariously liable for his employee's torts when this cannot be spread through any customer base.

(e) Enterprise liability: one notion here is that a business enterprise cannot justly disclaim responsibility for accidents which may fairly be said to be characteristic of its activities. As suggested in *Bazley*, it is fair that the employer pays because the employer's enterprise created or exacerbated the risk that the claimant would suffer the injury she did. This of course does not explain why charitable organisations should nonetheless be vicariously responsible.

53. It seems, therefore, that no single rationale provides a complete answer for the imposition of vicarious liability. I have to agree with the view expressed by, among others, Fleming in *Law of Torts*, 10th edition (2011) p. 438 that: "… the modern doctrine of vicarious liability should be frankly recognised as having its basis in a combination of policy considerations." If, as I accept, the court cannot ignore the role played by policy in shaping the decision at hand, the question still remains: what should the role of policy be?

54. The courts do not speak with one voice. At one extreme McLachlin J in *Bazley* believes:

> "[27] A focus on policy is not to diminish the importance of legal principle. It is vital that the courts attempt to articulate general legal principles to lend certainty to the law and guide future applications. However, in areas of jurisprudence where changes have been occurring in response to policy considerations, the best route to enduring principle may well lie through policy. The law of vicarious liability is just such a domain."

At the other extreme is Lord Hobhouse of Woodborough whose view is expressed at [60] in *Lister*:

> "I do not believe that it is appropriate to follow the lead given by the Supreme Court of Canada in *Bazley* … The judgments contain a useful and impressive discussion of the social and economic reasons for having a principle of vicarious liability as part of the law of tort which extends to embrace acts of child abuse. But an exposition of the policy reasons for a rule (or even a description) is not the same as defining the criteria for its application. Legal rules have to have a greater degree of clarity and definition than is provided by simply explaining the reasons for the existence of the rule and the social need for it, instructive though that may be."

My own view is that one cannot understand how the law relating to vicarious liability has developed nor how, if at all, it should develop without being aware of the various strands of policy which have informed that development. On the other hand, a coherent development of the law should proceed incrementally in a principled way, not as an expedient reaction to the problem confronting the court. So I must see whether it is possible to articulate general legal principles which will allow the court to decide whether the bishop may be vicariously liable for the alleged torts of Father Baldwin.

(5) The search for principle

55. Many seem to doubt that one can find a rule which covers every situation. In *Kilboy v South Eastern Fire Area Joint Committee* 1952 SC 280, 285, the Lord President (Cooper) said of the rule *respondeat superior* "What was once presented as a legal principle has degenerated into a rule of expediency, imperfectly defined, and changing its shape before our eyes under the impact of changing social and political

conditions." For Lord Pearce, "The doctrine of vicarious liability has not grown from any very clear, logical or legal principle but from social convenience and rough justice": *Imperial Chemical Industries v Shatwell* [1965] AC 656, 685. Professor Glanville Williams' rather scathing view in *Vicarious Liability and the Master's Indemnity*, 1957 MLR 220, 231 was:

> "Vicarious liability is the creation of many judges who have different ideas of its justification or social policy, or no idea at all. Some judges may have extended the rule more widely or confined it more narrowly than its true rationale would allow; yet the rationale, if we can discover it, will remain valid so far as it extends."

I am relieved he is not marking this essay.

56. The search for principle to explain the development of the law must nevertheless go on. The answer should not be a mere expedient reaction to the particular problem confronting the court at the time; the outcome must serve as the desired solution for the matter in dispute but it must not also generate inappropriate outcomes in other situations. As Phillip Morgan points out in the article he sent us, *Revising Vicarious Liability – a Commercial Perspective* 2011 Lloyds Maritime and Commercial Law Quarterly 175, "In the field of vicarious liability, where cases concerning abuse litigation have led, cases involving commercial concerns have followed", citing *Dubai Aluminium Co Ltd v Salaam* [2002] UKHL 48, [2003] AC 366 where *Lister* was applied in a case of commercial fraud.

57. The academic writers have accordingly set us a daunting task. I would have wished to have had more time for research and reflection but these are luxuries we do not enjoy. Let me start with MacDuff J's judgment and his adoption of the approach of the Canadian Supreme Court in *Doe.* Is the principled approach of universal application to ask whether the connection between the tortfeasor and the defendant is sufficiently close in its nature and purpose to amount to a relationship akin to employment and thus render it just and fair to make the defendant vicariously liable for the actions which he initiated by appointing the priest to his parish? That approach requires one to look for (1) a relationship akin to employment; (2) which is established by a connection between D (defendant) and A (actor) which is sufficiently close so that (3) it is fair and just to impose liability on D. That gives rise to these questions: (1) given the unchallenged finding that there is no relationship of employer/employee in this case, can the law be extended to relationships "akin to employment"? (2) Is the close connection test appropriate and (3) is it enough that the result is just and fair?

Extending vicarious liability to relationships akin to employment

58. This question is closely linked to a matter which has excited and divided academic opinion: can one be an employee for one purpose (e.g. in employment law for unfair dismissal or for PAYE income tax) but not for another, namely vicarious liability and the law of tort? The traditional view that the question "who is a servant?" should receive the same answer regardless of the context in which the question is asked is exemplified by Atiyah, *Vicarious Liability and the Law of Tort* p. 32/33. The more modern view to the contrary, held, for example, by Ewan McKendrick, *Tort Textbook* 5th ed., 18, derives from the increase in atypical forms of employment. McKendrick

poses the problem in his article *Vicarious Liability and Independent Contractors – A Re-examination* (1990) 53 MLR 777:

> "The Labour market in Britain is presently undergoing significant structural change. The principal change is a rapid increase in new, flexible forms and patterns of work which depart radically from the standard employment relationship whereby an employee works regularly (that is, full-time) and consistently for his employer under a contract of employment. This new flexible, 'atypical' workforce consists largely of the self-employed, part-time workers, casual workers, 'temps,' homeworkers and those working on government training schemes. The rise of this workforce has been well documented by labour lawyers but so far it has largely escaped the attention of tort lawyers. Yet the emergence of a large 'atypical' workforce is an event of great importance for the law of tort.
>
> The primary significance for tort lawyers lies in the fact that, owing to the flexibility, lack of continuity and irregularity of their work, many atypical workers are either unable or have great difficulty in establishing that they are employees employed under a contract of employment. If they are not employees then, presumably, they are outside the scope of the doctrine of vicarious liability. And if they are independent contractors then, as Lord Bridge recently stated, it is:
>
> > trite law that the employer of an independent contractor is, in general, not liable for the negligence or other torts committed by the contractor in the course of the execution of the work.
>
> Yet will the courts actually hold that these atypical workers are independent contractors for whose torts the employer is not liable? If they do, will that not undermine the social purposes, such as loss distribution, which have hitherto been furthered by the doctrine of vicarious liability? On the other hand, if the courts are to conclude that employers are liable for the torts of such workers how can they achieve this goal? Can the doctrine of vicarious liability be adapted in order to encompass this new workforce or will the courts have to create new forms of primary liability?"

59. In my judgment the time has come to recognise that the context in which the question arises cannot be ignored. If the case is one where an employee seeks a remedy against his employer, for example for unfair dismissal, then the case does require that the true relationship of employer/employee be established in order to found the claim. It is after all a claim based on that relationship. Likewise liability for income tax ultimately depends upon the proper construction of the specific provisions in the relevant tax legislation. The statutory definition will demand a true relationship of employer/employee. If the case is brought under the sex discrimination legislation, then a different test applies: see *Percy*. On the other hand the remedy of an innocent victim against the employer of the wrongdoer has a different justification rooted, as

we have seen, in public policy. The fluid concept of vicarious liability should not, therefore, be confined by the concrete demands of statutory construction arising in a wholly different context.

60. I have not overlooked Lord Steyn's observation in the Privy Council in *Bernard v The Attorney General of Jamaica* [2004] UKPC 47 at [23]:

> " … the Board is firmly of the view that the policy on which vicarious liability is founded is not a vague notion of justice between man and man. It has clear limits. This perspective was well expressed in *Bazley v Curry* … The principle of vicarious liability is not infinitely extendable."

On the other hand, it is not a static concept and has adjusted over the centuries to provide just solutions to the challenges of changing times. And times are still a-changing as McKendrick's article demonstrates. We need to adapt to the current demands. *Viasystems* has gone a long way to acknowledge that, for the purposes of establishing vicarious liability, the tortfeasor does not have to be an old-fashioned employee. It will be recalled that the issue there was whether "employers" could be held vicariously liable for the torts of an "employee" bound in contract to one of them but "loaned" by him to the other for the purpose of carrying out a particular piece of work. The actual contract of employment was treated as no more than an irrelevant distraction. Function triumphed over form. Despite the tortfeasor *not* being an employee of the second defendant, the second defendant was vicariously liable for his negligence. For *Street on Torts* 12th ed. p. 592, this was "a radical step" and he fears what will happen "in the wrong hands." In my hands I am prepared to say that, even if the court did not address the exact question we have to resolve – is a relationship akin to employment enough? – this decision of the Court of Appeal, accepted as it has been in *Hawley v Luminar*, has extended the conventional boundaries and will, I believe, come to be seen as something of a William Ellis moment where, perhaps unwittingly, their Lordships picked up the ball and ran with it thereby creating a whole new ballgame – vicarious liability even if there is strictly no employer/employee relationship. This appeal now presents us with the problem of laying down the rules for this novel game – vicarious liability in cases akin to employment.

