

Lord Taylor Memorial Lecture, Inner Temple,

Tailoring the law on vicarious liability

Lord Hope of Craighead

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It is a very real honour for me to have been invited to give this lecture in memory of Lord Taylor of Gosforth, the PNBA's first President. I am, as it happens, one of the very few judges still in office – perhaps the only one – who had the pleasure of sitting with him in a judicial capacity. It was in February 1996, about six months before Peter Taylor's retirement on grounds of ill-health, that we were both invited to sit as members of the appellate committee in the House of Lords. It was a criminal case, and he was there as a life peer who was qualified to sit on the appellate committee as he held the high judicial office of Lord Chief Justice of England and Wales. I was there as a life peer and qualified to sit too, as at that time I was the Lord Justice General of Scotland. Peter Taylor was very much in his element, as it was a case which involved a problem of English criminal law about the severance of charges. The question was whether it had been proper for a judge to allow sexual offences against more than one person to be tried together¹. We held that it was. This was a happy result for me, as the same conclusion would have been reached in Scotland. It came as no surprise, when at the end of the hearing of the appeal, he was invited to write the judgment.

That was by no means our first meeting. I had paid him a visit shortly after he was appointed Lord Chief Justice. He made it clear to me that he and fellow judges in the Court of Appeal did not think much of my decision to allow television cameras, under strict conditions, into the court room in Scotland. The universal hostility with which this idea was received by the judges on this side of the Border at that time seems now to have been a bit of an over-reaction. Otherwise he was the kindest of hosts, and I enjoyed his company on several other occasions when our

¹ *R v Christou* [1997] AC 117.

respective judicial offices led to our sharing engagements both at home and abroad. My favourite memory is of him at an annual conference of the Law Society of Scotland which was held in the Gleneagles Hotel. We were having lunch after a morning session at which he had delivered a paper. On a stage at one side of the huge dining room there was a piano. It was a grand piano, it was white, and Peter could not stop looking at it. Eventually he could stand it no longer. He went over to it, sat down and began to play, from memory, a selection of pieces by Schubert and Chopin. He was a brilliant pianist. He could have made a living as a professional, had he not decided to prefer the law. His delightful impromptu performance lasted for only about 20 minutes. But the memory of him, enjoying himself in a rare moment of relaxation at a white piano in that sunlit dining room, will live with me for ever.

The case on which we sat together was a case about sexual offences which had been committed against children between the ages of five and 15 at home by a close relative. Cases involving offences of that kind are, unfortunately, all too familiar in the criminal courts. They are not what I want to talk to you about today. My subject is in the same general area, as it is concerned with child sexual abuse. But it is directed to an issue that arises under the civil law. Its context is child sexual abuse committed outside the home, and the problem to which it is directed is one which arises where damages are sought against people other than the abusers by those who have been abused. The word “tailoring” in the title of my lecture was not, I must assure you, intended as a pun. It is taken from a judgment which Lord Phillips delivered on behalf of the Supreme Court in November last year called *Various Claimants v Catholic Child Welfare Society*². I should also make it clear that I was not a member of the panel that heard the appeal.

The claim in that case was directed against an institute known as the Brothers of the Christian Schools. It had been founded in France in 1680 by the priest and educational reformer Jean-Baptiste De La Salle, who had dedicated his life to the education of poor children in France, and

² [2012] UKSC 56, [2012] 3 WLR 1319.

is now active in about 80 countries. The De La Salle institute had supplied a member of its English brotherhood to serve as headmaster in an approved school, and other members of the institute to serve there as teachers. Many years after the event, it was alleged by 170 claimants that they had been sexually abused at the hands of brothers while they were resident in the school on various occasions between 1958 and 1992. The question was whether the institute could be held vicariously liable for the abuse that was committed in the school by its members while employed as teachers there as well as the bodies that were responsible for the school's management.

The word “tailoring” in my title comes from a passage near the end of the judgment where Lord Phillips said that the courts had been “tailoring” the law on vicarious liability by emphasising the importance of the criteria that are particular to this type of wrong³. He made it sound simple. But the decision of the Court of Appeal in that case⁴, and the decision of the Court of Session in Scotland in a case called *McE v De La Salle Brothers*⁵ which as Lord Phillips had remarked earlier⁶ was almost a carbon copy of the case he was dealing with, show that there were some quite deep rooted problems that had to be faced up to. It was not until the issue reached the Supreme Court that the Justices were bold enough to provide the management bodies in the *Catholic Child Care Society* case with the solution that they wanted, which was to share the liability with the institute whose members had perpetrated the acts of abuse. Two questions then arise. How did the Justices get there? And were they, perhaps, too bold?

