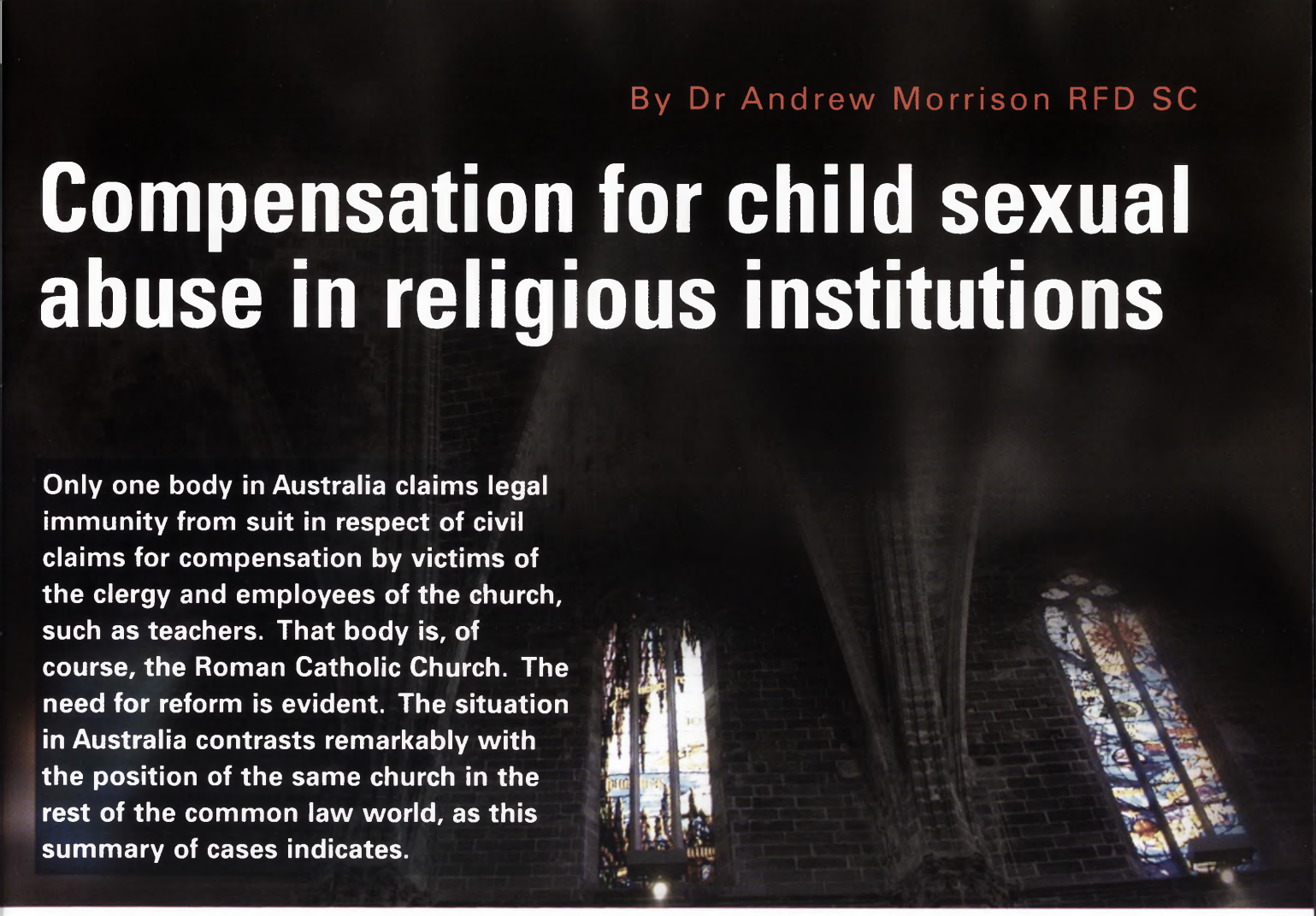
By Dr Andrew Morrison RFD SC

Compensation for child sexual abuse in religious institutions



Only one body in Australia claims legal immunity from suit in respect of civil claims for compensation by victims of the clergy and employees of the church, such as teachers. That body is, of course, the Roman Catholic Church. The need for reform is evident. The situation in Australia contrasts remarkably with the position of the same church in the rest of the common law world, as this summary of cases indicates.