The close connection test

61. With all due respect to the Canadian Supreme Court I simply do not understand how their review of precedent and/or broader policy rationales led to the conclusion that "the relationship between the tortfeasor and the person against whom liability is sought must be sufficiently close." If anything precedent is against that conclusion. Parent and child could not be closer yet the parent has never been vicariously liable for the tort of the child simply by reason of being a parent. Husband and wife may be thought to be closely connected but the ancient rule that the husband was always vicariously liable for his wife's tort was abolished long ago. A wife is not vicariously liable for her husband's (or his agent's) use of the family car owned by the wife where the use was entirely for his purposes and not for hers: *Launchbury v Morgans* [1973] AC 127. The close connection test (the sufficient connection between the work that the employee had been employed to do and the acts of abuse that he committed) is established for stage 2 purposes (*Lister* et al) but even if liability depends on a

synthesis of stage 1 and stage 2 (*Various Claimants* per Hughes LJ) I do not see why the close connection test for stage 2 purposes has to be transposed to stage 1 which is analysing the nature of the relationship. The employer may have as close a connection with his regularly used independent contractor as he has with an employee who is but an anonymous member of his workforce. I do not find closeness of that connection to be of any great assistance.

62. If there is a close connection test, it is that the relationship between the defendant and the tortfeasor should be so close to a relationship of employer/employee that, for vicarious liability purposes, it can fairly be said to be akin to employment. One may at least ask the very broad question whether the tortfeasor bears a sufficiently close resemblance and affinity in character to a true employee that justice and fairness to both victim and defendant drive the court to extend vicarious liability to cover his wrongdoing. For this purpose one is looking to identify the broad characteristics of the employer/employee relationship.

63. If it is necessary to see how close in character the tortfeasor is to being an employee of the defendant, it is necessary at least to bear in mind the characteristics and hallmarks of a true employee.

The hallmarks of the relationship of employer-employee

64. I indicated early on at [21] that vicarious liability tended to depend on the difference between employee and independent contractor. If, as I believe, it is necessary to attempt to capture the essence of what it is that makes a man an employee, I must examine those differences in more detail. Generally speaking, an employee works under the supervision and direction of his employer: an independent contractor is his own master bound by his contract but not by his employer's orders. An employee works for his employer: an independent contractor is in business on his own account. In *Ready Mix Concrete (South East) Ltd v Minister of Pensions and National Insurance* [1968] 2 QB 497 (a case which I observe with envy occupied the court for six days whilst we were allowed one only), McKenna J said at p. 515 that a contract of service exists if these three conditions are fulfilled:

> "(i) The servant agrees that, in consideration of a wage or other remuneration, he will provide his own work and skill in the performance of some service for his master; (ii) he agrees, expressly or impliedly, that in the performance of that service he will be subject to the other's control in a sufficient degree to make that other master; (iii) the other provisions of the contract are consistent with its being a contract of service."

He elaborated:

> "Control includes the power of deciding the thing to be done, the way in which it shall be done, the means to be employed in doing it, the time when and the place where it shall be done. All these aspects of control must be considered in deciding whether the right exists in a sufficient degree to make one party the master and the other his servant."

Later at p. 524 he commented on Lord Thankerton's "four indicia" of a contract of service said in *Short v J. and W. Henderson Ltd* (1946) 62 TLR 427, 429 to be:

> "(a) The master's power of selection of his servant; (b) the payment of wages or other remuneration; (c) the master's right to control the method of doing the work; and (d) the master's right of suspension or dismissal."

McKenna J said:

> "It seems to me that (a) and (d) are chiefly relevant in determining whether there is a contract of any kind between the supposed master and servant, and that they are of little use in determining whether the contract is one of service. The same is true of (b) unless one distinguishes between different methods of payment, payment by results tending to prove independence and payment by time the relation of master and servant."

65. That leaves control as an important distinguishing factor. The example is often given of the difference between the chauffeur and the taxi driver but it is not always as easy as that. As times have changed so control has become an unrealistic guide. It may have been more meaningful when work was done by labourers under the direction of employers who had the same or greater technical skills than their workmen. Now that one is frequently dealing with a professional person or a person of some particular skill and experience, for example a brain surgeon, there can be no question of the employer telling him how to do his work for in truth the skilled person is engaged for the very reason that he possesses skills which the employer lacks. The emphasis placed on control has thus been reduced. As Roskill J said in *Argent v Minister of Social Security* [1968] 1 WLR 1749, 1758-9:

> "… in the earlier cases it seems to have been suggested that the most important test, if not the all-important test, was the extent of the control exercised by the employer over the servant. If one goes back to some of the cases in the first decade of this century, one sees that that was regarded almost as the conclusive test. But it is also clear that as one watches the development of the law in the first sixty years of this century and particularly the development of the law in the last fifteen or twenty years in this field, the emphasis has shifted and no longer rests so strongly upon the question of control. Control is obviously an important factor. In some cases it may still be the decisive factor, but it wrong to say that in every case it is the decisive factor. It is now, as I venture to think, no more than a factor albeit a very important one."

Roskill J's test was this at p. 1760:

> "Finally it has been more recently suggested that the matter can be determined by reference to what in modern parlance was called economic reality. All these are matters which have to be borne in mind. To my mind, no single one is decisive. One has

> to look at the totality of the evidence, at the totality of the facts found and then apply them to the language of the statute. One cannot do better than echo the words of Somerville LJ in *Cassidy v Ministry of Health* [1951] 2 KB 343, 352:
>
> > "one perhaps cannot get much beyond this: 'was his contract a contract of service within the meaning which an ordinary person would give to the words?'"

66. Roskill J also referred to Denning LJ's views expressed in *Stevenson Jordan & Harrison Ltd v MacDonald & Evans* [1952] 1 TLR 101, 111 and *Bank voor Handel en Scheepvaart NV v Slatford* [1953] 1 QB 248, 295. In the former Denning LJ said:

> "I find that the contract between the two parties was more consistent with a contract for service than a contract of service. From the totality of the evidence, Mr Evans-Hemming was not employed as part of the business of the plaintiffs but rather as a contract for service and his work, although done for the business, is not integrated into it but is only accessory to it."

In the latter he said:

> "… the test of being a servant does not rest nowadays on submission to orders. It depends on whether the person is part and parcel of the organisation."

Those passages have been criticised, for example by Professor Atiyah and by the Privy Council in *Lee Tin Sang v Chung Chi-Keung* [1990] 2 AC 374. Nonetheless there are echoes of that test in the judgment of Rix L.J. in *Viasystems*.

67. The Privy Council in *Lee Tin Sang* did, however, give this help at p. 382:

> "What then is the standard to apply? This has proved to be a most elusive question and despite a plethora of authorities the courts have not been able to devise a single test that will conclusively point to the distinction in all cases.
>
> Their Lordships agree with the Court of Appeal when they said that the matter had never been better put than by Cooke J. in *Market Investigations Ltd v Minister of Social Security* [1969] 2 Q.B. 173, 184-185:
>
> > "The fundamental test to be applied is this: 'is the person who has engaged himself to perform these services performing them as a person in business on his own account?'
> >
> > If the answer to that question is 'yes', then the contract is a contract for services. If the answer is 'no', then the contract is a contract of service. No exhaustive list has been compiled and perhaps no exhaustive list can be compiled of the considerations which are relevant in determining that

> question, nor can strict rules be laid down as to the relative weight which the various considerations should carry in particular cases. The most that can be said is that control will no doubt always have to be considered, although it can no longer be regarded as the sole determining factor; and that factors which may be of importance are such matters as whether the man performing the services provides his own equipment, whether he hires his own helpers, what degree of financial risk he takes, what degree of responsibility for investment and management he has, and whether and how far he has an opportunity of profiting from sound management in the performance of his task."

68. To much the same effect is an earlier Privy Council case, *Montreal v Montreal Locomotive Works Ltd* [1947] 1 DLR 161 where Lord Wright said:

> "In earlier cases a single test, such as the presence or absence of control, was often relied on to determine whether the case was one of master and servant, mostly in order to decide issues of tortious liability on the part of the master or superior. In the more complex conditions of modern industry, more complicated tests have to be applied. It has been suggested that a four-fold test would in some cases be more appropriate, a complex involving (1) control; (2) ownership of tools; (3) chance of profit; (4) risk of loss. Control is not always in itself conclusive."

He went on to say that

> "it is in some cases possible to decide the issue by raising as the crucial question whose business is it, or in other words by asking whether the party is carrying on the business, in the sense of carrying it on for himself or on his own behalf and not merely for a superior."