I must start with the Scottish case of *McE v De La Salle Brothers*⁷. The facts were almost identical to those of the *Catholic Child Welfare Society* case except that, as it was a test case, there was only one claimant. His name was anonymised by the use of the initials of his surname. There are, as

³ Ibid, para 83.

⁴ [2010] EWCA Civ 1106.

⁵ [2007] CSIH 27, 2007 SC 556; also reported as *M v Hendron* 2007 SLT 467.

⁶ [2012] 3 WLR 1319, para 5.

⁷ The decision of the judge in the Outer House was issued under the name *AM v Reverend Joseph Hendron and Others* [2005] CSOH 121; also reported as *M v Hendron*: 2005 SLT 1122.

you can imagine, many people in Scotland whose initials are “McE”. The claimant was a former residential pupil of St Ninian’s approved school near Stirling. He too, as is so typical of such cases, had waited for a long time before bringing what had happened to him out into the open. He claimed that he had been sexually abused while he was at the school between about 1963 and 1966 when he was 9 to 12 years of age, but it was not until 1999 that he sought medical attention. The delay in itself presented him with a serious problem. He would have been able to bring the action outside the three year time limit only if he could show that the delay was attributable to periods when he was under legal disability due to non-age or unsoundness of mind and, if not, if the court considered that it was nevertheless equitable to allow him to do so⁸.

The Lord Ordinary, Lady Paton, allowed a preliminary proof on the limitation issues. She was reversed in part on this aspect of the case in the Inner House, where it was held that averments that the running of time had been interrupted by the pursuer’s suppressed or impaired memory of what had happened to him or by reticence induced by the assaults on him were not sufficient to entitle him to the relief. His alternative case for relief on equitable grounds would have been allowed to go to proof. The decision of the House of Lords in the subsequent case of *AS v Poor Sisters of Nazareth*⁹ not to interfere with the judgment of the Court of Session to refuse relief on that ground in a case brought by the former residents of a children’s home run by the Sisters, in which damages were claimed for sexual abuse they claimed to have suffered many years ago, on the ground of the prejudice caused to the respondents by the lapse of time suggests that the prospects of success on this issue would not have been all that good. But the point of real interest in the case is how the judges in the Court of Session dealt with the issue of vicarious liability.

As in the *Catholic Child Welfare Society* case, the religious order whose members were sent to work in the school was not the only party against whom the claim was brought. The action was

⁸ Prescription and Limitation (Scotland) Act 1973, sections 17 and 19A.

⁹ [2008] UKHL 32, 2008 SC (HL) 146.

directed also against the managers of the school, who were later of consent absolved from any liability, and the Lord Advocate as representing the statutory successors to the Social Work Services Group and the Scottish Education Department in respect of their former management functions¹⁰ in relation to approved schools. The question was whether, assuming that the action was to proceed against the other defenders, there was a relevant case against the religious order. The Lord Ordinary refused to dismiss the case against the religious order. In her opinion there was sufficient merit in the pursuer's averments to allow the case to go to trial so that the issue could be decided after hearing the evidence¹¹. The case against the order had been pleaded on the basis that the monks who were supplied to the school as teachers by the religious order were employees of the order when they were working there. But it was not clear whether any contracts of employment were entered into and, if so, with whom. In the course of the debate the pleadings were amended by deleting the word "employees" and substituting the word "persons". Counsel explained that the vicarious liability that the pursuer proposed to rely on was not restricted to the argument that the relationship was one of employer and employee. Counsel submitted that there were other situations in which vicarious liability could arise, such as agency or the employment of an independent contractor¹². The Lord Ordinary held that the pursuer's averments were insufficient to support a case of vicarious liability but that they were sufficient to support a case based on agency. As she put it¹³:

“On the averments in the present case, the De La Salle order agreed to provide teaching, care and supervision services for the children at St Ninian's. The order delegated those functions to certain of its members. Fulfilment of those functions was one of the predominant reasons for permitting the presence of [the brothers] at St Ninians. In

¹⁰ Under the Approved Schools (Scotland) Rules 1961 (SI 1961/2243).

¹¹ 2005 SLT 1122, paras 90-98.

¹² Ibid, para 13.

¹³ Ibid, para 94.

carrying out their tasks, [the brothers] were in my view acting as agents for their order, rendering that order liable for their acts carried out in the course of their agency.”

