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Sufficient Reparation for Betrayal of Trust in Child Sexual Abuse Cases? The Christian Duty of Care, Vicarious Liability and the Church of England[1]

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Abstract

Feminist challenges to the traditional principles of vicarious liability, and their application in practice, highlight the difficulties that face claimants seeking redress via a doctrine largely developed from claims relating to the corporate model, and reflecting masculine traits of institutional power and control embedded in the traditional company employer/employee relationship. This article explores the ways in which the recent spate of claims made against UK religious authorities in respect of present and historic acts of child sexual abuse perpetrated by the clergy have forced a paradigm shift requiring the courts to consider influences on the legal process associated with tropes such as restorative justice, powerfully supported and explained by feminist legal theorists. The position of the Roman Catholic Church, however, is shown to be very different to that of the Church of England, highlighting the need for the paradigm shift to go further and to consider the role of validation and vindication as elements in reparation, institutional as well as individual.

Keywords; vicarious liability, child sexual abuse, clergy abuse, restorative justice, harm vindication

Introduction

Accusations of child sexual abuse perpetrated by figures of religious authority have become public over the past three decades in England. Initially focus was on the Roman Catholic Church but the revelations have increasingly included Protestant denominations. The accusations made in respect of Roman Catholic clergy precipitated a number of complex civil law claims against their respective 'employers'. In turn this highlighted powerful challenges, particularly from feminist perspectives, to existing thought on tort doctrine and

[1] The authors wish most sincerely to thank the reviewers for their cogent, constructive and insightful comments, which have greatly strengthened this piece, and also Penelope Childs for commenting on earlier drafts.

remedies. Notably, these have included ideas relating to restorative justice approaches.[2] Judgments have revealed considerable movement in legal guidelines in relation to vicarious liability and limitation periods. The UK courts have now established in principle that the Roman Catholic Church has responsibility for its priests as 'employees', but this has not yet been successfully extended to the Protestant churches in England, despite the official acceptance by them of the actuality of extensive incidents of historical child sexual abuse practised by some of their priests.

Considering the Anglican reality, reparative gestures have been made by the Church of England, including a public apology from the Archbishop of Canterbury, Justin Welby, endorsed by the Synod.[3] But official guidelines do not reference any form of reparation to match the levels of remorse expressed other than offers of spiritual support. The issue explored by this article is what this acceptance of moral responsibility actually means in terms of the legal liability of the Anglican Church for English claimants. This has wider implications for other Protestant churches.[4] The current situation regarding the Church of England raises the question of what the priorities are for victims of such abuse when seeking vindication and associated reparation.[5] Does (can) the traditional remedy of financial compensation proffer sufficient reparation? The need for harm vindication, expressed through strategies such as the public 'validatory' airing of the less tangible (and quantifiable) consequences of abuse claims via the court system, has been central to the challenges to legal thought posed by feminist scholars like Kathleen Daly.[6] The recent overturning by an Independent Review of the Director of Public Prosecutions' decision not to prosecute Lord

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[2] Encapsulated in Strang Heather and Braithwaite John (eds) *Restorative Justice and Family Violence* Cambridge University Press Cambridge 2002.
[3] 'Child Abuse Apology from Church of England' *Christian Today* 7 July 2013. http://www.christiantoday.com/article/child.abuse.apology.from.church.of.england/33106.htm
[4] This includes the Church **in** Wales, and the Church **of** Scotland. While Anglican, neither are state nor established churches so their legal position is different to that of the Anglican Church in England itself.
[5] Varuhas Jason 'The Concept of "Vindication" in the Law of Torts: Rights, Interests and Damages' (2014) 34(2) *Oxford Journal of Legal Studies* 253-293.
[6] Daly Kathleen 'Sexual assault and restorative justice' in Strang and Brathwaite (eds) *Restorative Justice* above note 2.

Janner on historic child sexual abuse charges suggests that the legal and political establishment are responding to these, but what of the churches?[7] In line with harm vindication principles, public apologies are being freely offered by the churches but can apology alone ever be a sufficient reparative response?[8] This discussion utilises feminist legal theory to reflect on the responsibility of these spiritual institutions with specific reference to claims of vicarious liability as the primary civil law mechanism for holding organizations to account. .

1 Synthesizing Feminist Legal Theory and Vicarious Liability in the Context of Clergy Abuse

For over 20 years, feminist scholars including Leslie Bender, Patricia Peppin and Josephine Donovan have argued that the application of tortious principles, traditionally presented as 'neutral and unbiased', should properly take into account issues highlighted by wider feminist perspectives including the implications of the inherent language of law for justice delivery.[9] Peppin claims that the fundamental negligence concepts of harm, duty and standard of care 'need to be construed in a manner sensitive to historic disadvantage'.[10] Since the typically masculine traits of hierarchy and dominance both 'disadvantage [and] characterise relationships in life', then a corresponding 'awareness of this dimension should enter into the determination of liability and compensation.'[11] Bender argues:

> 'Tort law needs to be more of a system of response and caring.... Its focus should be on interdependence and collective responsibility rather than on individuality, and on

[7] Former Labour MP and member of the House of Lords diagnosed with Alzheimer's Disease: 'Lord Janner to be prosecuted for child sex offences' *Daily Telegraph* 30 June 2015 http://www.telegraph.co.uk/news/uknews/crime/11705439/Lord-Janner-to-be-prosecuted-for-child-sex-offences.html.

[8] Smith Nick *Justice Through Apologies. Remorse, Reform and Punishment* Cambridge University Press Cambridge 2014.

[9] See Bender Leslie 'A Lawyer's Primer on Feminist Theory and Tort' (1998) 38 *Journal of Legal Education* 3; 'Feminist (Retorts): Thoughts on the Liability Crisis, Mass Torts, Power, and Responsibilities' (1990) *Duke Law Journ*al 848; Peppin Patricia 'A Feminist Challenge to Tort Law' in Bottomley Anne (ed) *Feminist Perspectives on the Foundational Subjects of Law* Cavendish London 1996 p 69. Donovan Josephine *Feminist Theory: The Intellectual Traditions* Continuum New York 3rd ed 2006.

