

VICARIOUS LIABILITY FOR SEXUAL ABUSE BY CLERGY

1 Was the abuse sufficiently connected with the priest's "employment"?

Lister v Hesley Hall Ltd [2002] 1 AC 215:

An employer will be vicariously liable for an employee's sexual abuse where there is a sufficiently close connection between the tort and the employee's duties.

Maga v Archbishop of Birmingham [2010] 1 WLR 1441:

The claimant, who had learning difficulties and epilepsy, brought a claim against a Roman Catholic archdiocese for damages for personal injuries, alleging that he had been sexually abused as a child some 30 years earlier by a priest who lived and worked in the archdiocese. The claimant was not a Roman Catholic but had met the priest, who had special responsibility for youth work, through church discos which were open to all young people, and had done jobs for the priest, including in the presbytery where the priest lived and where some of the alleged abuse had taken place. In its defence the archdiocese pleaded that the claim was time-barred under the Limitation Act 1980 and denied vicarious liability for the priest's acts, although it admitted, for the purposes of the action only, that the priest had been an employee of the archdiocese. The judge dismissed the claimant's claim holding that the claim was not time-barred, as, inter alia, the claimant was, and had at all times been, under a disability for the purposes of section 28(1) of the 1980 Act; that the claimant had been sexually abused by the priest substantially as alleged; that the archdiocese was not vicariously liable for that abuse.

The Court of Appeal held that the issue of whether a claimant was under a disability for the purposes of section 28(1) of the Limitation Act 1980 was a matter of judgment primarily for the first instance tribunal, and since the judge had approached the issue properly on the evidence the court would not interfere with his conclusion that the claimant was under a disability, nor with his finding of fact that the claimant had been sexually abused.

Further, although the archdiocese had no direct responsibility for the claimant as a non-Catholic, a number of factors taken together established a sufficiently close connection between the priest's employment as a priest at the church and the abuse which he had inflicted on the claimant to render it fair and just to impose vicarious liability for the abuse on the archdiocese as the priest's employer:

- The priest was normally dressed in clerical garb. At the very least, this factor sets the scene.
- The priest had a special role of trust and responsibility and a degree of moral authority. It was his employment as a priest which enabled him and was intended to enable him to hold himself out as having such a role and authority.
- The priest was “in a sense, never off duty”.
- The priest had a special responsibility for youth work among Catholics and non-Catholics. Accordingly, when grooming the claimant, the priest was ostensibly carrying out one of his specifically assigned functions in the church.
- The priest developed his relationship with the claimant by inviting him to a disco on church premises organised in his capacity as a priest. Thus, the claimant was drawn into the relationship through the medium of a church organised function carried on on church premises.

- The priest had the claimant clean up after the discos. The priest's role and status enabled him to "draw the claimant further into his sexually abusive orbit by ostensibly respectable means connected with his employment as a priest at the church".
- The claimant did cleaning at the presbytery for the priest.
- The abuse occurred in the priest's room in the presbytery. The priest's job involved spending time alone with individuals such as the claimant. "The progressive stages of intimacy were to my mind only possible because Father Clonan had the priestly status and authority which meant that no one would question his being alone with the claimant. It is this that provides the close connection between the abuse and what Father Clonan was authorised to do."
- The priest had a duty to evangelise or "to bring the gospel to be known to other people, Roman Catholics and non-Roman Catholics." As a result the priest was obligated to befriend non-Roman Catholics and to gain and be worthy of their trust. Accordingly, he was ostensibly performing his duty as a priest employed by the archdiocese by getting to know the claimant.

The duty to evangelize:

- Canon 211: “All Christ’s faithful have the obligation and right to strive so that the divine message of salvation may more and more reach all people of all times and all places.”
- Canon 225.1: “Since lay people, like all Christ’s faithful, are deputed to the apostolate by baptism and confirmation, they are bound by the general obligation and they have the right, whether as individuals or in associations, to strive so that the divine message of salvation may be known and accepted by all people throughout the world. This obligation is all the more insistent in circumstances in which only through them are people able to hear the Gospel and to know Christ.”
- Canon 225.2: “They have also, according to the condition of each, the special obligation to permeate and perfect the temporal order of things with the spirit of the Gospel. In this way, particularly in conducting secular business and exercising secular functions, they are to give witness to Christ.”
- Doctrinal Note on Some Aspects of Evangelization: “Evangelization also involves a sincere dialogue that seeks to understand the reasons and feelings of others. Indeed, the heart of another person can only be approached in freedom, in love and in dialogue, in such a manner that the word which is spoken is not simply offered, but also truly witnessed in the hearts of those to whom it is addressed. This requires taking into account the hopes, sufferings and concrete situations of those with whom one is in dialogue. Precisely in this way, people of good will open their hearts more freely and share their spiritual and religious experiences in all sincerity. This experience of sharing, a characteristic of true friendship, is a valuable occasion for witnessing and for Christian proclamation.”

2 Is the relationship of priest and religious organisation one that attracts vicarious liability at all?

Early employment law authorities held that ministers of religion were not employees as there was no intention to create legal relations.