As for the question whether what the brothers did was within the scope of their authority, she followed the decision of the House of Lords in *Lister and others v Hesley Hall Ltd*¹⁴ that, where there was a close connection between wrongful acts and the type of work being performed, it would be fair and just to hold the wrongdoer’s employers liable for the employees’ wrongful acts. She held that this approach was equally applicable to the situation described by the pursuer, and that he was entitled to an inquiry on this point too¹⁵.

One might have thought that this was a wise and forward-looking decision. But when the case reached the Inner House on appeal it was reversed and the Lord Ordinary’s approach to the issue was vigorously criticised¹⁶. The grounds on which the question was decided in favour of the religious order are not easy to discover in what turned out to be a very long judgment. It runs to 204 paragraphs. Nearly half of Lord Osborne’s opinion, which runs to 178 paragraphs, is taken up by reciting the parties’ arguments. The court’s treatment of the case was complicated too by the fact that it also had to deal with the limitation issues and with the case against the Lord Advocate as representing the Scottish Education Department, which was also challenged as lacking relevant averments. Only 25 paragraphs of Lord Osborne’s opinion are devoted to the case against the religious order¹⁷. Lord Clarke, concurring, deals with this issue in two paragraphs¹⁸, and Lord Marnoch, also concurring, in four¹⁹.

It is possible to distil from those paragraphs of the judgment the following points. The Lord Ordinary had seriously misdirected herself, as she had failed to recognise or appreciate the obvious problem created by the legislative provisions under which the school was run. They

¹⁴ [2001] UKHL 22, [2002] 1 AC 215.

¹⁵ 2005 SLT 1122, para 96.

¹⁶ See fn 5, above.

¹⁷ 2007 SC 556, paras 118-133.

¹⁸ *Ibid*, paras 181-182.

¹⁹ *Ibid*, paras 198-202.

placed the responsibility for its management on those who occupied the position of its managers. If liability was to be visited on the religious order, the pursuer would require to aver and prove that it had a degree of authority, control or responsibility over the perpetrators in relation to the activity which provided the opportunity for the injurious conduct at the time of its perpetration. But it was abundantly clear that it was the managers who had that relationship with the perpetrators. Lord Clarke was particularly forthright in his criticism. He said that in his judgment the Lord Ordinary had singularly failed to face up to, or recognise, that situation and its consequences and, instead, had sought to construct possible bases of liability against both sets of defenders which were simply unfounded²⁰.

As for vicarious liability based on agency, the Inner House judges said that the Lord Ordinary had sought to construct such a case without any such case having been pleaded against the religious order. There was nothing in the pursuer's pleadings to suggest that a legal relationship of that kind was ever created between the order and the school's managers. The order did no more than simply put forward candidates for employment by the managers. It would in any event have been inconsistent with the managers' statutory functions and duties, as the only purpose for which the members of the order were present in the school was for the performance of contracts of employment between those members and the school's managers. The Lord Ordinary had also been wrong to rely on what was said in *Lister v Hesley Hall Ltd*, as it was quite clear that the House of Lords was concerned in that case with the concept of vicarious liability between the employer for acts committed by an employee. There was no authority that would justify its application to a situation where the issue was vicarious liability for a wrong committed by an agent.

There are, I think, two themes at work here. One is an intense focus on the way the case had been pleaded. The other related to the fact that the religious order had nothing to do with the

²⁰ Ibid, para 181.

management of the school. Under the statute this was the responsibility of its managers. This was seen as excluding the possibility that the order too could be held responsible for the actions of the brothers while they were working under the direction and authority and control of the managers.

As for the first point, the Scottish system of pleading has many advantages. But it can be quite unforgiving in a case such as this, where the frontiers of a principle of the common law are being explored. Everything depends on the facts and lines of argument set out in the written pleadings. Lord Osborne insisted that the system, in this case, must be operated in its established manner²¹. This leaves little room for the judges to develop their own ideas, as Lady Paton was obviously inclined to do. She had given permission for the pursuer's pleadings to be amended to make it clear that his argument on vicarious liability was not restricted to employment. But this was not enough to satisfy the Inner House judges that there was a basis in the pleadings for an argument based on agency, as the word "agency" was not mentioned in them anywhere. There was some force in the second point, as she did not address the issue whether two parties could be held vicariously liable. Nor, in fairness to her, did counsel. It is a pity that the court's attention was not drawn to the decision of the Court of Appeal in *Viasystems (Tyneside) Ltd v Thermal Transfer (Northern) Ltd and others*²², in which it was held that it is possible in law to have dual vicarious liability for a single tortious act.