[10] As above Peppin at 70.

[11] As above.

safety and help for the injured rather than on “reasonableness” and economic efficiency.’[12]

Her espousal of the concept of ‘*re*tort’ is illuminating, partly as in the sense of a conversational response to legal theory and judicial practice; but also as a theoretical device, to reconceptualise and reconstruct the application of tortious liability through feminist legal method.[13] Like Daly, she insists that a full remedy of harms would require consideration of the ‘physical, emotional, and interpersonal losses or "costs" inflicted upon particular individuals, and the continued, dangerous decision making potential of the errant corporation’.[14] In other words, if it is to fulfil its supposed legal function, which includes as strategic aims both deterrence and compensation, tort law must recognise emotional, physical and spiritual harms. Along with Daly’s framing reflections on harm vindication and the need for validation in achieving justice, Bender’s ground-breaking, and in the context of sexual abuse claims, prescient, feminist critique of tort law provides the basis for our subsequent focus on what has been achieved, and what challenges remain. Her critical themes of equality, responsibility, remedy and alternative legal strategies are also employed to reflect on the extent to which judicial reasoning in the leading cases reviewed here relates to the challenges posed by such critiques.[15]

For Carol Gilligan as well as Daly, questions of morality from a feminist perspective focus upon ‘context…relationships, equity, and responsibility’; with interconnectedness as a defining characteristic of a relationship rather than the quintessentially hierarchical conceptualisations of more conventional male perspectives.[16] Furthermore, tortious remedies should not be limited to financial compensation but should recognise and accommodate other means of reparation; something which could include public

[12] As above note 9 ‘A Lawyer’s Primer’ p 4.
[13] As above note 9 ‘Feminist (Retorts)’ 865.
[14] As above note 6 Daly at 36.
[15] Bender ‘A Lawyer’s Primer on Feminist Theory’ as above note 9.
[16] Gilligan, Carol ‘In a Different Voice: Psychological Theory and Womens’ development’ Cambridge, Massachusetts 1982 cited as above note 9 ‘A Lawyer’s Primer’ p 3.

acknowledgement of instances of abuse, via court hearings, as well as apologies. As Conaghan has commented, 'over the last few decades feminists have been at the vanguard of boundary changes to tort liability, particularly in relation to claims deriving from sexual…harm'.[17] Certainly the criticisms in such scholarship are fundamental to understanding the implications of changes in the practices in the English courts in the last quarter-century, particularly in the re-visitation of vicarious liability in recent judicial reasoning in relation to the Roman Catholic Church. But the question remains of where this leaves the Church of England.

Under the Salmond Test, vicarious liability is a device whereby a party may become liable for the tort of another. Strictly speaking both parties remain defendants, although for practical purposes, most usually related to the ability of one (deeper pocket) defendant to assume liability, there will be only one party held liable.[18] The traditional doctrinal approach was to locate that arrangement within a defined employment, or *master and servant*, relationship. Society and the law have moved beyond such linguistic and conceptual antiquity, preferring a contemporary reading of vicarious liability. This involves reconsideration of the extent of the connections that cement the relationship between the two defendants; the actual tortfeasor and the legal person deemed responsible.[19]

The traditional perspective effectively debarred such judicial consideration until the leading judgment in *Caparo* in 1990, which imported notions of 'fairness' and 'justice' to accompany the 'reasonable' when determining the existence of a general duty of care, with the implications that had for vicarious liability.[20] The broadening of the Salmond test, identified

[17] Foreword by Conaghan Joanne in Richardson Janice and Rackley Erica (eds) *Feminist Perspectives on Tort Law* Routledge Abingdon 2012 at p iv.
[18] Most often this is seen in an employment relationship, in which circumstance it is usual for the employer to be required to obtain third party liability insurance.
[19] For a discussion of this evolution see the judgment of Ward LJ in *JGE v The Trustees of the Portsmouth Roman Catholic Diocesan Trust* [2012] EWCA Civ 938 paras 19-72.
[20] *Caparo Industries pIc v Dickman* [1990] UKHL 2 (per Lord Bridge at 5).

from the start as imprecise and necessarily requiring pragmatism,[21] provides the first evidence of a shift from the traditional doctrinal strait-jacketing towards justice mechanisms more in line with harm vindication concepts. A decade later, this underpinned the House of Lords' judgment in *Lister v Hesley Hall* 2001. Lord Millet held that 'an employer who is not personally at fault is made legally answerable for the fault of his employee' where an inextricable link could be established between wrongful acts and the employment involved, in this case, sexual abuse of children by staff.[22] Recent UK Supreme Court and Court of Appeal decisions dealing with abuse claims against the clergy suggest that the judiciary are regularly exhibiting the levels of awareness highlighted by Peppin in relation to cases involving the Roman Catholic Church. This has included a more generous interpretation of vicarious liability targeting those with the means to finance compensation for victim claimants. It ensures that if an 'employer' has created risk through, broadly, an employment relationship, they should be expected to be vicariously liable if that risk transpires.[23] Per Lord Phillips in the *Catholic Child Welfare* case, 'it is fair, just and reasonable' for vicarious liability to be shared with the employing school by an institute of the Catholic Church, given that the abuse was committed by Catholic monks.[24] In the context of the emphasis elsewhere on restorative justice in the last quarter-century, a greater willingness of victims to come forward in these cases has manifested itself. This has enabled courts to make a paradigm shift where contextual factors identified as crucial to a vindication of hurt felt and indicative of a betrayal of the duty of care are positively considered when applying the principles of vicarious liability.[25] Such broadening of responsibility would not necessarily have been achieved but for the framing factor provided by the distinctive factors presented in these cases, alongside

[21] Ibid.
[22] *Lister v Hesley Hall* [2001] UKHL 22.
[23] See *A v Archbishop of Birmingham* [2005] EWHC 1361 QB; *Maga v The Trustees of the Birmingham Archdiocese of the Roman Catholic Church* [2010] EWCA Civ 85.
[24] *The Catholic Child Welfare Society & Ors v Various claimants & Ors* [2012] UKSC 56, 94.
[25] Kalbian Aline *Sexing the Church, Gender, Power and Politics in Contemporary Catholicism* Indiana State University Press Bloomington 2005 p 139.

the non-corporate structure of religious institutions and the relatively uncomplicated legal nature of the non-established Roman Catholic Church in the UK.[26]

This contrasts with the complexities surrounding the legal position of the established Church of England. It leaves it open to question how far, in practice, the redrawn vicarious liability concept can be utilised successfully to deal with all cases involving clerical sexual abuse of children. The failure, to date, to bring any case against the Church of England as an institution, despite a number of convictions of individual clergy on abuse charges,[27] suggests that a sole reliance on the vicarious liability doctrine may not be sufficient to permit the delivery of what victims would see as 'justice' and an appropriate recompense for the harm done to them.