69. There being no single test, what one has to do is marshal various tests which should cumulatively point either towards an employer/employee relationship or away from one. Adopting that approach confirms that which is accepted as the common ground, namely, that Father Baldwin is not a true employee. The test may yet be useful to see whether he can be said to be an independent contractor, for if he is, the law is clear: the employer is *not* vicariously liable for the torts of his independent contractor. I am satisfied that Father Baldwin is no more a true independent contractor than he is an employee. For a start, he has no contractual relationship with his bishop. He is hardly a person in business on his own account with a free hand to carry out the job, if it is a job, as and when he wishes.

70. Whilst it may be useful to carry out some sort of comparative exercise for the purpose of ascertaining how close the relationship of Father Baldwin and the bishop is to a relationship of employer/employee as opposed to that of employer/ independent contractor, my judgment is that one should concentrate on the extent to which, if at all, he is in a position akin to employment. The cases analysed in the immediately

preceding paragraphs should be noted with a view to abstracting from them, if it is possible, the essence of being an employee. To distil it to a single sentence I would say that an employee is one who is paid a wage or salary to work under some, if only slight, control of his employer in his employer's business for his employer's business. The independent contractor works in and for his own business at his risk of profit or loss.

71. Whilst it is useful as part of an overall exercise to use the traditional distinctions between employer and employee to see whether vicarious liability may fairly and properly be extended to this particular relationship, it is also necessary to include a consideration of the policy factors which enable a judgment to be made as to the justice - or injustice - of extending liability.

How to weld policy considerations into a useful test for vicarious liability

72. I have found Professor Richard Kidner's article *Vicarious Liability: for whom should the 'employer' be liable?* (1995) 15 LS 47 to be most illuminating and helpful. He suggests that the following in some mix or other are appropriate signposts which may point to vicarious liability:

> "(1) Control by the 'employer' of the 'employee'. Traditionally this has meant asking whether the employer can control not only what is done but also how it is done. This makes little sense and the variant of asking whether the employer has the legal *right* to control is merely circular. Rather this factor should look at the degree of managerial control which is exercised over the activity and this may depend on how far a person is integrated into the organisation of the enterprise. At the one end of the spectrum a contractor will merely be asked to achieve an end result, or more ambiguously the specification of that end result may be so detailed as to amount to detailed control over how that result is to be achieved. At the other end of the spectrum, it is the person who is actually controlled in every detail of how things are to be done. Another way to look at the control test is to examine the degree to which the 'employee' is accountable to the employer; in other words to what extent is he subject to the managerial procedures of the employer in relation to such matters as quality of work, performance, productivity etc?
>
> (2) Control by the contractor of *himself*. This is not about Mr Newall who took no orders from anybody [the *Mersey Docks* case] but is rather an element of the entrepreneur test and involves looking at how the contractor arranges his work, his use of assets, his payment etc.
>
> (3) The organisation test (in the first sense of how central the activity is to the enterprise): This involves the question, how far the activity is a central part of the employer's business from the point of view of the objectives of that business. This element flows from the need to establish who it is that is engaging in the

> activity and the more relevant the activity is to the fundamental objectives of the business the more appropriate it is to apply the risk to that business.
>
> (4) The integration test (i.e. the organisation test in the second sense of whether the activity is integrated into the organisational structure of the enterprise). This also looks at the traditional test of whether the function is being provided for the business or by the business and is also a part of the entrepreneur test for it asks whether the activity is part of the enterprise's organisation or of some other organisation. A service may be absolutely essential to the business or wholly peripheral to it, but if it is being provided by what is in effect a separate business it would be appropriate to apply the risk to the enterprise. It is a factor of both who is engaging in the activity and also who stands to gain or lose from it.
>
> (5) Is the person in business on his own account (the entrepreneur test)? This is not really a separate test as it is intimately involved in the other four, but it needs to be highlighted so that the burden of proof is right. For the purpose of vicarious liability a person should not be regarded as an independent contractor simply because according to the technical requirements of employment law he is not an employee. Rather it needs to be established that he is actually behaving as an entrepreneur and is taking the appropriate risks and has the possibility of resulting profits. Thus even if a person's activity is peripheral to the enterprise and even if he is not for managerial purposes regarded as part of the organisation, a person could still be regarded as an 'employee' if it is clear that in relation to that business he is not acting as an entrepreneur. Agency workers would be an example."

Conclusions

73. I confess I have found this difficult to decide. I see the force of the arguments both ways. I can conclude that the time has come emphatically to announce that the law of vicarious liability has moved beyond the confines of a contract of service. The test I set myself is whether the relationship of the bishop and Father Baldwin is so close in character to one of employer/employee that it is just and fair to hold the employer vicariously liable.

74. Looking first at the control test, the priest is appointed to his office subject to the oversight of the bishop, and of any diocesan laws and regulations but in other respects, responsibility for running the parish rests with the parish priest. The priest exercises his ministry in co-operation and collaboration with his bishop rather than as one who is subject to the bishop's control as would be the case in an ordinary employment relationship. Nevertheless, as Dr Costigane said (see [9] above):

> "There is no direct control in the sense of the bishop checking what a priest does every single day, but there is a level of

> control in the sense that if certain things don't happen then action could be taken …"

Moreover, as prescribed by the canon law, and as acknowledged by Monsignor Read, presbyters (priests) are bound by special obligation to show reverence *and obedience* to their own ordinary, with the emphasis added by me. Monsignor Read said in his cross-examination (see [11] above):

> "… he (the bishop) would not give detailed instructions as how they were to exercise the role of parish priest to them as individuals but rather issue norms through the *Ad Clerum* to the clergy as a whole, as particular policy or things of that kind. If it came to the bishop's attention that a priest was in breach of ecclesiastical law, he would have the right and duty to take action."

Abusing a little girl is a most gross breach of ecclesiastical law and if it came to the bishop's knowledge, he would be bound to dismiss the priest from his office as parish priest even if he could not deprive him of the sacrament of holy orders. Here May LJ's test in *Viasystems* quoted at [38] above comes into play. He asked:

> "Who was entitled, and perhaps theoretically obliged, to give orders as to how the work should or should not be done?"

Although it might never have crossed his mind to contemplate the unthinkable, I do not doubt that Bishop Worlock *could* have told Father Baldwin, "Go out and care for the souls of your parishioners but on no account are you ever to sexually abuse any one of them".

75. Although the priest decides for himself how he runs his parish he operates within a pre-existing framework of rights and obligations set out in the Code of Canon Law as all such matters as duties, financial support and time away from the parish are left to the general provisions of Canon Law. Nevertheless he is ultimately subject to the sanctions and control of his bishop. The bishop does not control each and every facet of how the priest is to carry out his duties day by day for, as Monsignor Read explained in his written report,

> "His [the bishop's] role is not one of giving directions as to how that office is to be carried out. Those requirements are set out in the universal and particular canon law applying to the office concerned."

Nevertheless residual control still vests in the bishop. Ultimately there is little difference between the bishop's control over the priest and the health trust's control over the surgeon: neither is told how to do the job but both can be told how not to do it.

76. In my judgment the question of control should be viewed in a wider sense than merely enquiring whether the employer has the legal power to control how the employee carries out his work. It should be viewed more in terms of whether the employee is accountable to his superior for the way he does the work so as to enable the employer

to supervise and effect improvements in performance and eliminate risks of harm to others (the notions relied upon by McLachlin CJ in *Bazley* (see [47] above). In this sense the priest is accountable to his bishop.

77. As for the organisation test, the problem here is to identify the employer's – the bishop's – business. Or is it really the bishop's business? In reality it is not. The Roman Catholic Church may not be a legal persona but it does exist. It is highly organised. As Canon 369 of the current 1983 Code of Canon Law describes it, "

> "A diocese is a portion of the people of God, which is entrusted to a bishop to be nurtured by him, with the co-operation of the *presbyterium*, in such a way that, remaining close to its pastor and gathered by him through the Gospel and the Eucharist in the Holy Spirit, it constitutes a particular Church. In this Church, the one, holy, Catholic and Apostolic Church of Christ truly exists and functions."

Translating that into secular language, there is an organisation called the Roman Catholic Church with the Pope in the head office, with its "regional offices" with their appointed bishops and with "local branches", the parishes with their appointed priests. This looks like a business and operates like a business. Its objective is to spread the word of God. The priest has a central role in meeting that target. Ministering, as he does, to the souls of the faithful, can be seen to be the very life blood of the Church, vital to its existence. "The more relevant the activity is to the fundamental objectives of the business, the more appropriate it is to apply the risk to the business", says Kidner and I agree.

78. Next the integration test: the role of the parish priest is wholly integrated into the organisational structure of the Church's enterprise. He is, in Denning LJ's terms (see [66] above), part and parcel of the organisation, not only accessory to it. This picks up on the test applied by Rix LJ at [79] of *Viasystems* (see [39] above):

> "… what one is looking for is a situation where the employee in question, at any rate for relevant purposes, is so much a part of the work, business or organisation of both employers that it is just to make both employers answer for his negligence."