The judgment in *Viasystems* was delivered a month after Lady Paton delivered her judgment in the Outer House, so she could not have been aware of it. But the fact has to be faced that it was overlooked in the Inner House. As May LJ pointed out in his judgment in *Viasystems*²³, the parties' written cases and the judge's decision in that case were predicated on an assumption that only one of the defendants could in law be vicariously liable. But at the outset of the hearing of

²¹ *Ibid*, para 118.

²² [2005] EWCA Civ 1151, [2006] QB 510.

²³ *Ibid*, para 12.

the appeal in that case counsel drew the court's attention to the fact that it had been suggested by Professor Atiyah, in a discussion about the position of the borrowed servant, that it was strange that the courts had never countenanced what might be an obvious solution in some cases, which was to hold both the general employer and the temporary employer vicariously liable for the employee's negligence²⁴. After a careful examination of the authorities, including those from other jurisdictions, May LJ concluded that the assumption that there could only be one vicariously liable defendant was not supported by any authority binding on the Court of Appeal, that there was, in the modern context, little sense or justification for it and that dual vicarious liability should be, and was, a legal possibility²⁵. Rix LJ, the only other judge who was sitting on that case, said that it provided a coherent solution to the problem of the borrowed employee – making it clear that he was using the word “employee” in an extended sense. The functional basis for the doctrine had become increasingly clear over the years, and the existence of the possibility of dual responsibility would be fairer and would also enable cases to be settled more easily²⁶.

It seems likely, if that case had been cited in the Inner House, that it would have been dismissed, as was the decision in *Lister v Hesley Hall*, as irrelevant on the ground that it was concerned only with the relationship between employer and employee which the Lord Ordinary had held was not present in that case. There was a marked lack of enthusiasm in that court for developing the law beyond its known boundaries. There would also have been the objection that no such argument had been mentioned in the pleadings. For a court that was determined to uphold the traditions of the system of written pleadings, this would have been a formidable objection. Nevertheless, one is left with an uneasy feeling that the case may not have been rightly decided by the Inner House. There is no sign that any of the judges in that court were inclined to look beyond what both May LJ and Rix LJ acknowledged was a long-standing assumption that dual

²⁴ P S Atiyah, *Vicarious Liability in the Law of Torts* (1967), p 156.

²⁵ [2006] QB 510, paras 46, 49.

²⁶ *Ibid*, para 77.

vicarious liability was not possible, or to accept that relationships that are comparable to, or akin to, employment could provide a basis for liability on this ground.

The focus of attention now moves to England and Wales, and to the case of *Various Claimants v Catholic Child Welfare Society*²⁷. The facts of this case were, as has already been noted, almost a carbon copy of those of the case which was before the Court of Session. The issue was whether the religious order, the Institute of the Brothers of the Christian Schools, could be held vicariously liable for the acts of the brothers living at St William's School, Market Weighton in Yorkshire. On a trial of preliminary issues, in which he was asked to rule on who, subject to any limitation and other defences, could be held liable to the claimants for the alleged abuse at the school, Judge Hawkesworth QC, sitting as a judge of the Queen's Bench Division, held that two organisations which were responsible for managing the school were liable but that the religious order was not. The claimants and the managers both appealed, but the Court of Appeal dismissed the appeals²⁸. The claimants were content to look to the managers only for relief, but the managers sought and were given permission by the Supreme Court to appeal to that court. But before I come to how the case was dealt with there, I wish to concentrate on the decision of the Court of Appeal to see how far its reasoning was consistent with that of the Inner House in the *McE* case.

The judgment of the Court of Appeal was given by Hughes LJ. He had the advantage over the Scottish judges of being able to concentrate on the single issue of vicarious liability. The issues of limitation had been held over for another day. He also had the advantage of having read the judgments in *Viasystems*. He acknowledged that it is now recognised to be possible for there to be dual concurrent vicarious liability in two defendants for the same tort, and he accepted too that it might well be that the principle of dual liability is not confined to the scenario of the

²⁷ [2012] 3 WLR 1319.

²⁸ [2010] EWCA Civ 1106.

“borrowed employee”²⁹. He held, nevertheless, that the judge had been right to hold that the institute did not carry vicarious liability for torts committed by its brothers arising from their teaching occupations at the school.