Despite the advances noted, an essentially traditional fixation on monetary compensation as the principal remedy for harm continues to dominate. In practice, in most instances where tortious liability is proven, financial compensation is the inevitable outcome as opposed to other forms of 'corrective justice'.[28] But Honore argues that a tortfeasor's accountability as an 'outcome responsibility' is broader than any moral blame or legal liability and one that 'figures prominently in our sense of our own agency and is important for both the theory of agency and moral theory.'[29] This could be used radically to challenge the issue of where responsibility lies in moral terms: thereby theoretically having the potential to make religious institutions, including the Church of England, consider to what extent moral responsibility should be practically recognised by them, especially given their avowed objective of working to repair the harm done to individuals in the Anglican communion by clerical abusers.[30]

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[26] It is recognised that this experience has not been shared in Australia, for instance.
[27] *R v Rideout* Lewes Crown Court, 20 May 2013, unreported.
[28] See Beever Allan 'Corrective Justice and Personal Responsibility in Tort Law' (2008) 28(3) *Oxford Journal of Legal Studies* 475-500.
[29] Honore Tony *Responsibility and Fault* Hart Portland 1999 p 77.
[30] New Safeguarding and Clergy Discipline Measures will become law in 2016, after passing through Synod. See http://www.itv.com/news/2015-04-07/dozens-of-historical-church-of-england-child-abuse-allegations-made/.

2 Vicarious Liability and the Roman Catholic Church

In considering the peculiar legal position of the Church of England, a review of the development of the legal doctrine of vicarious liability in relation to the Roman Catholic Church needs to be undertaken to understand why the option of bringing such claims has not similarly been applied to the Church of England. When, in 1850, the Roman Catholic ecclesiastical hierarchy was re-established in the UK for the first time since the Reformation, care was taken to ensure that it was placed on a very different legal basis to the Church of England. The reasoning was to prevent any claims for restoration of ecclesiastical property, from churches to land, formerly in the possession of the Roman Catholic Church.[31] Consequently, in the late twentieth century, when individual perpetrators began to be convicted, lawyers believing that the Roman Catholic Church in England could be held to account, as well as the guilty men, cannot simply presume the same would apply to the Anglican Church.

In January 2012, Sean O'Neill, the Crime Editor at *The Times,* published a list of 31 named Roman Catholic priests convicted of child sex offences in the English courts between 2008 and 2011. In addition an unknown number received police cautions.[32] Disclosure of the scale of abuse was a factor in the willingness of concerned legal practitioners to pursue vicarious liability claims, not simply for financial recompense but as a way of achieving validatory public acknowledgment of harm done by persons with a moral as well as a secular duty of care. Richard Scorer, senior partner at Pannone LLP, is reported as stating that at any one time over 30 civil cases involving clerical abuse claims were being handled by lawyers. In Scorer's view the Roman Catholic Church's policies and procedures have improved since

[31] Paz Denis *Popular Anti-Catholicism in Mid-Victorian England* University of Stanford Press Stanford 1992.
[32] O'Neill, Sean 'Locked Archives that Guard the Catholic Church's Guilty Secrets' *The Times* 17 January 2012 p 8.

the 2001 Nolan Review on Child Protection in the Catholic Church in England and Wales.[33] However, he has cautioned that the full extent of the clerical abuse has yet to be uncovered; something he accounts for by reference to Canon 490 of the Code of Canon Law, which requires each bishop to maintain a secret and secure document archive.[34] Also militating against the assumption that the Church is moving towards an acknowledgment of the need for reparation for abuse, as O'Neill highlights, compensation awards secured against the Catholic Church have been relatively small, typically £10-20,000. After all, the 'Church often deploys expensive lawyers and complex arguments to resist claims' in the courts, prioritising the maintenance of its assets over restorative justice to victims.[35]

Pope Francis appears to be seeking to change this. He has unequivocally acknowledged that Roman Catholic clergy have been guilty of abuse and issued an apology.[36] He has also acknowledged that there is still a reluctance by the local Catholic hierarchy in many countries to abandon its secrecy and engage in positive and public negotiations in the interest of harm vindication, via the courts, with victims.[37] A continuing preference for negotiated financial settlements before court hearings is disturbing given that victims are often less concerned about financial outcomes than with gaining a public airing for their claims through the courts, as a means of achieving validation of their sufferings. In 2004, former altar boy Simon Grey was the beneficiary of what is generally identified as the first substantive out of court settlement agreed by the Catholic Church in the UK. Abused between 1975 and 1981 by Father Christopher Clonan at Christ the King Church, Coventry, Grey brought proceedings against the Birmingham Archdiocese for breach of their duty of care. Just before the High Court hearing the Archdiocese offered £300,000 in settlement

[33] Available at http://www.cathcom.org/mysharedaccounts/cumberlege/finalnolan1.htm
[34] As above 'Locked Archives'. See also Scorer Richard '"Can I sue the Pope?" Child abuse litigation against the Holy See' (2012) *Journal of Personal Injury Law* 25.
[35] As above.
[36] 'Pope hits out at criticism of Church over Sexual Abuse' *BBC News* 5 March 2014.
[37] 'Pope: Church Must Rid Itself of the Scourge of Child Sexual Abuse' *Vatican Radio* 5 February 2015.