79. Finally the entrepreneur test: is the priest more like an independent contractor than an employee? Is he actually behaving as an entrepreneur, running his own little business, taking the appropriate risks and enjoying the resulting profits? True it is that the priest is not directly paid a salary but is dependent on what he can take from the collections given at Mass. As I understand it, any surplus forms part of the parish funds and is hardly his to put in his pocket. More recently a Decree on the Ministry and Life of Priests n.20 (December 1965), implemented in part through the Apostolic Letter *Ecclesiae Sanctae* of 6th August 1966 provided that:

> "They (the bishops) should also, either individually for their own diocese or better still by several acting in accord in common territory, see to it that rules are drawn up by which due provision is made for the decent support of those who hold or have held any office in the serving of God."

That smacks a bit more like being paid a wage. But it certainly does not resonate with being an entrepreneur. The very fact that the priest is required by Canon Law to reside in the parochial house close to his church is rather like the employee making use of the employer's tools of trade.

80. At [70] above I distilled the essence of being an employee to be that he is paid a wage or salary to work under some, even if only slight, control of his employer in his employer's business for that business. Father Baldwin may not quite match every facet of being an employee but in my judgment he is very close to it indeed.

81. The result of each of the tests leads me to the conclusion that Father Baldwin is more like an employee than an independent contractor. He is in a relationship with his bishop which is close enough and so akin to employer/employee as to make it just and fair to impose vicarious liability. Justice and fairness is used here as a salutary check on the conclusion. It is not a stand alone test for a conclusion. It is just because it strikes a proper balance between the unfairness to the employer of imposing strict liability and the unfairness to the victim of leaving her without a full remedy for the harm caused by the employer's managing his business in a way which gave rise to that harm even when the risk of harm is not reasonably foreseeable.

82. Can I test the conclusion in two ways? The first is admittedly loose: applying, or rather adapting, some of Somerville LJ's test in *Cassidy v Ministry of Health* cited at [65] above, I ask was the relationship akin to employment within the meaning which an ordinary person would give the words? I believe that the passenger on the fictional Clapham omnibus would say of a parish priest that he is a servant of the parish and that the parish should be ultimately responsible for his actions. But that is, of course, an emotive, and therefore a not very reliable test.

83. Let me then remove the emotion, which certainly pervades this case where one is outraged by the thought, if it be true, that a parish priest would defile a young girl on the day of her first communion. Change the facts completely. Let us assume the priest receives an urgent call to minister the last rites to a faithful member of his parish close to death. Canon 468 requires this of him:

> "With sedulous care and an outpouring of love, the parish priest must help the sick in his own parish, indeed above all those close to death, solicitously supporting them with the Sacraments and commending their souls to God."

To perform this sacred duty he jumps on his battered old bicycle and pedals furiously down the hill to attend his ailing parishioner. Alas he does so negligently, fails to observe another of his flock on a controlled pedestrian crossing. She is knocked down and suffers injury. The priest was clearly in the course of doing what he was appointed to do. There is no problem about applying stage 2 of the test. But he has taken a vow of poverty. He is not himself insured. But the parish is. Are we really having to conclude that his bishop and/or the diocesan trust are not vicariously liable because he is not employed or in a relationship akin to employment? Are we to say he is simply an office holder personally responsible for the manner in which he conducts his office. I think not.

84. Consequently, whilst acknowledging the strength of the arguments to the contrary, I would dismiss this appeal.

Lord Justice Tomlinson:

85. In *The Institute of the Brothers of the Christian Schools* case, 2010 EWCA Civ 1106, Hughes LJ with whose judgment I agreed laid emphasis upon the fact sensitive nature of the two stage enquiry which it is necessary to undertake when examining whether A is vicariously responsible for the acts of B and concluded, at paragraph 37 that "It is a judgment upon the synthesis of the two [stages] which is required". In the light thereof and having regard to the notorious difficulty of this area of the law I do not view with equanimity the invitation to the court to resolve the preliminary issue which was here directed to be tried. It is not a field which lends itself to preliminary issues, still less to a preliminary issue which represents only one half of two interdependent enquiries.

86. Accordingly I make no apology for declining to answer the broad question which Miss Gumbel QC submitted arises for decision and which, she says, was intended to be raised. That issue is, she suggested, "Can a Roman Catholic Bishop ever be held liable for the actions of a priest in his diocese," because, if not, that is a complete answer to the claim. Miss Gumbel asked the court not to answer this question in the negative because so to do would, she suggested, put the Roman Catholic Church in a position of immunity. If that were the question, I would certainly not answer it in the negative, since the answer would depend upon what precisely the priest had done and what he had been authorised to do. If the preliminary issue indeed raises this question, then in my view it admits of only one answer.

87. The question posed by the preliminary issue is in fact much more tightly drawn. It refers to the Second Defendant, which for present purposes we are invited to regard as a reference to Bishop Derek Worlock, who was Bishop of the Roman Catholic Diocese of Portsmouth during the period May 1970 – May 1972 when the alleged acts of abuse took place. Furthermore the preliminary issue refers to the alleged torts of Father Baldwin, which means the matters set out in the Particulars of Claim. Those Particulars assert that Father Baldwin was at the relevant time "the Parish Priest" at the Sacred Heart Church Waterlooville. There is an issue about this. The Defendants assert that Father Baldwin was at the relevant time working in the diocese as Vocations Director and was moreover based and working at the other end of what is a large diocese. For the purposes of this appeal and of resolving the preliminary issue, I will assume that the pleaded allegation is correct. I will also assume, because I think it is an assumption which enables the case for the Claimant to be put at its highest, that Bishop Worlock appointed Father Baldwin to the office of Parish Priest at the Sacred Heart Church. That said, (a) it is not alleged that Bishop Worlock, or indeed any other bishop, was in any way at fault in selecting Father Baldwin for this office and (b) in such circumstances I am unsure that the vicarious responsibility of a Diocesan Bishop for the acts of a priest operating in the diocese should be dependent upon the accident of whether he had in fact appointed him.

88. It is not alleged that the Bishop entrusted to Father Baldwin any specific duty in relation to the conduct of The Firs Children's Home at which the Claimant was resident whilst a young girl of seven and eight years old. The home was operated and/or managed by an order of nuns. There is no presently pleaded allegation as to

any duty of responsibility, of whatever nature, resting upon the Bishop for the activities of the nuns of the order.

89. The allegation is that Father Baldwin was regularly invited or permitted, sc. by the nuns, to visit the home and that he did so "in the course of his duties as a priest for [the Bishop]". I do not read this as involving an allegation that Father Baldwin was given any specific responsibility in relation to the home, rather as an allegation that visiting the home fell within the scope of what ordinarily a parish priest could be expected to do should there be a residential home of this sort run by nuns within his parish. In my view it would be far easier for the Claimant to establish the vicarious liability of the Bishop if it were the case that the Bishop had entrusted Father Baldwin with a responsibility for overseeing the conduct of the home or overseeing the nuns in their conduct of the home.

90. It is also alleged that whilst a resident at the home the Claimant was a parishioner of the Sacred Heart Church. I assume that this means that the Claimant was (and is) a member of the Roman Catholic Church. This is potentially a point of some significance – cf the observations of Lord Neuberger MR and of Longmore LJ in *Maga v Archbishop of Birmingham* 2010 1 WLR 1441 at paragraphs 44 and 79 respectively.

91. Finally, it is said that by reason of Father Baldwin visiting the home in the course of his duties as a priest for the Bishop, combined with the circumstance that the Claimant was at the relevant time a parishioner of the Sacred Heart Church, the Bishop owed to the claimant a duty of care.

92. If the principled approach to the establishment of vicarious liability adopted by Lord Hobhouse in *Lister's* case, 2002 1 AC 215, is the touchstone, the Claimant cannot I think succeed without establishing that the Bishop indeed owed a duty of care such as that alleged, albeit that there would need to be some particularity as to the precise ambit of that duty. I am very reluctant to hold on the basis of the material before us that the Bishop did owe such a duty, by which I mean of course a duty recognised and enforceable by the common law, not what Longmore LJ at paragraph 91 of his judgment in *Maga* described as "a duty of imperfect obligation". If the Bishop had or had assumed some responsibility for the conduct of the home the position might well of course be very different. But I regard as extravagant the notion that a Roman Catholic Bishop owes without more to every member of the Roman Catholic Church resident within his diocese an enforceable duty of care and what is more a duty of undefined ambit. On the basis of the pleaded allegations, I am not sure that the Claimant can for these purposes claim to be in any different position from that of every other member of the Roman Catholic Church within the diocese, whether resident at the home or not.