The judgment contains a much more complete examination of the approach that ought to be taken to issues of vicarious liability than is to be found in the Scottish case. Hughes LJ reminded himself, as the point has been recognised on both sides of the Border for many years³⁰, that it is necessary to focus on two stages. The first stage, he said, was to examine the relationship between the person against whom vicarious liability is pleaded, commonly referred to as D2, and the person who committed the tort, commonly referred to as D1. The second stage, he said, is to examine the connection between D2 and the act or omission of D1 which is in question³¹. But before he began to examine the facts in this way he also reminded himself³² of the point that the social utility of vicarious liability where it applies – because it attaches liability to a party who is better able to bear the loss than D1 – is not a justification for extending it whenever there may be social usefulness in doing so, and of Lord Steyn’s warning that, as vicarious liability is a principle of strict liability, there is a need to keep the doctrine within clear limits and that it is not infinitely extendable³³. His point, I think, was that the common law does not like imposing liability where the defendant whom the claimant seeks to make liable has not himself been negligent.

At stage 1, the classic relationship which gives rise to vicarious liability is, of course, that of employment. It was argued for the institute that vicarious liability could only exist in such a relationship, or at least only where D2 was paying D1 to do his business. Hughes LJ rejected

²⁹ Ibid, para 45.

³⁰ ‘That was the established law on which we cut our teeth’, said Ward LJ in *JGE v Trustees of Portsmouth Roman Catholic Diocesan Trust* [2012] EWCA Civ 938, [2012] 4 All ER 1152, para 21; Atiyah, *Vicarious Liability in the Law of Torts*, p 171; David M Walker, *The Law of Delict in Scotland* (2nd ed, 1981), pp 134 and 140.

³¹ [2010] EWCA Civ 1106, para 37.

³² Ibid, para 36.

³³ *Bernard v Attorney General of Jamaica* [2004] UKPC 47, [2005] IRLR 398, paras 21, 23.

this argument, noting that it was clear that vicarious liability could exist between partners³⁴. As a partnership was simply one form of unincorporated association, it could extend to other kinds of associations such as trade unions and to the relationship of agent and principal that exists where a member of an association acts of behalf of others. But he said that it did not follow that the position of an agent was simply the same as that of an employee. There was not the same connection between the tort of D1 and his relationship with D2. Everything therefore depended on the second stage of the inquiry, which was much more difficult and yet more fact sensitive.

As for stage 2, vicarious liability was likely to arise where the risk that D1 would commit a wrong is inherent to an operation which D 2 is carrying out for his own purposes. But it was not enough that an inherent risk existed. For the necessary close connection to be established, the risk had to be inherent in a business or operation carried on by D2, entrusted by him to D1³⁵.

On the facts of this case, that test was not satisfied. The necessary close connection between the institute and the tort had not been established. The institute did not run the school, and it did not exercise effective control over a brother-teacher's way of doing his job. The brothers were furthering the teaching mission of the institute, having been sent to the school for that purpose. They were identifiably clothed with the status of members of the institute and were subject to its discipline. But it did not follow that the institute was engaged in the business of running the teaching at St Williams³⁶.

Hughes LJ's careful examination of the issues goes some way towards removing one's sense of unease about the result of the case in the Court of Session. Even if a more generous view had been taken of the pleadings and the possibility of dual vicarious liability had been recognised, one would still have been left with the fact that the religious order did not run the school or exercise any control over how the brothers went about their teaching duties when they were at St

³⁴ *Dubai Aluminium & Co v Salaam and Others* [2002] UKHL 48, [2003] 2 AC 366.

³⁵ [2010] EWCA Civ 1106, paras 45 and 47.

³⁶ *Ibid*, paras 56-58.

Ninian's. That was the fundamental obstacle that, on an orthodox approach to the issue, the management bodies that were seeking to share liability with the order were unable to overcome.