which Grey accepted. However, in subsequent media interviews, Grey made it clear that he felt he had not benefitted from harm vindication:

> 'I would have liked to have my case heard in open court, but pursuing that principle could have cost me money and my sanity. I suffered serious abuse and that was what this was about: my abuse and others' abuse.'[38]

In 2005, though, Clonan's actions were finally exposed in the courts. The High Court in Manchester awarded £635,684 (the largest sum to date) to claimant A, who was abused by Clonan between 1977 and 1988, starting when A, the child of devoted Catholics who had welcomed Clonan into their home, was aged 7.[39] Implicitly acknowledging a quasi-restorative justice dimension to the case, Justice Clarke commented that as a regular visitor to the home Clonan was 'trusted and admired. The abuse was the grossest breach of the trust that A and his family had placed in him.'[40] As a child A had not understood what was happening and then had become too scared to speak out, fearing he would not be believed The judge's direct acknowledgement of harm done therefore amounted to an appropriate vindication accompanying the more traditional financial compensation.[41] Equally, the award was not challenged by the Church. Belief that it had a positive impact on victims is supported by the fact that another of Clonan's victims came forward seeking validation via the courts.[42]

Clonan had paid Maga (an epileptic 12 year-old non-Catholic boy with severe learning difficulties) small sums of money for odd jobs and invited him to attend discos at the church. There he had been abused by Clonan in the presbytery. Represented by the Official Solicitor, Maga claimed the trustees were vicariously liable for Clonan's abuse and negligent in not following up a number of allegations, including one made in 1974 by the parents of another

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[38] 'Compensation for Former Altar Boy' *BBC News* 12 January 2004.
[39] *A v Archbishop of Birmingham* [2005] EWHC 1361 QB.
[40] Ibid paras 1-3.
[41] The sustained abuse caused schizophrenia and post-traumatic stress disorder which triggered the disclosure of the allegations at the age of 22, A was 35 years of age at the time of the hearing.
[42] *Maga v The Trustees of the Birmingham Archdiocese* [2010] EWCA Civ 85 especially paras 45-50.

boy to Clonan's immediate supervisor, Father McTernan. The trustees' response argued not only that the claim was time-barred but also that they were not vicariously liable as Clonan's actions were not 'closely connected' to his 'employment.' Lord Neuberger MR found common ground between the Church and other professions and corporate entities. Father Clonan normally dressed in his clerical 'uniform'. This denoted his position of trust and responsibility and intensified his moral authority. His 'duty' to evangelise extended to Catholics and non-Catholics alike, he was also given specifically assigned responsibility to engage with young people (grooming Maga under the guise of performing his pastoral duties) which:

> 'gave him the status and opportunity to draw the claimant further into his sexually abusive orbit by ostensibly respectable means connected with his employment as a priest at the Church.'[43]

Ultimately, the Court of Appeal determined, importantly, that the claim was not time-barred because of the ruling in *Hoare* (discussed below). However, it also held that the defendants were not vicariously liable on the grounds that Conan's association was not part of any evangelisation, therefore he was not carrying out any priestly duties.

In a further challenge to progressive reasoning, O'Sullivan has expressed concern that understandings of vicarious liability have been 'driven by unusual, extreme situations hovering around its edge, because only with a clearly defined edge can we be sure what forms the core of the rule.'[44] Her assertion that vicarious liability 'is being shaped and defined by cases involving child abuse, miles away from its bread and butter function of making commercial employers pay for the negligence of their employees' reveals an ongoing reluctance by some in the English court system to move vicarious liability thinking forward.[45] Fortunately, others accept that evolution of legal concepts and principles does depend upon

[43] Ibid at para 48.
[44] O'Sullivan Janet 'Case Comment: The sins of the father – vicarious liability extended' (2012) *Cambridge Law Journal* at 485.
[45] As above.

boundary shifts, and a degree of flexibility to accommodate new realities. Concepts of 'employment' are usefully more fluid than in previous generations and provision of services increasingly exists outside of normal commercial contexts. It is therefore appropriate that the law reflects the contemporary landscape. A close connection test potentially enables a positive outcome, in that a greater emphasis is placed on an 'employer' to ensure effective oversight or supervision of an employee.

This evolution of tort law is often a creation of policy factors and in that context the desirability of a 'clearly defined edge' was addressed in the Court of Appeal by Lord Justice Ward in *JGE v The Trustees of the Portsmouth Roman Catholic Diocesan Trust*. This laid the basis for a seminal Supreme Court decision later that year, *E v English Province of Our Lady of Charity.*[46] The claimant's case was that Father Wilfred Baldwin, appointed by the Portsmouth Diocese, raped her when she was 7 years-old and living in a Roman Catholic children's home run by an order of nuns. The defendants, Our Lady of Charity, were the order and trustees of a trust which had stood in the place of the diocesan bishop at the material time. The defendants claimed that their relationship with the priest was not analogous to an employer/employee relationship as there was no written employment contract. As priests were appointed verbally, the Bishop had no authority to supervise, only advise; no wages were paid by the diocese and priests could not be dismissed except by the Pope. While Father Baldwin owed the Bishop obedience he was free to conduct himself and his ministry as he wished and was only answerable to the canon law. Two of the judges at the Court of Appeal (Ward and Davis LLJ) held that there was a close connection between the tortfeasor and the defendant.[47] Their relationship was 'so close in character' to that of an employee and employer that it was 'just and fair' to hold the defendant liable because of the extent to which the priest was integrated into the structure of the church and the centrality of his role. Ward concluded that vicarious liability is a fluid concept that needs to be determined

[46] *JGE v The Trustees of the Portsmouth Roman Catholic Diocesan Trust* alternatively *E v English Province of Our Lady of Charity* [2012] EWCA Civ 938.
[47] Ibid paras 81, 131.

in context.[48] Here that context was the seriousness of the sexual abuse, which has 'emphatically moved beyond the confines of a contract of service.'[49] He stressed on more than one occasion that liability should only be fixed where it is 'just and fair' to hold the defendant vicariously liable tempering Kidner's clearly patriarchal tests which follow the orthodoxy of control, integration, organisation and entrepreneur.[50]