CASE SUMMARIES

State of NSW v Lepore (2003) 212 CLR 511

Angelo Lepore was a pupil in a government school aged seven in 1978. Together with other pupils, he allegedly misbehaved and was taken from the classroom into a storeroom adjoining it and made to remove his clothes. He was struck and the assault had a sexual element. As a result of his complaint, action was taken against the teacher, who was convicted of four counts of common assault. At first instance, Downs DCJ concluded that the teacher had assaulted the plaintiff. This was unsurprising, since no one asserted otherwise. However, he made no useful findings as to the nature of the assault or the number of assaults so as to render this finding useful. He did, however, conclude that the Education Department was not negligent. On appeal to the Court of Appeal, the majority held that strict liability arose from the non-delegable duty of care owed by an education authority to a pupil (*Kondis v State Transport Authority*[1] and *Commonwealth v Introvigne*[2]). Mason P and Davies AJA found a breach of the non-delegable duty of care. Heydon JA dissented, but thought vicarious liability was open, although it had not been argued in the lower court. This was on the basis that the trial judge's finding left open the argument that an unauthorised or unlawful form of chastisement could be said to fall within the scope of the teacher's duties.

With two Queensland cases, the NSW Department of Education appealed to the High Court. The appeal was enlivened by recent superior court decisions in Canada and England. In *Bazley v Curry*[3] and *Jacobi v Griffiths*,[4] the Canadian Supreme Court said that the *Salmond* test was not definitive as far as liability of employers was concerned. That test posits that employers are vicariously liable for employee acts authorised by an employer, or unauthorised acts so connected with authorised acts that they might be regarded as modes (albeit improper modes) of doing their duties. Thus, employers have been held liable for thefts by employees from customers. The fundamental question is whether the wrongful act is sufficiently related to the employer's aims. However, the close connection test says that it is relevant whether power, intimacy and vulnerability made it appropriate to extend vicarious liability, even for acts which were manifestly criminal. In England, *Lister & Ors v Hesley Hall Ltd*[5] involved plaintiffs who were residents at a school for boys with emotional and behavioural difficulties. The defendant employed a warden who systematically sexually abused them. Overturning the Court of Appeal decision, the House of Lords unanimously held that the plaintiffs should succeed and, applying the close connection test, found the defendant was vicariously liable for the acts of criminal and sexual assault.

In *Lepore* in the High Court, the appeal of the state of NSW was allowed in part and a retrial was ordered. The reasoning of Heydon JA in the NSW Court of Appeal was adopted in part. Gleeson CJ said that vicarious liability was open and intentional wrongdoing, especially intentional >>

While plaintiffs in Canada and the UK would succeed on the basis of vicarious liability on the close connection test, the position in regard to vicarious liability has been left in significant doubt in Australia.

criminality, was relevant but not conclusive as to whether or not it was proper to hold the Education Department liable. He referred to the sufficient connection test. Where there is a high degree of power and intimacy, the use of that power and intimacy to commit sexual abuse may provide a sufficient connection between the sexual assault and employment to make it just to treat such contact as occurring in the course of employment [74].

Gaudron J held that where there is a close connection between what was done and what that person was engaged to do, vicarious liability might arise and an employer may be estopped from denying liability for deliberate criminal acts of an employee. McHugh J took the approach of the majority in the Court of Appeal – that a non-delegable duty meant strict liability. Kirby J agreed with the approaches in Canada and United Kingdom and would have found for the plaintiff on the basis of vicarious liability on the close connection test.

Gummow, Hayne and Callinan JJ would not extend vicarious liability to deliberate criminal acts. However, Gummow and Hayne JJ agreed with the majority that a retrial should occur.

Accordingly, there was a majority of four for the proposition that the plaintiff could succeed in respect of criminal acts, but no clear agreement as to why. (It is noted that none of that majority is now sitting on the Court.)

The action went back to the District Court and ultimately settled on satisfactory terms. The position in regard to vicarious liability has been left in significant doubt in Australia. It is clear, however, that the non-delegable duty of care is a duty to do no more than is reasonable in employing someone, so that it is not clear that the content of the duty is any greater than a delegable duty of care.

John Ellis v Pell and the Trustees of the Roman Catholic Church for the Diocese of Sydney [2007] NSWCA 117; [2007] HCA 697

From about 1974, when he was 13, until 1979, when he was 18, John Ellis was engaged as an altar server in the Roman Catholic parish at Bass Hill. He alleged that he was subject to frequent sexual assaults by a priest, Father Duggan. He became a partner in a major commercial firm of solicitors in NSW, Baker & McKenzie. He married, but his marriage and his employment broke down because his interpersonal skills were seriously deficient.

