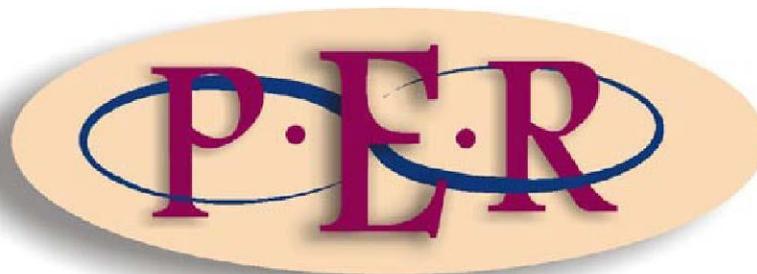


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THE LIABILITY OF CHURCHES FOR THE HISTORICAL SEXUAL ASSAULT OF CHILDREN BY PRIESTS

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Until the 1970s people were reluctant to believe that child sexual abuse took place at all. Now we know only too well that it does. But it remains hard to protect children from it. This is because the perpetrators are so often people in authority over the victims, sometimes people whom the victims love and trust. These perpetrators have many ways, some subtle and some not so subtle, of making their victims keep quiet about what they have suffered. The abuse itself is the reason why so many victims do not come forward until years after the event. This presents a challenge to a legal system which resists stale claims.¹

1 Introduction

In recent years hundreds of mostly middle-aged men have claimed that priests of different denominations, but especially the Roman Catholic Church, had sexually assaulted them in their youth. Claims for damages against churches led to protracted court cases in several countries. Such a claim has not yet been brought against any church in South Africa. However, in January 2014 three men in their sixties alleged that a well-known author of religious books and former pastor of the Dutch Reformed Church in South Africa sexually assaulted them while they were inhabitants of a children's home. Between 1958 and 1964 the pastor (now 87) was the manager of this children's home in Ugie in the Eastern Cape, where he himself was an inhabitant as a boy. One of the men alleged that they did bring the assaults to the attention of the Ugie congregation as well as the Department of Education, but that no steps were taken.² No claims have been filed against the church yet.

In cases such as these the public's reaction is one of shock and outrage since the presumed protectors apparently misused their position of trust to sexually assault vulnerable children in their care. On the other hand, accused persons are regarded with sympathy since they are often advanced in years at the time when the claims

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¹ Baroness Hale of Richmond in *A v Hoare* 2008 UKHL 6 para 54.

² Barnard 2014://www.rapport.co.za/Suid-Afrika/Nuus/Ds-Solly-Kerk-sal-optree-20140208.

are made and it may be difficult to defend themselves against accusations made years after the events.

There are different courses of action open to the victims of sexual assault. They may lay criminal charges against the wrongdoer³ and may also bring civil claims for damages against the perpetrator himself or the employer for whom the wrongdoer worked at the time of the assaults. A claim against the employer may be based on the negligence of the employer where, for instance, a victim did complain or the employer knew or should have known about the assaults, but the employer did not investigate the complaints. In such a case the employer could be held directly liable.⁴

Even in the absence of the negligence of the employer, the victim could still have a claim based on the vicarious liability of the employer.⁵ In terms of this doctrine an employer can be held liable for the wrongful conduct of his employee which caused damage to a third party, even though the employer is not at fault. This strict or faultless liability is not founded on any legal rule but on policy considerations, of which the most important seem to be fair compensation for the victim, loss distribution and deterrence, in the sense that employers will be motivated to take measures to ensure that their employees do not harm anyone.⁶

In a claim based on vicarious liability, the victim will have to prove that he or she suffered damage as a result of a wrongful act committed by an employee of the defendant and that the wrongful act was committed within the scope of employment.⁷ The requirements that the wrongdoer must be an employee of the defendant and that the act must have been performed within the course and scope of employment will be discussed in this contribution in the context of the liability of the church for the wrongful acts of its clergymen. A further issue that will be discussed is whether a claim of this kind, brought years after the event, has gone stale since it is brought outside the time allowed in legislation for civil claims.