Ward concluded by briefly reviewing some of the main themes of vicarious liability: control, compensation, deterrence, loss-spreading and enterprise liability.[51] This echoes Bender in that it established a position that there is 'no single rationale that provides a complete answer for the imposition of vicarious liability' and that the courts rarely 'speak with one voice.'[52] On the one hand, his position reflects Fleming's *Law of Torts* that 'the modern doctrine of vicarious liability … should be frankly recognised in having its basis in a combination of policy considerations.'[53] It also reflects McLachlin J's comment in the Canadian case of *Bazley v Curry*:

> 'a focus on policy is not to diminish the importance of legal principle…. 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.'[54]

On the other, it acknowledges Lord Hobhouse's criticism of McLachlin's 'social and economic reasons' in *Lister*, where Hobhouse made it clear that 'the exposition of the policy reasons for a rule is not the same as defining the criteria for its application.'[55] Weighing up both approaches Ward undeniably acknowledges that policy considerations do and should

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[48] Ibid 59-60.
[49] Ibid 73.
[50] Ibid 70 and72 citing Kidner Richard 'Vicarious Liability: for whom should the employer" be liable?' (1995) 15 *Legal Studies* 47.
[51] Ibid 74-81.
[52] Ibid 52-54.
[53] Cited in Giliker Paula *Vicarious Liability in Tort: A Comparative Perspective* Cambridge University Press Cambridge 2010 p 244.
[54] *Bazeley v Curry* [1999] 2 SCR 534.
[55] *Lister v Hesley Hal*l [2001] UKHL 22 para 60.

inform legal principles provided they are 'developed incrementally and in a principled way'.[56] This chimes with feminist perspectives on the need to adopt a more modern and sensitive approach to vicarious liability. The policy dimension has been well expressed in the UK Supreme Court by Lord Phillips.[57] The 'defined edge', comes with Phillips' observation that 'the policy objective underlying vicarious liability is to ensure, insofar as it is fair, just and reasonable, that liability for tortious wrong is borne by a defendant with the means to compensate the victim'.[58]

The moral balance influencing the Supreme Court's conclusions in the Birmingham Archdiocesan appeal in the *Maga* case references the largest claim against the Roman Catholic Church, made by Patrick Raggett.[59] A city lawyer, he had been regularly abused over a four year period by a teacher at the Jesuit Catholic College he had attended in the 1970s. Raggett sought £5 million in compensation after suffering a breakdown in 2005 and suddenly remembering that Father Michael Spencer had abused him, touching his genitals and performing digital anal penetration. Spencer had died in 2000, aged 76, but Raggett sued the Governors of the College, who denied liability on the basis that the claim was time-barred as it had not been brought within three years of Raggett's 18th birthday as per section 11 Limitation Act 1980. However, in the High Court, Mrs Justice Swift directed that the section 11 bar should not apply, being satisfied with Raggett's claim of suppressed memory accounting for the delay.[60] She followed the 2008 House of Lords decision in *A v Hoare*, a set of conjoined appeals.[61] The House of Lords held that for compensation claims for personal injury in cases of historic sexual abuse, time ran (under section 14 of the Act) from

[56] *JGE v The Trustees of the Portsmouth Roman Catholic Diocesan Trust* [2012] EWCA Civ 938.
[57] *The Catholic Welfare Society v Various Claimants* [2012] UKSC 56.
[58] Ibid para 34.
[59] *Raggett v Society of Jesus Trust for Roman Catholic Purposes* [2009] EWHC 909 QB.
[60] Ibid.
[61] *A v Hoare, X v Wandsworth LBC, H v Suffolk CC, C v Middlesbrough Council Young v Catholic Care (Diocese of Leeds)* [2008] UKHL 6.

when the claimant had knowledge of the necessary facts of any abuse, not from when he or she could have been expected to take certain steps to report the original abuse.[62]

While Mrs Justice Swift agreed that not all the problems of Raggett's adult life were a consequence of the abuse, she emphasised that as 'the victim of an insidious form of abuse involving a grave breach of trust' he had 'suffered significantly' and in so doing, provided his claim with a level of validation in line with that he was seeking, as his own comments make plain.[63] Raggett was scathing of the Church's responses and the ongoing breach of trust that represented for him:

> 'The most important aspect of this trial is that the people who allowed this to happen – and who were quite happy to see it swept under the carpet – have been held responsible at last.…For all the warm words from the Jesuit order about co-operating in this case, the reality is they fought it tooth and nail without regard for my feelings.… the Catholic Church generally, is still not accepting legal and moral responsibility for the dark virus of abuse in the way it should.' [64]

This once again returns the focus to the feminist critiques of vicarious liability as traditionally conceived, and the argument that for the law to work effectively, it must work in a social context that acknowledges the need for changes in how institutions perceive their responsibility for offenders as well as for victims.

3 'Equality-before-the-law' and religious institutions

Bender insists that

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[62] An interesting viewpoint on the limitation issue in a Canadian context can be found in Adjin-Tettey Elizabeth and Koddar Freya 'Improving the Potential of Tort Law for Redressing Historical Abuse Claims: The Need for a Contextualized Approach to the Limitation Defence' (2010-11) 42 *Ottawa Law Rev.* 95-122.

[63] *Patrick Joseph Raggett v The Governors of Preston Catholic College* [2012] EWHC 3641 QB; 'Jesuit-run College Abuse Victim Patrick Raggett Wins Damages' BBC News 9 November 2012 http://www.bbc.co.uk/news/uk-england-london-20267571.

[64] Gledhill Ruth 'Lawyer can sue Jesuits for £5m over abuse' *The Times* 6 May 2009.