93. The question which we are asked to resolve focuses upon what Hughes LJ at paragraph 37 of his judgment in *The Institute of Christian Brothers* case described as the relationship between D1 and D2, i.e. that between the tortfeasor and the person, whom I will for convenience call the principal, sought to be made vicariously liable for the tort. In *Maga* the relationship between the Roman Catholic Diocesan Bishop and a priest working within the diocese, albeit not the "Parish Priest", was accepted for the purposes of the argument in that case to be one of employment.

94. In circumstances where the relationship between D1 and D2 is not one of employment, or perhaps akin to it, the only common thread which I can discern running through the authorities is that in order to be capable of giving rise to vicarious liability the relationship must at the very least be something which can loosely be described as agency. Thus in *John Doe v Bennett* 2004 ISCR 436, a decision of the Supreme Court of Canada upon which the judge placed heavy reliance, McLachlin CJ at paragraph 27 of her judgment described the relationship between bishop and priest there established upon the evidence both as "akin to an employment relationship" and, because of the extensive control which the bishop was there found to exercise over the priest, as giving rise to a reasonable perception that the priest was "an agent of the diocesan enterprise".

95. I am not sure that McLachlin CJ defined what she meant by the "diocesan enterprise", but I think that she was referring to the whole gamut of the activities of the church within the relevant community. At paragraph 11 of her judgment and in a different context she described the position thus:-

> "On a secular level, the Church interacts with members of the diocesan community in a host of ways. It carries on a variety of religious, educational and social activities. It makes contracts with employees. It transports parishioners. It sponsors charitable events. It purchases and sells goods and property."

96. The remote Canadian parishes in which the abusive priest in question worked were most unusual in nature. McLachlin CJ described them in this way at paragraph 30 of her judgment:-

> "The parishes in which Bennett worked were geographically isolates, impacting on the opportunities for, and extent and frequency of, the sexual assaults and contributing to their remaining unchecked for many years. The communities were entirely Roman Catholic and the devoutly religious inhabitants placed the Church at the centre of their daily lives. There were few other authority figures; the communities lacked municipal government, diverse business activities, secular organisations, police, courts or any other form of community leadership, leaving that role entirely to the parish priest. The only schools were denominational, and as such were influenced by the priest, who served as the only local representative of the distant school board."

It was in this context that McLachlin CJ described the Bishop as having conferred upon Bennett an "enormous degree of power relative to his victims". She went on to remark that that power imbalance was intensified in St George's Diocese due to the factors which I have just set out.

97. Nonetheless, I do not think that the court in *Doe v Bennett* observed a consistent distinction between the power conferred upon the priest by virtue of his appointment as the employee or quasi-employee or agent of the Bishop and the power which was conferred upon him solely by virtue of his status or standing as an ordained priest.

Thus at paragraph 29 the court said that "Bennett's wrongful acts were strongly related to the psychological intimacy inherent in his role as priest". McLachlin CJ went on to point out that "the church encourages psychological intimacy between the priest and the members of the parish". That may be so, but I consider that it is open to question whether the psychological intimacy should be attributed to status as ordained priest rather than to appointment as parish priest. Perhaps in the case under consideration the distinction was of no importance having regard to the special features of the remote parishes. Thus at paragraphs 31 and 32 McLachlin CJ concluded as follows:-

> "31. Bennett had enormous stature because of his position as parish priest, both to the boys and to their parents. The plaintiffs perceived him as a "god" – quite logically given his centrality in the community and the disparity in lifestyles between himself and his parishioners. As the school principal, Kerry Dwyer, testified, "It was like having a celebrity in the community that you had to treat properly . . . [T]here were incidents where I found people believed that the priest could turn you into a goat." Or, as one victim stated, when he asked his father if he should sleep over at Bennett's house as Bennett had requested, "my dad said of course, he's the priest". While Bennett had a particularly forceful personality, the root of his power over his victims lay in his role as a priest, conferred by the bishop. The trial judge summed it up eloquently, at para. 28: "The awe in which Father Bennett was held by the community at large contributed to his ability to control his victims and thus to satisfy a prodigious appetite for constant sexual gratification."
>
> 32. In summary, the evidence overwhelmingly satisfied the tests affirmed in *Bazley*, *Jacobi and K.L.B.* The relationship between the diocesan enterprise and Bennett was sufficiently close. The enterprise substantially enhanced the risk which led to the wrongs the plaintiff-respondents suffered. It provided Bennett with great power in relation to vulnerable victims and with the opportunity to abuse that power. A strong and direct connection is established between the conduct of the enterprise and the wrongs done to the plaintiff-respondents. The majority of the Court of Appeal erred in failing to apply the right test. Had it performed the appropriate analysis, it would have found the Roman Catholic Episcopal Corporation of St George's vicariously liable for Father Bennett's assaults on the plaintiff-respondents."

98. In an earlier passage of her judgment, paragraph 20, McLachlin CJ had observed that "vicarious liability is based on the rationale that the person who puts a risky enterprise into the community may fairly be held responsible when those risks emerge and cause loss or injury to members of the public". The Roman Catholic Church has in our case been at pains to disavow the notion that the very appointment of a priest materially increases the risk of sexual assault, a notion which no doubt owes its currency to the

adverse publicity which has surrounded the Catholic Church in relation to sexual abuse in recent times. Lord Faulks QC submitted and I agree that it is a substantial and unjustified leap in reasoning "to associate the priesthood ipso facto with sexual abuse". There are however echoes of this approach in the judge's judgment. At paragraph 35 he referred to the "immense power" handed to the priest by the Second Defendants, by which is to be understood the Bishop, and went on to conclude at paragraph 38 that "It was their [his] empowerment of the priest which materially increased the risk of sexual assault." He concluded at paragraph 39 that by appointing Father Baldwin as a priest, and thus clothing him with all the powers involved, the Defendants [the Bishop] created a risk of harm to others, viz the risk that he could abuse or misuse those powers for his own purposes or otherwise.

99. In the *Lister* case Lord Millett said at paragraph 83:-

> "Experience shows that in the case of boarding schools, prisons, nursing homes, old peoples' homes, geriatric wards and other residential homes for the young or vulnerable, there is an inherent risk that indecent assaults on the residents will be committed by those placed in authority over them, particularly if they are in close proximity to them and occupying a position of trust."

100. It is considerations such as these which inform my view, expressed above, that the Claimant's task in attaching liability to the Bishop would be much easier had the Bishop entrusted to Father Baldwin some responsibility in respect of the residential home. It may be that evidence will establish either that he did or that he should be regarded as having done so, but I do not understand that to be something which the Claimant is currently offering to prove at trial. We can determine this preliminary issue only on the basis of the pleaded allegation. I consider that Lord Faulks is correct when he submits that the judge has not attempted to explain why the very appointment of a priest to the office of parish priest materially increases the risk of sexual assault.

101. In *Viasystems Ltd v Thermal Transfer* 2006 QB 510 Rix LJ at paragraph 55 offered the following analysis:-

> "55. The concept of vicarious liability does not depend on the employer's fault but on his role. Liability is imposed by a policy of the law upon an employer, even though he is not personally at fault, on the basis, generally speaking, that those who set in motion and profit from the activities of their employees should compensate those who are injured by such activities even when performed negligently. Liability is extended to the employer on the practical assumption that, inter alia because he can spread the risk through pricing and insurance, he is better organised and able to bear that risk than the employee, even if the latter himself of course remains responsible; and at the same time the employer is encouraged to control that risk. For these purposes, issues have naturally arisen as to when the relationship of employer and employee, as distinct from that of employer and independent contractor,

> exists; or as to the doctrine of the course of employment, which seeks to set the scope and limits of the employer's liability. Over the years, the tests which have been adopted to answer these issues have developed in a way which has gradually given precedence to function over form."

Returning to the theme at paragraph 79 Rix LJ said this:-

> "What has to be recalled is that the vicarious liability in question is one which involves no fault on the part of the employer. It is a doctrine designed for the sake of the claimant imposing a liability incurred without fault because the employer is treated by the law as picking up the burden of an organisational or business relationship which he has undertaken for his own benefit."

102. These passages contain what I respectfully regard as a useful synthesis of the learning on the topic. It resonates with the speech of Lord Millett in the *Lister* case where at paragraph 65 he collected together some of the academic commentary:-

> "65. Vicarious liability is a species of strict liability. It is not premised on any culpable act or omission on the part of the employer; an employer who is not personally at fault is made legally answerable for the fault of his employee. It is best understood as a loss-distribution device: (see Cane's edition of *Atiyah's Accidents, Compensation and the Law* 6th ed (1999), p 85 and the articles cited by Atiyah in his monograph on *Vicarious Liability in the Law of Torts,* at p 24. The theoretical underpinning of the doctrine is unclear. Glanville Williams wrote ("Vicarious Liability and the Master's of Indemnity" (1957) 20 MLR 220, 231):
>
> "Vicarious liability is the creation of many judges who have had different ideas of its justification or social policy, or no idea at all. Some judges may have extended the rule more widely or confined it more narrowly than its true rationale would allow; yet the rationale, if we can discover it, will remain valid so far as it extends".
>
> Fleming observed (*The Law of Torts,* 9th ed (1998), p 410) that the doctrine cannot parade as a deduction from legalistic premises. He indicated that it should be frankly recognised as having its basis in a combination of policy considerations, and continued:
>
> "Most important of these is the belief that a person who employs others to advance his own economic interest should in fairness be placed under a corresponding liability for losses incurred in the course of the enterprise . . ."