³ Criminal Law (Sexual Offences and Related Matters) Amendment Act 32 of 2007 (hereafter the "Sexual Offences Amendment Act").

⁴ *Media 24 v Grobler* 2005 7 BLLR 649 (SCA).

⁵ *Wagener* 2014 SALJ 179.

⁶ *K v Minister of Safety and Security* 2005 26 ILJ 681 (SCA) para 21.

⁷ *Mkize v Martens* 1914 AD 382 390.

I will endeavour to indicate what the probable outcome would be if South African courts were to have to decide the vicarious liability of the church in a case of historical sexual abuse of children by priests, ministers or clergymen. Developments in Canada and the United Kingdom will be discussed, since these countries seem to be at the forefront of the development of vicarious liability, as will be indicated below. South African courts, moreover, have in the past sought guidance in jurisprudence in these common law countries in order to develop South Africa's own doctrine of vicarious liability.⁸

2 An employment relationship

In a claim against a church based on vicarious liability, the relationship between each denomination and its clergymen will have to be analysed to establish whether an employment relationship did exist at the time of the alleged acts. A hurdle for claimants is that the relationship between a priest and the church was until recently not regarded as an employment relationship, since priests were regarded as servants of God.⁹ Churches further argued that neither the church nor corporations registered to perform certain specific functions ancillary to the main purpose of the church could be regarded as employers, since there was no intention to create an employment relationship.¹⁰

2.1 Canada

In *John Doe v Bennett*,¹¹ (hereafter *John Doe*) a priest sexually assaulted boys in his parishes for over two decades. The victims sued the episcopal corporation and the Roman Catholic Church. The court rejected the Episcopal Corporation of St George's argument that it was created only for holding property and could therefore not (as his employer) be held liable for the sexual assault of children by the priest. The court pointed out that the corporation as a legal person could execute juristic acts such as

⁸ K v Minister of Safety and Security 2005 26 ILJ 681 (SCA).

⁹ Diocese of Southwark v Coker 1998 ICR 140.

¹⁰ *John Doe v Bennett* 2004 1 SCR 436, 2004 SCC 17 para 9.

¹¹ *John Doe v Bennett* 2004 1 SCR 436, 2004 SCC 17 (hereafter *John Doe*).

the conclusion of contracts and that it acted as the legal interface between the Roman Catholic Church and the community.¹² The court further pointed out that:

... the relationship between the bishop and a priest in a diocese is not only spiritual, but temporal. The priest takes a vow of obedience to the bishop. The bishop exercises extensive control over the priest, including the power of assignment, the power to remove the priest from his post and the power to discipline him. It is akin to an employment relationship.¹³

Since the relationship between the wrongdoer and St George's was akin to an employment relationship, the court held that St George's as the secular arm of the church could be both directly and vicariously liable.¹⁴ The court did not make a decision on "the complicated question" of whether the Roman Catholic Church as such could be held liable. The principle adopted in *John Doe* that a "relationship akin to employment" was found to be sufficient for vicarious liability, instead of an employment contract as previously required, was followed by courts in the United Kingdom.

2.2 United Kingdom

In a long line of English cases it was consistently held that ministers of different church denominations, *inter alia* the Methodist Church, the Presbyterian Church and the Church of England, held office in terms of ecclesiastical law.¹⁵ The position of priests was thus not defined by a contract of appointment,¹⁶ since the courts found that there was no intention by the parties to conclude any kind of contract. In *Diocese of Southwark v Coker*¹⁷ the court remarked that the law should not impose a legal relationship on members of a religious community which would be contrary to their religious beliefs. According to the court, the relationship should be regulated by the rules of the specific church which is part of the public law of England, and not by a contract between the parties.¹⁸

¹² *John Doe* para 11.

¹³ *John Doe* para 27.

¹⁴ *John Doe* para 16.

¹⁵ *Percy v Board of National Mission of the Church of Scotland* 2005 UKHL 73, 2006 SC (HL) 1 paras 7-10.

¹⁶ *Percy v Board of National Mission of the Church of Scotland* 2005 UKHL 73, 2006 SC (HL) 1 para 7.