> ‘Accompanying our ideology of equality-before-the-law is an expectation that the judge and legal process somehow will intervene, if necessary, to balance the unequal power between the parties, so that justice can prevail.’ [65]

Such power dynamics can and should not simply be ignored or dismissed because the autonomy of the law privileges more objective and universal principles. There has been discernible movement. Claims for intentional sexual assault (trespass against the person) once fell within the breach of duty category,[66] but in *Stubbings v Webb*[67] (concerning a claim of sexual abuse committed over 20 years before) the House of Lords ruled that such cases were now excluded from sections 11, 14 and 33 of the Limitation Act 1980 which, in combination, had previously permitted such claims. Burton confirms that *Stubbings* ‘produced severe distortions in the lower courts who attempted to distinguish it on grounds which created both anomalies and complexity.’[68] Claimants of historic abuse were now required to prove that defendant organisations had been ‘systematically negligent’ in failing to respond to and deal with any allegations. Practically speaking, the legal discourse was clearly discriminating against those with an inherent ‘historic disadvantage’ as well as condoning the power imbalance between the parties. But in overruling *Stubbings,* Lord Hoffman in *Hoare* delivered the lead opinion criticising the panel for deciding the case ‘as if the 1954 Act had just been passed’ and pointing out that, by way of a model, the Australian High Court had declined to follow it.[69]

Hoffman dismissed the ‘systematically negligent’ requirement suggesting that future claimants should instead rely on vicarious liability.[70] Other aspects corrected in his reasoning

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[65] Bender above note 4 at 884.
[66] Long established in *Letang v Cooper* [1965] 1 QB 232; *Long v Hepworth* [1968] 1 WLR 1299.
[67] [1993] AC 498.
[68] Burton Frank ‘Limitation, vicarious liability and historic actions for abuse: a changing legal landscape’ (2013) *Journal of Personal Injury Law* 95.
[69] *Hoare* as above note 61 para 17; para 20 *Stringel v Clark* (2006) 228 ALR applying *Kruber v Grzesiak* [1963] VR 621.
[70] Ibid.

would appear to be in line with feminist scholarship. However, feminist responses would be dissatisfied with the continuing limitations on the interpretation of what constitutes 'significant injury'. Thus under section 14(2) of the Limitation Act in the context of child sexual abuse: 'an injury is significant' only if 'the person whose date of knowledge is in question would reasonably have considered it sufficiently serious to justify his instituting proceedings.' Yet young children may not realise that their abuse is 'sufficiently serious'; they are also unlikely to appreciate the need to, and implications of, 'instituting proceedings.' While the provision allows both actual knowledge 'observed by' the claimant and constructive knowledge such as medical and paediatric expertise to be taken into account, the section remains vague as to whether individual characteristics caused by the abusive behaviour could be considered. Moreover, the judiciary over-complicated the test of whether a reasonable person with that knowledge would consider the injury sufficiently serious making it partly objective and partly subjective.[71]

Bender's position on the 'injured parties' would be clear; that they are not only 'burdened by the pain, injustice, and disruptions caused by their injuries, but they also are tangled in a legal system which is unfamiliar, alienating and ritualized'.[72] Therefore what constitutes 'reasonableness' needs to be more generously and flexibly interpreted, paralleling Hoffman's conclusion that a claimant's injuries would be established as a 'significant injury' where he was 'obviously aware that he had been seriously assaulted', either at the time or realised such years later.[73] Lady Hale admitted that she found the provision more difficult to construe but 'despite my nagging doubts' fully supported Lord Hoffman's 'more generous approach to the exercise of discretion.'[74] Lord Brown acknowledged their Lordships were 'ushering in' a 'new era' and with it the likelihood of more sexual abuse claims.[75] The ruling was followed in

[71] Ibid para 34 et seq.
[72] Bender above note 9 at 883.
[73] *Hoare* note 61 paras 40-43. Despite subsequent conflicting expert opinion casting doubt on whether he 'really' knew.
[74] Ibid paras 56-59.
[75] Ibid para 84.

Raggett and *B v Nugent Care Society* concerning three test cases in respect of a group litigation comprising 60 claimants who had been sexually abused in the 1960s and 1970s at two residential Catholic schools.[76] The Court of Appeal in *Nugent* issued guidance on the correct approach in applying section 33 of the Limitation Act post-*Hoare*. First, the claimant need only show that the alleged abuse occurred and caused the alleged psychological or physical damage and that the defendant was vicariously liable for it. Second, the question of whether the claimant could reasonably have been expected to institute proceedings is to be determined by the judge under section 33, whereas pre-*Hoare* it had only been treated as relevant to the claimant's knowledge and not to the exercise of the discretion.

These discussions on the moral responsibility of Roman Catholic parish priests and teachers for their congregations and pupils, and the legal responsibility of their parent (employing) Church, have been rehearsed at length. This is because they represent the extent to which the Roman Catholic Church in the UK has been forced by the courts into accepting its legal responsibility for the actions of its 'employees'. The decision in *The Catholic Child Welfare Society* [77] case has gone a considerable way towards reflecting a measure of divergence from a traditionally rigid doctrine on vicarious liability in relation to the Roman Catholic Church. To date, it has only been the Roman Catholic Church which has been required to take responsibility via the doctrines of vicarious liability, for the tortious actions of their clergy and associated agents.

4 Responsibility and Religious Institutions

In relation to 'responsibility' Bender makes a clear distinction between corporate and individual liability. Corporate liability should relate to the harms caused vicariously whereas personal responsibility must 'correlate with the power of individuals' and their authority to 'make decisions about resources, markets, personnel, and safety, as well as power to

[76] *B v Nugent Care Society, R v Wirral MBC* [2009] EWCA Civ 827.
[77] As above note 24.

disclose.'[78] The Roman Catholic Church has significant power and authoritative responsibility to make decisions about its personnel and the safety of those under their care and it is on these grounds that courts have agreed that it must be held accountable. However, there can be no assumption that, in England, the Anglican Church is equally vulnerable. It might be thought unlikely, following Lord Phillips' exposition of policy, that the quirks of theology and the arcane complexity of the Anglican Church's legal position will continue to challenge the ability of the courts to establish vicarious liability against the institution in England should a claim be brought against it. Yet even in the post-*CCW* environment in England, it is likely to be more than just a matter of time before or if the current apparent impunity of that Church changes. A recent judgment has suggested that it remains difficult to establish a traditional employment relationship for Protestant churches generally.[79]