> Atiyah, *Vicarious Liability in the Law of Torts* wrote to the same effect. He suggested, at p 171:
>
> "The master ought to be liable for all those torts which can fairly be regarded as reasonably incidental risks to the type of business he carries on".
>
> These passages are not to be read as confining the doctrine o cases where the employer is carrying on business for profit. They are based on the more general idea that a person who employs another for his own ends inevitably creates a risk that the employee will commit a legal wrong. If the employer's objectives cannot be achieved without a serious risk of the employee committing the kind of wrong which he has in fact committed, the employer ought to be liable. The fact that his employment gave the employee the opportunity to commit the wrong is not enough to make the employer liable. He is liable only if the risk is one which experience shows is inherent in the nature of the business."

103. Central to the resolution of the issue in this case is, I think, the question whether the concept described by Lord Millett and by Rix LJ can be transposed into the context of the priest doing the work of the church, and whether the Bishop is for this purpose simply to be identified with the church.

104. The judge regarded Father Baldwin as having been appointed to do the work of the church "for the benefit of the church" – paragraph 35. He regarded Father Baldwin as "appointed and authorised by them (i.e. the church) to act on their behalf" – paragraph 36. Adapting the principles distilled from *Viasystems* and *Bazley v Curry* [1999] 174 DLR (4) 45, another decision of the Supreme Court of Canada, he regarded the activities of Father Baldwin as "set in motion by [the church] in pursuance of a relationship into which [the church] had entered for [its] own benefit".

105. I find this reasoning contrived and unconvincing. I do not consider that the concepts of enterprise and benefit can easily be transposed into this context. If Father Baldwin can properly be regarded as undertaking his ministry for the benefit of anyone I should have thought that it was for the benefit of the souls in his parish. I do not think that it is sensible to describe either the church or the Bishop as having derived a benefit from the activities of its or his priests within the diocese. Miss Gumbel submitted that in this context benefit need not mean financial benefit. That may be so, although as Lord Faulks pointed out (as did Hughes LJ in paragraph 57 of his judgment in *The Institute of Christian Brothers* case) a commonality of interest does not necessarily reflect a benefit any more than it gives rise to an "enterprise" which the priest can properly be regarded as carrying out for and on behalf of the Bishop.

106. The judge's findings at paragraph 29 of his judgment as to the lack of control exercised by a diocesan bishop over the priests in his diocese set this case apart from any other hitherto decided, in particular *John Doe v Bennett* where the bishop was found to exercise extensive control over the priest. I do not think that the judge's error as to the power of removal affects this conclusion. Furthermore the present case is distinguishable from *Maga*, where it was accepted for the purposes of that case that

Father Clonan was an employee of the Archdiocese. I have nonetheless pondered long and hard whether the decision and reasoning of this court in *Maga* does not in any event compel us to decide that the Bishop may here be vicariously liable for the alleged torts of Father Baldwin. In my view it does not. The reasoning relates to a relationship equivalent to employment with all the assumptions that that brings as to the nature and extent of the control exercised or capable of being exercised. The present case calls those assumptions into question.

107. In *Maga* at paragraphs 82 and 83 of his judgment Longmore LJ said this:-

> "82. Regardless of general policy considerations, however, it seems to me to be important to look at the nature of the employer in this particular case. For the purposes of this action (but not otherwise), it is accepted that Father Clonan was an employee of the Archdiocese. The Archdiocese is a Christian organisation doing its best to follow the precepts of its Founder (see, in particular, Mark 10.13-16). Like many other religions, it has a special concern for the vulnerable and the oppressed. That concern may not be quite the same as the legal obligation to care or assumption of responsibility for care that was emphasised by Lord Steyn or Lord Hobhouse in Lister but it seems to me to be analogous.
>
> 83. In the case of the Roman Catholic Church, this situation is further emphasised by its claim to be the authoritative source of Christian values. For centuries the Church has encouraged lay persons to look up to (and indeed revere) their priests. The Church clothes them in clerical garb and bestows on them their title Father, a title which Father Clonan was happy to use. It is difficult to think of a role nearer to that of a parent than that of a priest. In this circumstance the absence of any formal legal responsibility is almost beside the point."

At paragraph 88 Longmore LJ observed:-

> "88. . . . When one [looks at the global picture], one sees that this is a case of Father Clonan inviting the claimant to the Presbytery and there abusing him. That displays a strong connection with the Church by a priest whose power and ability to exercise intimacy was conferred by virtue of his ordination by the Church."

108. All of this was of course said in the context of an examination whether there existed a sufficiently close connection between the abuse and what Father Clonan was authorised to do, i.e. the second stage of the two-stage enquiry. However I do not think that Longmore LJ would have been able to express himself in this way had he not been considering, as he emphasised at the outset of this part of his judgment, the responsibility of an employer for his employee. Shorn of that starting point, the question whether the Bishop had a legal obligation to care or assumed a legal responsibility to care would have been thrown into stark relief. The absence of any formal legal responsibility would not have been "almost beside the point" but would

rather be the point. I infer from the way in which he expresses himself that Longmore LJ may share the doubt on this aspect which I have expressed at paragraph 8 above. I also consider that in the absence of the concession there made Longmore LJ would not without more have referred in paragraph 88 to the power and ability, or perhaps the authority, conferred by virtue of ordination by the church. For the reasons I have endeavoured to state, I do not consider that ordination by the church is without more sufficient to attract vicarious liability to a diocesan bishop.

109. I mean no disrespect to Miss Gumbel when I observe that she struggled to identify a coherent principle the application of which should here lead to vicarious liability on the part of the bishop. I can identify no such principle. At the end of her address Miss Gumbel submitted that ultimately the test is whether it is fair that the person able to pay should be held liable. I do not believe that the law is so unprincipled. Moreover if the thinking is that behaviour so gross as that here alleged should attract a remedy I should like to believe that the Claimant will, upon proof of her allegations, in any event have a remedy against the First Defendants. It should not be overlooked that it is alleged that the First Defendants failed to heed or act properly upon information given to them of Father Baldwin having indecently assaulted two identified boys and moreover it is alleged that nuns of the First Defendants' Order saw Father Baldwin sexually assaulting the Claimant. No monetary compensation can begin to redress the hurt and harm of abuse such as is here alleged, but on the pleaded allegations which we are assuming to be made out the Claimant will not I think be without a remedy if she is unable to recover from the Bishop, or more accurately from those who have agreed to meet any liability which attaches to him.

110. I have not found this an easy case to decide. The point we are asked to decide is elusive. However, addressing myself to the question in the narrow sense in which I have understood it as explained above, and having regard to the judge's findings of fact on the basis of the evidence which was before him, I do not believe that it should be resolved in favour of the Claimant. I would allow the appeal.

Lord Justice Davis:

111. It is common ground between the parties, by reference to settled authority, that in determining whether vicarious liability can be involved in a case of this kind there is a two-stage test. The first stage involves the relationship between the second defendants (to be equated in effect with the then diocesan bishop) and Father Baldwin. The second stage involves the connection between the relationship and the alleged acts of sexual abuse on the part of Father Baldwin.

112. This preliminary issue is concerned solely with the first stage. In a number of past cases of this general type (for instance, *Maga*) the relevant bishop or archbishop of the Roman Catholic diocese in question had conceded, for the purpose of the case in question, that the priest should be regarded as an employee: those cases have thus mainly focused on the second stage. But no such concession is made in the present case. To the contrary. The second defendants – as they are entitled to do – dispute that they can have any vicarious liability for the alleged acts of Father Baldwin at all. In taking that stance Lord Faulks QC, on behalf of the second defendants, emphasises that this is not in any way to detract from the abhorrence with which the second defendants regard sexual abuse or from the commitment of the Catholic Church to investigate allegations of abuse and to help bring perpetrators to justice.

113. The question thus is "whether the person who (allegedly) committed the tort was in such a relationship with another as to enable the concept of a vicarious liability to arise. In some circumstances difficult questions may occur in this regard….": see paragraph 33 of the judgment of Lord Clyde in *Lister*.

114. This is undoubtedly a case of such difficulty. And the difficulty has been increased by two further considerations in the present case.

i) First, where a preliminary issue is directed there normally is an agreed statement of the primary (assumed) facts or an agreement that the facts alleged in the Particulars of Claim are assumed to be true or something like that. But here there was not even agreement as to whether Father Baldwin was – as the Particulars of Claim assert – the priest responsible for the parish of Sacred Heart Church, Waterlooville at the times in question (as opposed to being the diocesan Vocations Director based in Reading, as the second defendants say). At all events, the pleaded allegation is that he was. It is also pleaded that Father Baldwin was invited to visit the home and did so in the course of his duties as priest; and that JGE, while a resident of the home, was a parishioner of that church. It is further pleaded that the second defendants in the premises owed JGE a duty of care at all relevant times.

ii) Second, the reality is in cases of this kind that, in terms of facts, there can be a significant degree of overlap between the first stage and the second stage. As put by Hughes LJ in the *Institute of the Brothers of the Christian Schools* case "it is a judgment upon a synthesis of the two [stages] which is required."

iii) It thus may strongly be queried, with hindsight, whether this was an appropriate occasion for a preliminary issue to be directed in this particular case.