It is time now to go – with permission, of course – to the UK Supreme Court. Could the principle of strict liability be “tailored”, in Lord Phillips’s words, so as to invest the institute with a share of the liability? It is not difficult to feel that it would be unjust for the principle not to be capable of such an adjustment. After all, the brothers themselves were in no position to compensate their victims for the acts of sexual abuse that they inflicted upon them. Why should the institute, on whose behalf and at whose choosing they had gone to teach at the school, not bear a share of the responsibility? But in *Morgans v Launchbury and others*³⁷ the House of Lords rejected Lord Denning MR’s view³⁸ that the principle which lies behind all vicarious liability was that responsibility should be put onto the person who ought in justice to bear it. That was a case where the owner of a car which she herself was not driving could be held vicariously liable for the actual driver’s negligence. Lord Denning said that she should, as she was the person who put the car on the road, she was the one who caused or permitted it to be used and she was the one who was or ought to have been insured in respect of it. Lord Wilberforce’s response was that the owner, the person I have referred to as D2, ought not to pay if he has no control over the driver D1, has not authorised or requested the act which he was performing at the time or if D1 was acting wholly for his own purposes. Lord Pearson said that what Lord Denning had done amounted to a departure from the agency principle *qui facit per alium facit per se*. It amounted to the introduction of a new basis for liability, which ought to be left to Parliament. It is with those words ringing in one’s ears, as it were, that one turns to the Supreme Court’s unanimous judgment.

One notices at once that, although *Launchbury v Morgans* was cited in argument, it is not mentioned in the judgment. Instead the point is made at the outset of an overview of the issues

³⁷ [1973] 1 AC 127.

³⁸ See *Launchbury v Morgans* [1971] 2 QB 245 at 255.

that the law of vicarious liability is “on the move”³⁹. Having noted the way the law had developed during the past 50 years from its original focus on the question whether the act in question was committed in the course of the employee’s employment, including the ruling in *Viasystems* that it was possible for there to be dual vicarious liability, Lord Phillips acknowledged that it was now more difficult to identify the criteria that must be demonstrated to establish liability. But he agreed with the two stage approach that had been applied by Hughes LJ in the Court of Appeal, subject to a refinement of the way he had described the second stage – the “connection” test: what is critical at this stage, Lord Phillips said, is the connection that “links the relationship” between D1 and D2 and the act or omission of D1. The argument for the managers was that the necessary closeness of connection between the relationship between the institute and the brothers and the abuses committed by the brothers was provided by the fact that the institute sent the brothers to St William’s to further the purpose of the institute, clothed with the status of members of the institute, and thereby increased the risk that brothers would sexually abuse the children with whom they were in close proximity. The institute’s case, which the Court of Appeal had accepted, was that only a body managing the school would have had a sufficiently close relationship with the brother teacher to be responsible for his wrongdoings.

The panel of the Supreme Court that heard the appeal had the advantage of having before it the decision of the Court of Appeal in *E v English Province of Our Lady of Charity*⁴⁰. That was yet another case in which damages were claimed for acts of sexual abuse perpetrated by someone in holy orders or a religious order. The acts in question had been committed by a visiting Roman Catholic priest while the claimant was resident in a children’s home run by an order of nuns. The action was brought against the order and against the trustees of the diocesan trust, which stood in the place of the diocesan bishop. A preliminary issue was whether the relationship between the priest and the trust was capable of giving rise to vicarious liability. In what Lord

³⁹ [2012] 3 WLR 1319, para 19.

⁴⁰ [2011] EWHC 2871, [2012] 2 WLR 709.

Phillips described as a bold judgment⁴¹, MacDuff J held that it could. There was no contract of employment between the priest and the trust, and no effective control over the priest once he was appointed as he was free to conduct his ministry as he thought fit without interference from the bishop. The relationship was significantly different from that between an employer and an employee. But the crucial facts, as the judge saw it, were that he had been appointed and authorised to act on the trust's behalf to do the work of the church and provided with the premises, the pulpit and the clerical robes to enable him to do so⁴². His judgment was affirmed by a majority in the Court of Appeal⁴³. The leading judgment was given by Ward LJ, with whom Davis LJ agreed. Tomlinson LJ who had sat with Hughes LJ in the Court of Appeal in the *Catholic Child Welfare Society* case and had agreed with his judgment, dissented.

It is not possible to do justice to Ward LJ's comprehensive judgment in the *Lady of Charity* case in a short lecture such as this. Lord Phillips described it as impressive. It has however been criticised for a lack of doctrinal clarity⁴⁴ and another commentator has said that the radical approach which it adopted could prove troublesome⁴⁵. The most striking aspects of it, as an indication of the way the law has been on the move, were Ward LJ's description of the relationship between the priest and the bishop as "akin to employment" and his conclusion that it was so close in character to an employment relationship that it was "just and fair" to hold the bishop, and through him the trust, vicariously liable.

The first of these phrases provides a solution to the problem that confronted Lady Paton in the *McE* case. She was looking for a legal relationship that could be equated for present purposes with that provided by a contract of employment. Professor Atiyah, writing in 1967, said that there were only three relationships that would satisfy the requirement for liability: master and

⁴¹ [2011] EWHC 2871; [2012] 2 WLR 709.