Stewart v New Testament Church of God [2008] ICR 282

Stewart claimed unfair dismissal. To bring proceedings, he had to show he was an employee within s.230 Employment Rights Act 1996, which provides “employee means an individual who has entered into or works under... a contract of employment. ‘contract of employment’ means a contract of service of apprenticeship, whether express or implied, and (if express) whether oral or in writing.”

Court of Appeal upheld EAT’s decision that Stewart was employed:

- Whether or not there is an employment relationship will be a question of fact in each case.
- There is no presumption that there is no intention to create legal relations. A spiritual motivation does not necessarily preclude an intention to create legal relations. This follows *Percy v Board of National Mission of the Church of Scotland [2006] ICR 134*, a case under the Sex Discrimination Act 1975, where Lord Nicholls said:

“the context in which these issues normally arise today is statutory protection for employees. Given this context, in my view it is time to recognise that employment arrangements between a church and its ministers should not lightly be taken as intended to have no legal effect and, in consequence, its ministers denied this protection.”

- The religious beliefs held in a church might throw light on the relationship between it and its ministers – if there were a religious belief that contractual relationships should be shunned, that would be a factor in determining whether or not the parties had intended to enter into a legally binding agreement.
- There was no written contract of employment, but he was described as an employee on his pay slip and tax and NI were deducted.
- Stewart's duties were substantial.
- Although Stewart had a discretion as to the manner of performance, he reported to the national office.
- The standards expected of Stewart were laid down in the church's constitutional documents, which contained a theological statement as well as dealing with practical matters.

There does not necessarily have to be a strict relationship of employment for vicarious liability to arise. See Lord Clyde in paragraph 33 of *Lister*:

“Questions may arise in some cases whether the person who committed the tort was in such a relationship with another as to enable the concept of a vicarious liability on that other person to arise. In some circumstances difficult questions may occur in this regard. However that complication does not exist in the present case. The warden was plainly an employee and in a relationship of employment with the respondents.”

An employee's regular employer loaned out the employee for a specific task to a temporary employer. The employee negligently flooded the client's premises while installing air conditioning systems. The regular employer retained overall control as to how the employee worked, but the temporary employer supervised the particular job.

The Court of Appeal held that the question to determine vicarious liability was who was entitled to exercise control over the relevant act or operation of the worker. To look for a transfer of a contract of employment was distracting and misleading. In this case, the worker's employment was not transferred. The inquiry should concentrate on the relevant negligent act and then ask whose responsibility it was to prevent it: who was entitled and obliged to give orders as to how the work should or should not be done. Entire and absolute control was not a necessary precondition of vicarious liability. On the facts, as they both exercised sufficient control, they were both employers for the purposes of vicarious liability.

So, it is at least arguable that, even if there is no relationship of employment between a minister and his church, the church should still be vicarious liability for his assaults if the church has a sufficient degree of control over the minister.

The Code of Canon Law:

- Canon 212.1: "Christ's faithful, conscious of their own responsibility, are bound to show Christian obedience to what the sacred Pastors, who represent Christ, declare as teachers of the faith and prescribe as rulers of the Church."
- Canon 273: "Clerics have a special obligation to show reverence and obedience to the Supreme Pontiff and to their own Ordinary."
- Canon 274.2: "Unless excused by a lawful impediment, clerics are obliged to accept and faithfully fulfil the office committed to them by their Ordinary."

- Canon 384: A diocesan bishop “is to have special concern for the priests, to whom he is to listen as his helpers and counsellors. He is to defend their rights and ensure that they fulfil the obligations proper to their state.”
- Canon 392.1: “Since the bishop must defend the unity of the Universal Church, he is bound to foster the discipline which is common to the whole Church, and so press for the observance of all ecclesiastical laws.”
- Canon 277.1: “Clerics are obliged to observe perfect and perpetual continence for the sake of the Kingdom of heaven, and are therefore bound to celibacy. Celibacy is a special gift of God by which sacred ministers can more easily remain close to Christ with an undivided heart, and can dedicate themselves more freely to the service of God and their neighbour.”
- Canon 285.1: “Clerics are to shun completely everything that is unbecoming to their state, in accordance with particular law.”

The question of whether or not there can be vicarious liability for sexual abuse by a priest is being litigated in *J v Trustees of Portsmouth RC Diocesan Trust*, listed for trial in October 2010.

3 Who should be the defendant?

Is the abuser a diocesan priest or does he belong to a religious order?

SJ
Society of Jesuits

Look the priest up in The Catholic Directory. - annual publication
- all public library

Most likely defendant for a diocesan priest will be his (arch)bishop. **But:**

- The trustees hold the assets,
- There can be arguments as to whether a Catholic bishop will be liable for the torts of his predecessor. Halsbury's Laws asserts that a Roman Catholic bishop is not a corporation sole (unlike a Church of England bishop). However, the point has not recently been considered and the authorities cited in support were decided before the Roman Catholic Relief Act 1829.
- There can be arguments as to whether or trustees will be liable for the torts of their predecessors.

So, ALWAYS ask the defendant's representatives who to sue.

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