John Ellis approached the Catholic Church with his complaint. The Church took more than a year to appoint someone to investigate it, by which time Father Duggan was no longer capable of saying anything useful. He subsequently died. The Church opposed an extension of time in which to sue on the basis that it was prejudiced by the death of Father Duggan.

Mr Ellis sought a representative order against Cardinal Pell on behalf of the Church as an unincorporated association. He also sought to sue the Trustees of the Church, who held its property under the *Roman Catholic Church Trust Property Act* 1936 (subsequently amended in 1986).

However, after the first day of hearing of the application, another former altar boy, Stephen Smith, came forward and said he had also been abused by Father Duggan. He was the successor to John Ellis. More significantly, he said that he knew that John Ellis was his predecessor and would also have been abused. Had he been asked, he would have disclosed this. Stephen Smith gave unchallenged evidence that in 1983 he gave Father McGloin, Dean of the Cathedral in Sydney, a statutory declaration detailing sexual assaults upon him. Instead of investigating this claim, Father McGloin confronted him with the perpetrator and left them alone. Understandably, Mr Smith did not pursue the matter further. The Church produced no records of the statutory declaration or of any investigation. At first instance, Patton AJ noted:

> "It is rather chilling to contemplate that he is the same Father McGloin referred to in the judgment of the Court of Appeal delivered 18 September 2005, against whom allegations were made similar to those made against Father Duggan by Mr Smith and the plaintiff."

The Church did not call Father McGloin, who is no longer practising as a priest but still lives in Sydney.

The Church did not challenge the allegations of sexual abuse. Indeed, a 'Towards Healing' investigation ultimately admitted that the abuse had occurred. It argued, however, that there was no one to sue in respect of the pre-1986 legislation because the Trustees merely held the property of the Church, which was itself not a legal entity. Patton AJ found that because the membership of the Church was so ill-defined, he could not make a representative order against Cardinal Pell, but found there was an arguable case that the Trustees could be sued. He found the failure to investigate in 1983 overcame the complaints of prejudice, which were in effect caused by the Church's own misconduct.

The Trustees appealed to the Court of Appeal. It held on 24 May 2007 that neither the current Archbishop nor the Trustees were amenable to suit in respect of the alleged negligence and supervision of a priest in the 1970s. The Church is an unincorporated association, as is the Catholic Education Office, and its membership is too uncertain to permit a representative order to be made. The Trustees who hold the property of the Church in each diocese are liable only in respect of property matters, at least for the period

prior to legislative amendment in 1986. At least until 1986 there is, therefore, no one to sue for negligence or abuse by teachers in Roman Catholic parochial schools in NSW. In respect of priests, there is no one to sue after 1986 either, because priests are not employees of the Church. Vicarious liability for the conduct of priests was therefore rejected. The Church maintains that even after the legislative amendments in 1986, it is not liable to suit (except in property matters) even in respect of the conduct of teachers. Leave to appeal to the High Court was refused in November 2007. The Court of Appeal rejected the argument that the Church could be treated as incorporated as a *Corporation Sole*, an approach that has found favour in Canada and the United States.

The Roman Catholic Church in NSW and the ACT seems to have so organised its affairs that it has no liability for the conduct of its priests and no liability in its parochial schools for the conduct of its teachers, at least prior to 1986 and, the Church argues, even after that. The Church has taken a similar but slightly differing legislative position in every other state and territory. The implications are obviously very serious for those who suffered injury through abuse or negligence by agents of the Church.

Maga v The Trustees of the Birmingham Archdiocese of the Roman Catholic Church [2010] EWCA Civ 256

The claimant alleged he had been sexually abused by a priest of the Birmingham Archdiocese of the Roman Catholic Church when aged about 12 or 13 in 1975 and 1976. At first instance, Jack J held that the claim was not time-barred because the claimant had always lived with a disability and he would, if necessary, have extended time in any event. He found the claimant had been sexually abused by Father Clonan substantially as alleged. He found the claimant's father had complained to another priest who shared Father Clonan's accommodation and the Archdiocese had been negligent in not pursuing the matter. However, he found that the Archdiocese owed the claimant no duty of care and the Archdiocese was not vicariously liable for Father Clonan's sexual abuse of the claimant.