⁴² *Ibid*, paras 35, 36.

⁴³ sub nom *JGE v Trustees of Portsmouth Roman Catholic Diocesan Trust* [2012] EWCA Civ 938, [2012] 4 All ER 1152.

⁴⁴ David Tan, *A sufficiently close relationship akin to employment* (2013) 129 LQR 30.

⁴⁵ Professor Douglas Brodie, *The foundations of vicarious liability – JGE v English Province of our Lady of Charity* [2012] EWCA Civ 938, [2012] PIQR P19, 2013 SLT (News) 19.

servant, principal and agent and employer and independent contractor⁴⁶. So Lady Paton tried to find it in agency. The pleaded facts did not support this approach, but the message of the judgments in the *Lady of Charity* case is that it is not necessary to fit the facts into a particular category to which a recognised *nomen iuris* can be attached. A relationship that is akin to that between an employer and his employee may be enough. The second phrase, which first appeared in Lord Steyn's speech in *Lister v Hesley Hall*⁴⁷ and was also adopted by Lady Paton in the *McE* case⁴⁸, suggests a test that is not far removed from that used by Lord Denning MR in *Launchobury v Morgans*⁴⁹ which was rejected in that case by the House of Lords. What he said was that the reason behind the principle of vicarious liability was to put the responsibility on to the person who ought in justice to bear it. Why, one might ask? Social utility in itself cannot be the answer. The answer that one would now give is that, if the relationship is sufficiently close in character to that which exists between an employer and an employee and if there is a causative connection between the relationship and the wrong, it would be just and fair to apply that principle. So everything will depend on an analysis of the relationship and its connection with the abuse.

From that starting point Lord Phillips proceeded to examine the way vicarious liability for child sexual abuse perpetrated by a priest or a member of a religious order had been dealt with in three Canadian cases⁵⁰, by the House of Lords in *Lister v Hesley Hall* and in several other cases decided in this jurisdiction. His conclusion, in a passage that I have referred to more than once, was that the courts have been tailoring this area of the law by emphasising the importance of criteria that are particularly relevant to this type of wrong, so as to ensure that a remedy for the harm caused

⁴⁶ Atiyah, *Vicarious Liability in the Law of Torts*, p 3.

⁴⁷ [2002] 1 AC 215, para 28 ("fair and just").

⁴⁸ 2005 SLT 1122, para 95 ("fair and just").

⁴⁹ See fn 36, above.

⁵⁰ *Bazley v Curry* (1999) 174 DLR (4th) 45; *Jacobi v Griffiths* (1999) 174 DLR (4th) 71; *John Doe v Bennett* [2004] 1 SCR 436.

by abuse is provided by those that should fairly bear that liability⁵¹. Vicarious liability is imposed where a defendant, whose relationship with the abuser put it in a position to use the abuser to carry on its business or further its own interests, has done this in a manner which has created or significantly enhanced the risk that the victim would suffer the relevant abuse. There was, in that situation, a sufficient closeness of connection which provided a causative link between the acts of abuse and the relationship. Recalling the distinction that Lord Hobhouse drew in *Lister* between the reasons of policy that justified vicarious liability and the legal criteria that gave rise to it, Lord Phillips said that he did not think it right to say that the creation of risk was simply a policy consideration and not one of criteria. It was, in the end, a short step to the conclusion that the necessary relationship between the brothers and the institute and the close connection between that relationship and the abuse had been made out. So it was fair, just and reasonable, by reason of the satisfaction of the relevant criteria, for the institute to share vicarious liability for the abuse with the school's managers⁵².

No-one, I think, would wish to quarrel with that decision on public policy grounds. Child sexual abuse is an ugly phenomenon. There is a heavy responsibility on our legal system to deal as fairly and justly as it can with the consequences. In 1992, in *Stubbings v Webb and others*⁵³, Bingham LJ referred to what Auld LJ in the *Bryn Alyn Community* case in 2003⁵⁴ called the momentum of increase in public awareness of such conduct, and of the ushering in of a generation that was more sensitive to its seriousness and its significance. The context for those remarks was the question whether those who had been abused by members of their own family, and then in a residential children's home, had suffered a significant injury for limitation purposes. Great care was needed to balance the need to protect those who were at risk of being prejudiced by serious

⁵¹ [2012] 3 WLR 1319, para 83.

⁵² *Ibid*, para 94.

⁵³ [1992] QB 197.