115. I will not dwell further on the various policy considerations which are said to be the rationale for the doctrine of vicarious liability and which are examined at length by Ward LJ. But Lord Faulks at all events is entitled to emphasise that the application of the doctrine can cast liability on a person who may not necessarily himself be at any fault at all. He accordingly submits, citing authority for this purpose, that the doctrine should be kept within precise limits and is not to be extended indefinitely. That must be borne in mind. Even so, a review of the development of the doctrine over the last hundred years or so indicates that significant extensions (which is in reality what they are, even if they can also be styled as the higher courts declaring the law to be otherwise than it was previously thought or assumed to be) have from time to time been promulgated. The decision in *Grace v Lloyd Smith & Co* [1912] AC 716 is one example; *Morris v CLS Martin & Sons Limited* [1996] 1 QB 716 another; *Lister* itself another again. I would suggest that *Viasystems* – at least potentially – is a further example. So the law has not proved static in this area.

116. As worded, the preliminary issue directed here is confined to the circumstances of this case: "whether in law the second defendant may be vicariously liable for the alleged torts of Father Baldwin." But underneath it is potentially a far greater issue (on the first stage of the application of the doctrine). That is – as I understood Lord Faulks to accept, and indeed assert, when Miss Gumbel raised this as the sub-text of the preliminary issue – whether a Roman Catholic diocesan bishop can *ever* be vicariously liable for the acts of a Roman Catholic priest in the diocese. Lord Faulks

said that he never could be: or, even if he could be, then it would only be in exceptional circumstances (of which he could identify no instance). I would not necessarily agree that this preliminary issue can have quite so open-ended a consequence: but it unquestionably has significant ramifications for other cases of this kind.

117. So this preliminary issue potentially has wider implications. Moreover it does not have wider implications simply in cases involving Roman Catholic priests. There can be no special doctrine of vicarious liability for cases of this kind. This matter has to be decided by reference to and application of general principles of vicarious liability: cases involving sexual harassment or sexual abuse do not fall into any special category: see paragraph 48 of the judgment of Lord Clyde in *Lister*. Moreover, there could also be implications for the wider commercial sphere as Lord Faulks pointed out, referring to two interesting and forthright articles of Phillip Morgan in this regard: (2011) 74 MLR 932; (2012) Lloyds Maritime and Commercial Law Quarterly 175.

118. If one were baldly to pose the question: "Should the Roman Catholic church be liable for acts of sexual abuse of parishioners committed in the parish by the Roman Catholic priest?" that would doubtless beg the answer from a person who was a not a lawyer: "Yes, of course." But that would be a simplistic and legally unprincipled approach. The focus, for present purposes, has to be directed at the actual relationship between the Roman Catholic diocesan bishop and the parish priest to see whether it is such as to at least be capable of giving rise to vicarious liability on the part of the diocesan bishop. Accordingly, I would dismiss as irrelevant Miss Gumbel's assertion that the position should in principle be no different for Roman Catholic priests than it is for Anglican priests or Baptist ministers (she said nothing about, for example, Rabbis or Imams). As I have said, there is no special category for these kinds of case; and principle thus requires analysis of the particular relationship in question.

119. For that reason, I found of relatively limited significance employment cases such as *Percy* which were briefly cited to us. Unquestionably here the position is well removed on the facts from the position in *Percy* where the minister of the Church of Scotland was held (by a majority), though not an employee, to be under a contract personally to do work. (It is interesting, however, to note that Lord Hoffmann, in the minority, held that Ms Percy's duties were not contractual at all but were the duties of her office: see at paragraph 66 of his judgment. That approach has at least some resonance with Lord Faulks' submissions, given that a core part of his argument was that the alleged actions of Father Baldwin were committed by him as office holder). The subsequent decision of the Court of Appeal in *Stewart* (again an employment case) stresses the need for a close consideration of the facts, in this context; it also gave prominence to the potential relevance of an intention to create legal relations in a case of that kind.

120. I do have difficulty with some aspects of the reasoning of MacDuff J and with some aspects of the reasoning in the Canadian case of *Doe v Bennett* on which he heavily relied. The relevant relationship between the Roman Catholic diocesan bishop and the parish priest, for these purposes, has, as I see it, to lie in the appointment by the bishop of the priest as parish priest and such level of control as he has over him, in circumstances where it was common ground that there is no contract and no employment and indeed no intention to create legal relations as such at all. That,

however, is not to be equated with the *status* of priesthood: many of the remarks made by MacDuff J and in *Doe v Bennett* seem to me, with respect, to go to the status that any priest has by reason of being an ordained priest. But that does not conclusively bear as such on the relationship between parish priest and diocesan bishop.

121. I also have some difficulty with MacDuff J's emphasis on the "immense power", as the judge put it (echoing sentiments expressed in *Doe v Bennett*, which in any case had very unusual facts) conferred on Father Baldwin. It can be said that such "power" as he had derived essentially from his office or status as priest, not from his appointment as parish priest. In *Doe v Bennett* it even seems to have been suggested (see paragraph 20 of the judgment, possibly echoed in paragraph 38 of the judgment of MacDuff J) that in putting a parish priest into a community a "risky enterprise" was being put into the community. I agree with Lord Faulks that simply is not a tenable proposition, let alone a justification for the creation of vicarious liability at this first stage. It is true that in *Lister* (at paragraph 83) Lord Millett stated that "experience shows that in the case of …. other residential homes for the young and vulnerable there is an inherent risk that indecent assault on the residents will be committed by those placed in authority over them, particularly if they are in close proximity to them and occupying a position of trust." But that was said in the context of a case relating to an employee at a children's home and was dealing with the second – not first – stage for vicarious liability. In fact, it seems to me that the judgment in *Doe v Bennett* seems in places simultaneously to address, or to conflate, both stages of vicarious liability.

122. But, that said, I agree with the actual conclusion of MacDuff J. I do so because I am prepared to say, on the evidence, that the relationship between Roman Catholic diocesan bishop and parish priest is – even though governed by canon law – such as can be regarded as sufficiently akin to employment so that vicarious liability may properly and fairly arise. That the bishop was not, and could not be, Father Baldwin's employer in law is not decisive (see *Viasystems*). I thus would accept the thrust of the proposition advanced by Miss Gumbel in her Respondents' Notice.

123. That an appropriate level of control is ordinarily required for vicarious liability to be capable of arising is, I think, borne out by the authorities (including *Doe v Bennett* itself). That in fact accords with one of the underlying policy drivers which constitute the rationale for the doctrine. But, as the case of *Viasystems* also illustrates, the control does not have to be entire and absolute. What is the "appropriate" level of control for vicarious liability to be capable of arising? Obviously it will depend on the facts of the case. Further, it seems to me, in a context such as the present, pointers at this first stage are, if D can be vicariously liable for the torts of A, (1) that D has caused A to be placed in a position, or where D and A are otherwise in a relationship, whereby D is capable of having some control of A's activities; and (2) that the activities are performed on behalf of or are designed to further the aims or interests or purposes (the latter word seemingly favoured by Lord Wilberforce in *Launchbury v Morgans* at p. 134-5) of D. In addition, an assessment – not by way of the sole applicable test (that would be unprincipled) but as a factor required to be taken into account – of whether it is fair, just and reasonable to make D liable should, in my view, also be made in each case.

124. In my view, on the evidence the bishop did have such a relationship with and capacity of control over Father Baldwin in his capacity as parish priest.

125. It is true that the judge held that there was "effectively no control over priests once appointed". The judge further found that a Roman Catholic priest is free to conduct his ministry as he sees fit with little or no interference from the bishop, whose role is not supervisory and who is not in a position to make requirements or give directions. Lord Faulks understandably relied on those findings.

126. But those findings in my view do not fully reflect the reality of the position on the evidence and in any case do not conclude the issue in favour of the second defendant.