Lord Neuberger MR in the Court of Appeal found that the trial judge's finding on the limitation period was open to him and that the finding of sexual abuse was supported by the evidence. However, he held that the test laid down by the House of Lords in *Lister v Hesley Hall Ltd,*[6] which was consistent with the approach of the Supreme Court of Canada in *Bazley v Curry*[7] and *Jacobi v Griffiths*,[8] meant that the appropriate test was that the wrongful conduct must be so closely connected with acts the employee was authorised to do, that for the purpose of the liability of the employer to third parties, the wrongful conduct may fairly and properly be regarded as having been done in the ordinary course of the employee's employment. Although the claimant was not himself a Roman Catholic, Father Clonan was normally dressed in clerical garb and he developed his relationship with the claimant under the cloak or guise of performing his pastoral duties. The claimant's youth was relevant and it was Church activities, including discos on Church premises, which gave Father Clonan the opportunity to develop his sexual relationship. In the circumstances, and applying the close connection test, the Master of the Rolls was of the view that vicarious liability was properly made out against the Archdiocese.

He also accepted that there had been complaints by the claimant's father to another priest and that that those complaints had not been pursued or investigated, a matter for which the Archdiocese would be vicariously liable. The Master of the Rolls was also of the view that the Archdiocese owed a duty of care to the claimant. To treat it, as had been done at first instance, as a duty to the world in general, was to mischaracterise the duty alleged. He noted that in the Canadian Supreme Court in *Jacobi*, although vicarious liability did not apply there, the case was remitted for determination as to whether there had been a direct breach of duty through failure to supervise. Accordingly, the Master of the Rolls was of the view that the claimant's appeal should be upheld and the Archdiocese's cross-appeal dismissed. Longmore and Smith LJJ, also applying the close connection test, agreed.

PAO, BJH, SBM, IDF and TMA v Trustees of the Roman Catholic Church for the Archdiocese of Sydney & Ors [2011] NSWSC 1216 (Hoeben J)

In this case, Hoeben J had to consider whether actions by the various plaintiffs against the Trustees of the Roman Catholic Church for the Archdiocese of Sydney and various members of the Patrician Brothers religious order should be struck out. It was alleged that the Archdiocese Trustees operated and managed Patrician Brothers Primary School Granville when, while young students in 1974, each plaintiff was sexually assaulted by Mr Thomas Grealy (also known as Brother Augustine). Associate Justice Harrison in *PAO v Grealy*[9] had refused to strike out or summarily dismiss each of the five proceedings.

Before Hoeben J, there was additional evidence. The plaintiffs submitted that there was evidence before the court showing involvement of the Archdiocese Trustees in the running of schools. It was submitted that the Trustees exercised control over the Catholic Education Office and Catholic Building and Finance Commission. They were responsible for the financial management of funds collected by the schools by way of fees, donations and the like.

Hoeben J concluded that there was no evidence before the court connecting the Archdiocese Trustees directly or indirectly to the conduct of the Granville school and no indication that such evidence was likely to arise in the future. There was no evidence that the Patrician Brothers handed over control of the school to the Archdiocese Catholic Education system or that the Archdiocese Trustees exercised control over the Catholic Education Office. The plaintiffs' cases as against the Trustees were held to be hopeless and should not be permitted to go further. It was not suggested that there was any legal entity in respect of the Roman Catholic Church which might be sued in respect of the abuse at the school. Hoeben J applied the decision of the CA in *Trustees of the Roman Catholic Church for the Archdiocese of Sydney v Ellis.*[10]

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JGE v The English Province of Our Lady of Charity and The Trustees of the Portsmouth Roman Catholic Diocesan Trust [2011] EWHC 2871 (QB) (MacDuff J)

The preliminary issue was whether the Trustees of the Roman Catholic Church could be liable to the plaintiff for sexual abuse and rape by a Roman Catholic clergyman now deceased. This occurred when the plaintiff was in a children's home in Hampshire between 1970 and 1972. The defendant contended that the clergyman was not its employee and nor was the relationship akin to employment. It argued that the action should be struck out because vicarious liability could not arise. Relevantly, the Trustees stood in the shoes of the bishop for present purposes. The Church (first respondent) accepted for the purposes of the litigation that its trustees holding its property were its secular arm and were a proper defendant if vicarious liability arose.

Referring to *Viasystems (Tyneside) Ltd v Thermal Transfer Ltd & Ors,*[11] MacDuff J noted that the test of vicarious liability had gradually changed to give precedence to function over form as to its application. Thus, the approach in *Trotman v North Yorkshire County Council,*[12] which held that sexual abuse of a pupil by a schoolmaster fell outside the scope of employment, had been overtaken by *Lister v Hesley Hall Ltd,*[13] applying a close connection test importing vicarious liability. Most recently, this has been applied in *Maga* and he followed the approach taken there.