Despite its position as the Established Church, the Church of England is not a single legal entity. Equally, Anglican parochial clergy are not employees, but office holders and the right of appointment to an office does not automatically lie with the Church hierarchy and often still lies with the (secular) patron of an individual living. Their rights and duties as office holders are regulated not by an employment contract but by the laws relating to the office held: independent of the individual holding it.[80] As clarified in *Sharpe v Worcester Diocesan Board of Finance & Another* the position of a rector in relation to his diocese or the over-arching body of the Church of England is, under ecclesiastical law, very distinctly not that of an employee.[81] The Church can and does issue guidance to incumbents on how to perform the duties of their office satisfactorily according to current expectations, but even the

[78] Bender above note 9 at 870.
[79] *President of the Methodist Conference v Preston* [2013] UKSC 29.
[80] See Ecclesiastical Offices (Terms of Service) Regulations 2009: regulation 33 applies Part X of the Employment Rights Act 1996 *as if,* and not *because*, clergy are employed. Since 2011, most Anglican clerics hold their offices under Common Tenure.
[81] *Sharpe v Worcester Diocesan Board of Finance & Anor* [2012] ET 1302291/2008 and 1316848/2009, upheld by the Court of Appeal in *Sharpe v Bishop of Worcester (in his Corporate Capacity)* [2015] EWCA Civ 399.

Bishop's Papers cannot be held to amount to any form of employment contract as it is within the rights of Anglican clergy to decline to follow the advice on policy expressed in them.[82]

The position in ecclesiastical and employment law is that where a senior cleric has power over an individual cleric, it relates only to their spiritual authority as clerics. Using that spiritual authority, under ecclesiastical law, a cleric may be defrocked for conduct unbecoming to a cleric in holy orders. That sanction has been rarely used. Instead, the Anglican Church in England has preferred to resort to removing an individual's licence to officiate and preach at any service outside their own parish, either permanently or for a period of years.[83] The Church has very recently shown itself reluctant to apply that remedy to its clergy even after conviction on charges of sexual abuse. Most recently, a furore has arisen over Reverend Guy Bennett, formerly Rector of Oxted and Tandrige, convicted in 1999 on charges of indecent assault against young girls.[84] He was, that year, deprived of his licence to hold office in the Church, but has not been defrocked. In October 2014, the Archbishop of Canterbury wrote to one of Bennett's victims, outraged that he was attending church in East Grinstead, Sussex, regretting that it was not possible to stop anyone from wearing a dog-collar or using the honorific Reverend, so long as there was no illegal purpose in so doing. He added that having taken advice, it was also his conclusion that he 'did not have the powers to depose Bennett from clerical orders'.[85]

There is also the complication of the issue of the unique financial position of the Church of England as the state church in England. As office holders, clergy are in receipt of stipends provided by the Central Stipends Authority, run by the Church Commissioners. The Church

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[82] Church of England DDO Handbook at www.churchofengland.org/clergy.
[83] See the decision to remove the licence of Reverend Patrick Okechi for a period of 10 years where an adulterous affair with a parishioner was held to constitute a breach of trust http://www.ecclaw.co.uk/clergydiscipline/okechi2.pdf.
[84] 'Vicar faces jail over indecent assault' *BBC News* 30 April 1999 http://news.bbc.co.uk/1/hi/uk/332679.stm
[85] The letter has been published on a number of websites: https://theneedleblog.wordpress.com/2014/12/13/archbishop-of-canterbury-tells-survivor-that-paedophile-vicar-will-not-be-defrocked/; also 'Archbishop of Canterbury' *The Independent* 29 April 2015.

Commissioners were established by Parliament through the Church Commissioners Measure 1947, as an independent secular statutory body with responsibility for managing the Church's assets and finances. The objective was to ensure that the Church would not become a burden on tax-payers, but in practice, the senior ecclesiastical hierarchy of the Church does not have the power to manage its finances without the agreement of the Church Commissioners, as attempts to persuade the Commissioners to invest 'ethically' underline.[86]

Such legal ambiguities surrounding the position of the Anglican Church in England perhaps helps to explain why the conviction (along with his organist) in April 2013 of Reverend Keith Wilkie Denford, formerly parish priest at St John the Evangelist, Burgess Hill, on three charges of indecent assaults on boys under 16 has not been followed up by any broader claim against the Church of England. Instead, public reportage of the case has sought to emphasise that the Diocese of Chichester had taken pains to act properly and promptly once it learned officially of the abuse.[87] In response to media questioning about the diocesan response, the Bishop, Martin Warner, has pointed out that reportage of the abuse by one of the victims had only been made in 2011. At that point the Diocese had been swift to involve the police and to aid them in developing the case for prosecution.[88]

Even in the Anglican Church of Australia, where the position of clerics is less complicated by such arcane laws dating back to the time of the Church's establishment in the sixteenth century, there have not yet been successful claims against it for vicarious liability in sexual abuse cases.[89] But it has at least shown itself willing to act (if as discreetly as possible) to defrock those found guilty of sexual abuse of children. As a result of amendments to its canon law, Church Discipline Ordinance 2006, and the Holy Orders, Relinquishment and

[86] See *Harries v The Church Commissioners for England* [1992] 1 WLR 1241.
[87] 'Child Abuse Pair Found Guilty' *Church Times*, 12 April 2013.
[88] As above.
[89] As noted above there has also been a difficulty with vicarious liability claims relating to the Roman Catholic Church in Australia.

Deposition Canon 2004, it is even reported to be planning to laicise a former Bishop, Keith Slater, for failing to take action on incidents of abuse by clergy within his diocese.[90] This may provide a model which the Anglican Church in England might be wise to follow, in terms of maintaining a genuine spiritual authority rooted in a popular conviction that the Church takes seriously its moral duties of care, even though as at the time of writing there are still no instances of successful vicarious liability claims.