127. The experts were in essential agreement on most issues; albeit their joint written statement records a "difference in emphasis" on the level of control of a bishop. Dr Costigane emphasised the level of control whereas Monsignor Read emphasised that the bishop's role was a safeguarding role rather than a managerial role. Monsignor Read also said (and in her oral evidence Dr Costigane did not controvert this) that a priest exercised his ministry more as a collaborator rather than someone subject to the control of his superior in the employment field. The evidence was that the parish priest was responsible for the running of his parish. But that does not, in my view, displace the proposition, by reference to the precepts of canon law, that the bishop did (in a meaningful sense) have a degree of control over Father Baldwin as appointed parish priest in the diocese. The judge himself expressly found that the bishop must exercise episcopal vigilance and that there was some element of control in that. Further, the bishop might visit a parish only once every five years or so; but he could do so more frequently. It is true that, as the above recited evidence shows, a bishop could not make requirements or give directions which the priest – unlike an employee – would in law be under a duty to obey. But, in my view, that does not indicate a lack of capacity and entitlement to control. It was common ground that, under canon law, the priest owes his bishop reverence and obedience. Bishops are commissioned to perpetuate the works of Christ (as stated by Monsignor Read in his report on behalf of the second defendant). In the present case the bishop had responsibility for the care of the diocese of Portsmouth, comprising 96 parishes at the time: it was to this parish in the diocese (on the alleged facts) that he chose to appoint Father Baldwin. On appointment, as Monsignor Read further said in his report, the responsibility for running a parish rests on the parish priest "subject to the oversight of the Bishop": albeit the priest is not a delegate of the bishop.

128. That there was a sufficient level of control is, I think, confirmed by the (agreed) fact that a bishop has, under canon law, power to remove or transfer a parish priest against his will or to deprive him of his position as parish priest (although not from the priesthood altogether), in accordance with prescribed procedures under canon law. Moreover under canon law a bishop may of his own motion suspend a priest under his authority: canon 2186 of the 1917 Code. It may be noted that such a step may be taken not only where a priest is in breach of his responsibilities and duties under canon law: it can, at least in the case of transfer to another post, be effected "should the good of souls or the need or advantage of the church require it". There was also undisputed evidence of Dr Costigane that, under canon law, appropriate penalties may be imposed on a priest if he does not obey the lawful precepts of his bishop (canon 2331).

129. I also consider that, in a real way, a parish priest such as Father Baldwin is furthering, and was appointed and entrusted to further, the bishop's aims and purposes (that is, to perpetuate the works of Christ in the diocese – see Vatican II Decree on the Pastoral

Office of Bishops in the Church, as cited by Monsignor Read). I bear in mind that in the *Institute of the Brothers of the Christian Schools* case it was stated by Hughes LJ (at paragraph 57) that vicarious liability on the part of the Institute could not be derived on the basis that brother-teachers were carrying out its purposes and were furthering the teaching mission of the Institute having been sent to the establishment in question for that purpose. But in my view that was said in the context of the facts of that case, where it was key that the Institute, whose mission was that of teaching, was not engaged in the business of running the teaching at the establishment in question: a point also emphasised by Pill LJ at paragraphs 84 to 87 of his judgment. It might be said (and Lord Faulks did say) that here too the bishop had not taken responsibility for running this particular home – rather, the first defendant had. But that is not an answer, to my mind. Here, the home was within the parish and (as alleged) JGE was one of Father Baldwin's parishioners. His appointment by the bishop to the parish as parish priest necessarily, and as the bishop would have expected, carried with it responsibilities, as parish priest, to visit and promote the well being of parishioners. That JGE was at the relevant time in a home (within the parish) run by an order of nuns in my view does not displace that: indeed, I incline to regard it as little more than incidental for the purposes of the case against the second defendants. In any event, even if the first defendant may have a liability that does not preclude – as the case of *Viasystems* indicates – the second defendants from having a liability also.

130. I therefore consider that in the circumstances of a case such as the present the bishop had undertaken responsibility to promote the spiritual well-being of parishioners within the diocese, and had entrusted the furtherance of that aim within this parish to his appointed parish priest. Thus the appointment by the bishop of Father Baldwin to this parish was designed to further that overall aim. Of course it can be said that Father Baldwin's activities as parish priest were for the benefit of parishioners (not the bishop); but that does not, in my view, displace the object and purposes for which he was appointed to the parish by the bishop in the first place.

131. For these reasons I would conclude that, although this was most certainly not an employment relationship or even a contractual relationship, the relationship between the bishop and Father Baldwin nevertheless was sufficiently akin to that of employment: and at all events was one such whereby, given the degree of control and connection and given the objectives of the bishop in the appointment of Father Baldwin which it was intended he should further and promote, vicarious liability in respect of his activities in the parish is capable of arising. For these purposes, I do not think it is a conclusive objection that the control and the connection do not arise under and are not in any way governed by the (common) law: it suffices, in my view, that they arise under and are governed by canon law. Further, checking to see whether that gives rise to a result which is just and reasonable, I think it does. Whether in any given situation that actually does impose liability on the second defendants for any particular alleged activity involves then going to the second stage: which is not a matter for decision for present purposes.

132. Although not central to my thinking, I consider that conclusion may be supported by this further consideration. Suppose a case (not this one) where a bishop is repeatedly and directly told in person of acts of abuse or misconduct on the part of a parish priest but takes no steps to investigate or prevent them. I would have thought, as at present advised, that a duty in law would be capable of arising in such a case (indeed,

Monsignor Read accepted that under canon law an obligation to "take steps" would arise; in oral evidence, Dr Costigane also said that "if certain things don't happen action can be taken"). It would be odd if it proved to be a duty of no real content, by being met with a plea that a bishop had no control over, or no means of preventing, such misconduct. In reality as I see it, he does – for example, by removing or transferring or suspending, where the priest misconducts himself or refuses to obey or follow the bishop's guidance and advice. It also would be odd, as Miss Gumbel observed, if no breach of duty on the part of the bishop could be maintained if such complaints were raised not with the bishop directly but with priests on his staff (if I may use that word) who then do nothing. On Lord Faulks' argument, the bishop would seem to have no vicarious liability for the omission of those priests to report the matter to the bishop, thus preventing him from taking some action.

133. Since preparing the substance of this judgment, I have read the draft judgments of Ward LJ and Tomlinson LJ. I have found the extensive discussion by Ward LJ of the authorities and academic commentaries most interesting. The divergence in viewpoints there manifested in part seems to be fashioned by competing attitudes as to the extent to which, as a matter of policy, an innocent defendant should (without fault) be made to bear responsibility for the wrongful acts of another. One can, at all events, understand the lament of Lord Hobhouse in *Lister* that an exposition of policy rationales cannot be equated with the applicable principles. The reality is, in my view, that because the doctrine of vicarious liability is a legal construct based on policy its application has depended on the weight given to the various policy rationales in particular cases and to changes in circumstances and public perceptions over the generations. The approach has, for better or worse, never been purist or static.

134. It will be apparent that in the result, on the (alleged) facts of this case, I have reached the same conclusion as Ward LJ. I have of course considered the points made by Tomlinson LJ, and I acknowledge their force. But, as will be gathered, my view is different. It may be that the bishop had no "formal legal responsibility" for Father Baldwin; but in my view his responsibility for and control over the parish priest whom he had appointed was real and substantial. I would, as will be gathered, attach importance to the fact that Father Baldwin had been appointed by his bishop as parish priest: that is not simply to be equated with his status as ordained priest.

135. I also do not, for myself, attach the importance that Tomlinson LJ attaches to the (alleged) fact that JGE was abused while at the home run by the first defendant or to the fact that she may have a claim against the first defendant. The present case is in this regard clearly distinguishable from the *Institute of Christian Brothers* case. To me, the important fact here is that JGE on the alleged facts was resident (at the home) as a parishioner; and Father Baldwin's understood responsibilities, as part and parcel of his appointment by the bishop as parish priest, were designed to extend to ministering to those parishioners resident in the home, as part of the parish. I do not myself, with respect to Tomlinson LJ, consider it at all "contrived and unconvincing" to say that Father Baldwin, in ministering to the children in this home in the parish, was carrying out the purposes for which the bishop had appointed him as parish priest. It is, in my view, neither necessary nor appropriate linguistically to confine the consideration to concepts of "benefit" or "enterprise".

136. In the result, therefore, although my reasoning would not be in all respects that of the judge, on the whole I think that he reached the right conclusion. I would dismiss the appeal.

Addendum

Lord Justice Ward:

137. The appellants now apply for permission to appeal to the Supreme Court. We acknowledge that the Court's judgment in this case has widen the scope of vicarious liability extending it from well established situations of employment to relationships that are "akin to employment". This has ramifications in other areas of the law and to that extent this case does raise a matter of some public importance. The issue was important enough for the Supreme Court of Canada to consider it. We also acknowledge that each of us has found the case difficult to decide on the facts. Nonetheless, we have decided, after some hesitation, to refuse permission to appeal. Rather than deal with a case decided as a preliminary issue, the Supreme Court may prefer to wait till they have a case fought out on all factual issues with a judgment at the conclusion of a fully contested trial. Secondly we are aware that the Supreme Court are hearing the case of *Various Claimants v The Catholic Child Welfare Society and the Institute of Brothers of the Christian Schools & ors* on 23rd July and although Stage 1 is not at issue in that case, the Supreme Court will be better able than we are to judge whether this case raises other issues they may wish to hear next. This addendum is written in the hope that it may be of some assistance to the Supreme Court in the event that permission to appeal is sought.