Vicarious liability does not depend upon whether employment is technically made out. The relationship between the Church and priests contains significant differences from the normal employer/employee relationship. The differences include the lack of the right to dismiss, little by way of control or supervision, no wages and no formal contract.

He noted that in *Doe v Bennett & Ors,*[14] the Canadian Supreme Court held a bishop vicariously liable for the actions of a priest who had sexually abused boys within his parish. Employment was not conceded, but the priest had taken a vow of obedience to the bishop and the bishop exercised extensive control over the priest, including the power of assignment, the power of removal and the power to discipline him. In these circumstances, the Canadian Supreme Court held that the relationship was 'akin to employment' and that, in the circumstances, made the bishop vicariously liable.

In all the circumstances, MacDuff J held that, applying the close connection test, vicarious liability can arise whether or not a strict relationship of employer-employee arises. By appointing Father Baldwin as a priest and thus clothing him with all the powers involved, the defendants created a risk of harm to others, namely the risk that he could abuse or misuse those powers for his own purposes. In the circumstances, the defendants should be held responsible for the actions, which they initiated by the appointment and all that followed it. The strike-out application was accordingly dismissed by the majority in the English Court of Appeal.

Ward LJ referred to authorities supporting the proposition that a non-employer with sufficient control over the system of work could have vicarious liability extended to it. He noted the varying opinions in *NSW v Lepore*[15] and quoted the views of Gaudron J at [123-125]. Ward LJ thought the question of control should be viewed in terms of whether the employee is accountable to his superior for the way in which he does the work and, in this sense, a priest is accountable to his bishop. Applying the organisation test, the priest is part of the Church's organisation and on the integration test, the role of the parish priest is wholly integrated into the organisational structure of the Church's enterprise. The priest is not an independent contractor and is more like an employee. He concluded, therefore, that the defendants were vicariously liable for misconduct, including criminal misconduct, by a priest. Davis LJ took a similar view, but Tomlinson LJ dissented.

The defendants sought leave to appeal to the English Supreme Court, which was declined, in part because this was a trial only on a preliminary issue and in part because the Supreme Court was then hearing the case of *Various Claimants v The Catholic Child Welfare Society and The Institute of Brothers of the Christian Schools & Ors,*[16] which would traverse some of these issues.

The Catholic Child Welfare Society & Ors (Appellants) v Various Claimants (FC) and The Institute of the Brothers of the Christian Schools & Ors (Respondents) [2012] UKSC 56

At issue was who, if anyone, was liable for a large number of alleged acts of sexual and physical abuse of children at a residential care institution for boys originally operated by the De La Salle Institute, known as Brothers of the Christian Schools and operating as St William's School. The appeal to the English Supreme Court required a review of the principles of vicarious liability in the context of sexual abuse of children. The claims were brought by 170 men in respect of abuse between 1958 and 1992. The Middlesbrough defendants took over the management of the school in 1973, inheriting the previous liabilities. They used a De La Salle brother as headmaster and contracted four brothers as employee teachers. The Middlesbrough defendants were held vicariously liable for the acts of abuse by those teachers, and this was not in challenge. However, the Middlesbrough defendants challenged the findings that the De La Salle Order was not vicariously liable for the actions of its brothers. The Middlesbrough defendants' appeal seeking contribution had been rejected in the Court of Appeal; but leave was granted to appeal to the Supreme Court.

Lord Phillips (with whom the other members of the Court agreed) noted the views on vicarious liability expressed in the Court of Appeal in *JGE* and the impressive leading judgment of Ward LJ [19]. The following propositions were said by Lord Phillips to be well-established:

(i) It is possible for an unincorporated association to be vicariously liable for the tortious acts of its members.
(ii) One defendant may be vicariously liable for the tortious act of another defendant even though the act in question constitutes a violation of the duty owed and even if the act in question is a criminal offence.
(iii) Vicarious liability can even extend to liability for a criminal act of sexual assault (*Lister v Hesley Hall*).[17]

(iv) It is possible for two different defendants to each be vicariously liable for the single tortious act of another defendant.