⁵⁴ *KR and others v Bryn Alyn Community (Holdings) Ltd (in liquidation) and another* [2003] EWCA Civ 85, [2003] QB 1441, para 43.

accusations of things said to have been done many years ago against the public vindication to which the claimant, if right, was entitled.

So too in the present context, where the issue is who should be held liable for the acts of the abuser. If the abuser himself has no funds, the finger is pointed at those with whom he has the closest connection. If they are not his employer, is the connection analogous to that of employment? If the law needs to be refined, or tailored, to accommodate this, so be it. Artificial barriers, such as those which may be thought to have influenced the decision of the Inner House in *McE*'s case and the Court of Appeal's decision in the *Catholic Child Welfare* case, should not be allowed to stand in the way. The law should be robust enough to withstand the process of tailoring, or of refinement, that is needed to enable a solution to be fashioned that meets the social purpose of placing the responsibility for meeting these claims on those who ought fairly to bear the liability.

That having been said, there remains much force in the point made by Lord Steyn that the doctrine of vicarious liability must be kept within clear limits. It is not, as he said, infinitely extendable. Any extension of strict liability requires to be undertaken with great care, lest it is found to rest on a basis that is purely arbitrary. There remains much force too in Lord Hobhouse's warning in *Lister*⁵⁵ that legal rules have to have a greater degree of clarity and definition than is provided by simply explaining the reasons for their existence and the social need for them. Otherwise uncertainty and confusion may result. As the commentator on Ward LJ's judgment in the *Lady of Charity* case whom I mentioned earlier put it, there is a very real danger of the law evolving in such a way that the outcomes in individual cases do seem arbitrary⁵⁶.

⁵⁵ [2002] 1 AC 215, para 55.

⁵⁶ See fn 44, above.

Lord Phillips has done his best in a carefully reasoned judgment to meet that objection. One can see here a principle emerging which does not just balance the harm against closeness of the connection. There was, of course, a very close connection between the brothers' employment at the school and the abuse which they committed while they were there. But the fundamental point is that it was the institute, in pursuance of its mission and its own interests, which had caused the brothers, with whom they were in a relationship akin to that of employment, to have access to the children in circumstances where the abuse was facilitated⁵⁷. In other words, it was the institute which had introduced the risk that this would happen. So it could be fairly held responsible for its management. This can be seen as an application of what the Supreme Court of Canada referred to as the doctrine of enterprise liability⁵⁸. The question in each case, it said, is whether there is a connection or nexus between the employment enterprise and the wrong that justifies imposition of vicarious liability on the employer for the wrong, in terms of a fair allocation of the risk and its deterrence. It is not too difficult to see the justification for this in the case of a business enterprise, the carrying on of which necessarily involves the risk to others⁵⁹. The institute was not carrying on a business in the ordinary sense. But the mission of providing a Christian education was nevertheless an enterprise, and there was a risk of abuse if the brothers who were placed in the school as part of that mission had a propensity to abuse children.

It may be, as Lord Phillips hinted towards the end of his judgment⁶⁰, that some further refinement will be needed to meet demands for compensation for sexual abuse of children within the entertainment industry. The precise criteria for imposing vicarious liability in such or other cases have yet to be defined. What are to be taken to be the parameters? What, if enterprise liability is to be the governing principle, is an enterprise? How is one to determine

⁵⁷ [2012] 3 WLR 1319, paras 85, 89.

⁵⁸ *Bazely v Curry* (1999) 174 DLR (4th) 45, para 37.

⁵⁹ *Dubai Aluminium Co Ltd v Salaam and others* [2003] 2 AC 366, para 21, per Lord Nicholls of Birkenhead.

⁶⁰ [2012] 3 WLR 1319, para 85.

what is, and what is not, within the range of activities for which those in charge of that enterprise can be fairly held to be vicariously responsible? What part does the risks that the activities may give rise to have to play in that assessment? One must hope that the search for clearly defined criteria, as one moves further and further away from the employer/employee relationship, is not abandoned simply in order to meet the need for a solution on a case by case basis. The fact that vicarious liability is a principle of strict liability places a special responsibility on the judges, as the law develops, to see that this does not happen. Tailoring is an exacting process, as the garment is carefully fitted and adjusted to the needs of the wearer. In law, the tailor will need, and will wish, to be just as careful.

23 April 2013

Lord Hope of Craighead⁶¹

⁶¹ I am grateful to my judicial assistant, Joseph Farmer, for his help in the preparation of this lecture.