5 Compensation

The practice of compensating in monetary terms for damage and hurt done according to a sliding financial scale is long-established.[91] The *CCW* judgment certainly reflects that, in line with Lord Phillips' policy reasoning, 'the employer, by employing the employee to carry on the activity will have created the risk of the tort committed by the employee',[92] as reaffirming that direction. While there are times when purely financial compensation is important, modern appreciations of the value of the individual and the importance placed on emotionally sensitive responses by the courts are likely to make it more difficult for those seeking compensation to accept it *solely* in the form of a financial restitution.

While victims, such as those discussed previously in this article, have expressed a desire for apologies, some distrust remains about the genuineness of those offered by the Christian churches. What alternative reparation might be acceptable, either instead of or accompanying financial compensation? Bender suggests a way forward would be for common law tort theory 'to acknowledge that financial responsibility alone is inadequate for legal responsibility' and that instead it must 'imagine another medium of value' which amounts to a 'recognition that injury is an emotional, physical, and spiritual event'.[93] She

[90] See http://www.abc.net.au/news/2015-03-18/former-bishop-keith-slater-to-face-defrocking-by-anglican-church/6328112.
[91] Brundage James *Law, Sex and Christian Society in Medieval Europe* University of Chicago, Chicago 1987.
[92] As above note 24 para 35.
[93] Bender above note 9 at 905.

asserts that a feminist voice of responsibility, which includes emotional, caregiving work, has not been readily translatable into money, so tort law has basically ignored it. She further advocates a reappraisal of the conceptualisation of injury to include recognition that injury is an emotional, physical, and spiritual event.[94]

The importance of an apology accompanying a successful vicarious liability against the Roman Catholic Church has already been mentioned, as has been the willingness of the Church of England to apologise, at least broadly and generically, for sexual abuse by Anglican clergy in the UK.[95] Yet as Nick Smith has pointed out, the issue of remorse for crimes and wrongdoing, and apologies ordered by law, sets up a series of complex issues, at least partly because so much of the moral origins of English law lie within canon and ecclesiastical law.[96] An expectation of the expression of contrition for individual wrong-doing is a core element in the rituals of the Christian churches, as the General Confession in the Book of Common Prayer has underlined for Anglicans who are required to state publicly that they had 'offended against thy holy laws' by having (amongst other things) 'done those things which we ought not to have done'.[97] To gain absolution from sins, genuine remorse was required, largely testified to by the public nature of the confession of sins.

Given this background, the force of apologies from the Church of England, expressed by its senior clerics does have value. As well as echoing restorative justice thinking about the need for public justice to involve harm vindication, it is also in line with Bender and Honore's requirement that redress should, to amount to justice, involve an acknowledgement and affirmation of the fact of individual suffering as a result of child sexual abuse in order to

[94] As above.
[95] Graham Georgie and Bingham John 'Justin Welby: I broke down in tears at horror of Church child abuse' *Daily Telegraph* 27 October 2014.
[96] As above note 8; also Helmholtz Richard and Baker John *Oxford History of the Laws of England* Oxford University Press Oxford 2004.
[97] General Confession *Book of Common Prayer.*

provide the necessary 'sensitivity to the experiences of the parties.'[98] A change to Church ordinances to permit an easier laicisation of clerical abusers could, in practice, be the most practical way forward for the Church of England to show at least a moral, if not a legal, appreciation of a vicarious liability for its vicars.

Conclusion

This discussion has demonstrated that, in the wake of the high profile clerical abuse cases discussed here, the English courts are responding positively to the challenges posed by feminist scholarship. In line with that scholarship, what the legal thinking surrounding the issue of vicarious liability has begun to show is a recognition that, because the matter involves a breach of trust by men with a duty of care for the souls, rather than simply the bodies, of victims, financial compensation has not been seen as sufficient recompense by many claimants. In expanding its thinking to reflect some of the approaches intrinsic to restorative justice, the law is recognising the importance of the wider social and institutional context in its decisions. This has, most recently, been shown in the High Court decision in the case of *A v Watchtower Bible and Tract Society*, where the Society was held vicariously liable in a case of child sexual abuse.[99] Though not strictly constituted a Christian Church analogous to the Methodist, Baptist, Presbyterian and Unitarian Churches, the Society does make claims to a similar moral status, making the decision relevant here.

The ability for the civil law to provide a remedy, albeit imperfectly if seen solely in terms of financial redress, is capable of producing accountability at a higher level. If tortious liability is about corrective justice, and a component of that correction is rooted in an enterprise-risk policy imperative, it is not difficult to see how an organised Church is now subject to greater and more transparent risk management obligations. However, it is not necessarily the case that the Church of England would so qualify; something underlined by the ongoing omission

[98] Bender above note 9 at 876; Honore above note 29.
[99] *A v Watchtower Bible and Tract Society* [2015] EWHC 1722 QB.

by Synod in July 2015 of any suggestion of planning for financial compensation to be paid by the Church in clergy abuse cases.[100] Given this, what alternative reparation can be appropriate? The Church of England has only accepted a moral liability for abuse perpetrated by clergy belonging to them. Beyond that, for reasons to do with its complex and arcane legal position, the Church as an institution has not yet received an equivalent scrutiny of the courts in relation to vicarious liability. The potential for a challenge to its impunity remains, not only through revelations by the Goddard enquiry[101] into child abuse by UK institutions which will include the Church of England, but more immediately with the forthcoming trial (currently scheduled for October 2015) of the retired Bishop of Gloucester. Peter Ball is charged both with child sexual abuse and misconduct in public office, possible because of his Episcopal role which places him in a different position to parish clergy.[102] Though he may, in the end, be found unfit to plead, it is likely that, echoing the decision in the Lord Janner case, a decision will be made to proceed with a hearing of facts at least on the abuse charges.

[100] 'Sunday' BBC Radio 4 12 July 2015.
[101] The enquiry started 9 July 2015 and is expected to last up to 2020 https://www.csa-inquiry.independent.gov.uk/.
[102] 'Judge to decide whether bishop accused of sex assault crimes will stand trial' *The Guardian* 1 May 2015.