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

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

Lord Phillips then turned to the argument that sexual abuse can never be a negligent way of performing duties under an employment-like relationship. He referred to *JGE*, *Maga* and *NSW v Lepore*,[18] where the majority in the High Court left such liability open, although he described the four different sets of reasons in the majority as having 'shown a bewildering variety of analysis'. The NSW Court of Appeal decision in *Trustees of the Roman Catholic Church for the Diocese of Sydney v Ellis*[19] is surprisingly not mentioned.

Applying the Canadian close connection test in *Bazley v Currie* and *Jacobi v Griffiths* as well as *John Doe v Bennett*[20] and *Blackwater v Plint*,[21] as well as in the House of Lords in *Lister*, he also noted that in a commercial context the House of Lords had taken a similar view in *Dubai Aluminium Co Ltd v Salaam*,[22] where dishonest conduct by a solicitor was held to involve the firm in liability because such conduct was part of the risk of the business.

Lord Phillips (with the concurrence of the balance of the court) said [86]:

> 'Vicarious liability is imposed where a defendant, whose relationship with the abuser puts it in a position to use the abuser to carry on its business or to further its own interests, has done so in a manner which has created or significantly enhanced the risk that the victim or victims would suffer the relevant abuse. The essential closeness of connection between the relationship between the defendant and the tortfeasor and the acts of abuse thus involves a strong causative link.
>
> [87] These are the criteria that establish the necessary "close connection" between the relationship and abuse.'

CONCLUSION

Australia would appear to be alone in the common law world in denying a remedy for victims of abuse in one church (the Roman Catholic Church) and in holding that the relationship between priests and bishops does not give rise to vicarious liability. In countries such as the United States and Canada, the church is treated as a *Corporation Sole*, giving it a corporate entity, which can be sued, rendering its trustees liable to compensate victims. In England, the Roman Catholic Church accepts that its trustees are its secular arm and are liable to compensate victims. In the United States, Canada, Ireland and England, it is now clearly established that the Roman Catholic Church is liable for the criminal conduct of priests, including sexual abuse of children, which occurs in the course of their duties, applying the close connection test so as to give rise to vicarious liability.

Only in Australia in the common law world has a contrary view been taken. Only in Australia are the assets of one church invulnerable to claims because the Church is said to have no relevant corporate entity and its trustees (at least prior to 1986 and the Church would argue even since) are immune from suit. The families of children attending Catholic parochial schools would be appalled to learn that whether or not they have a remedy in negligence against the school for injury incurred through the fault of a teacher depends upon the whim of the bishop in the particular diocese. In some dioceses, the *Ellis* point will not be taken. In Cardinal Pell's Archdiocese, experience suggests that it is always taken as a means of forcing claimants to take a pittance.

In the light of the clear differences with the Canadian Supreme Court, the House of Lords and English Supreme Court, it would seem that reconsideration of the decisions in *Lepore*, *Ellis* and *PAO* only await a suitable test case.

It is understood that the Victorian Legislative Council inquiry into sexual abuse in religious institutions is likely to recommend legislative change in that state to render the Roman Catholic Church vicariously liable and give it a legal status, making its trustees capable of being sued. Draft legislation has already been circulated in NSW and is likely to be introduced to the NSW Legislative Council during 2013. However, the powerful hold of the Roman Catholic Church within all major political parties suggests that getting legislative change in NSW will be distinctly challenging. The current Commonwealth Royal Commission Terms of Reference are wide enough to encompass submissions and findings on these important issues. ■

Notes: **1** (1984) 154 CLR 672 at 686. **2** (1982) 150 CLR 258. **3** (1999) 174 DLR (4th) 45. **4** (1999) DLR (4th) 71. **5** [2001] 2 All ER 769. **6** [2002] 1 AC 215. **7** (1999) 174 DLR (4th) 45. **8** (1999) 174 DLR (4th) 71. **9** [2011] NSWSC 355. **10** (2007) 70 NSWLR 565 (CA). **11** 2005] EWCA Civ 1151 (per Rix LJ). **12** [1999] LGR 584 (CA). **13** [2001] 2 All ER 769; [2002] 1 AC 215. **14** [2004] ISCR 436. **15** (2003) 212 CLR 511. **16**) [2012] UKSC 56. **17** [2001] UKHL 22; [2002] 1 AC 215. **18** [2003] HCA 4; 212 CLR 511. **19** [2007] NSWCA 117; [2007] HCA 697. **20** [2004] 1 SCR 436. **21** (2005) 258 DLR (4th) 275. **22** [2002] UKHL 48; [2003] 2 AC 366.

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