¹⁷ *Diocese of Southwark v Coker* 1998 ICR 140.

¹⁸ *Diocese of Southwark v Coker* 1998 ICR 140 para 27.

*Percy v Board of National Mission of the Church of Scotland*¹⁹ concerned a claim based on sex discrimination by a former (female) minister of the Church of Scotland. The House of Lords held that holding an office, even an ecclesiastical office, and the existence of a contract to provide services are not necessarily mutually exclusive.²⁰ Lord Nicholls of Birkenhead²¹ remarked that:

I think that difficulty has been caused by some of the reasons given in recent cases for saying that a priest or minister is not an employed person. To say, as Lord Templeman did in *Davies v Presbyterian Church of Wales* [1986] ICR 280, that a priest is "the servant of God" is true for a believer but superfluous metaphor for a lawyer. ... Nor do I think it very helpful to say, as Mummery LJ said in *Diocese of Southwark v Coker* [1998] ICR 140, that a priest is not employed because her appointment was not accompanied by an intention to create legal relations. That, together with the proposition that the priest is the servant of God, gives the impression that she operates entirely outside the legal system, looking to God to provide for her.

In *JGE v English Province of Our Lady of Charity & Portsmouth Roman Catholic Diocesan Trust*,²² in following the reasoning in *John Doe*, MacDuff J held that factors indicating that there is no employment contract, no wages or right of dismissal should not obscure the real question, which was whether, in justice, the defendant should be held responsible. In this case a visiting parish priest sexually assaulted a girl in a children's home on different occasions. The home was managed by an order of nuns who allowed the priest to see the victim alone. The court pointed out²³ that the tortious acts were those of:

... the man appointed in order to do the work of the church with the full authority to fulfil that role, being provided with the premises, the pulpit and the clerical robes. He was directed into the community and given free rein to act as representative of the church. He had been trained and ordained for that purpose and his position of trust gave him great power.

¹⁹ *Percy v Board of National Mission of the Church of Scotland* 2005 UKHL 73, 2006 SC (HL) 1 (hereafter *Percy*).

²⁰ *Percy* para 18. The court further explained that before the *Industrial Relations Act* 1971, which granted employees the right not to be unfairly dismissed, employees could not challenge their dismissal. However, persons appointed to "office" were regarded as a separate category of public employees, since they enjoyed the right to be heard before being dismissed. The rationale for this distinction has thus fallen away (*Percy* para 16).

²¹ *Percy* paras 61-63.

²² *JGE v English Province of Our Lady of Charity & Portsmouth Roman Catholic Diocesan Trust* 2011 EWWCH 2871 (QB), 2012 2 WLR 709.

²³ *JGE v English Province of Our Lady of Charity & Portsmouth Roman Catholic Diocesan Trust* 2011 EWWCH 2871 (QB), 2012 2 WLR 709 paras 35-36.

The court found that the relationship was akin to employment and that the Trust could thus be held liable.

The case went on appeal and was heard as *JGE v the Diocese of Portsmouth*²⁴ (hereafter *JGE*). The diocese of Portsmouth argued that priests were not employees, since there was no form of contract between the parties, and that the church viewed priests as officials and as such they were subject to canon law and not civil law. It was further argued that the priest was not an employee, because he was neither entitled to a fixed salary nor under the control of the bishop, since the bishop visited only once in five years.²⁵

The court agreed with the reasoning in *Percy*²⁶ and *JGE* in the lower court²⁷ and remarked that, although the priest was not under the constant control of the bishop, the bishop was certainly in a position to remove a priest should the priest act in contravention of church rules.²⁸ The court held that in keeping with the social purpose of vicarious liability and increasing forms of atypical forms of employment, "the fluid concept of vicarious liability should not ... be confined by the concrete demands of statutory construction arising in a wholly different context".²⁹ In Ward J's judgment "the time has come to recognise that the context in which the question arises cannot be ignored" and that requirements for an employment relationship in other contexts should not be applied to the relationship required for establishing vicarious liability.³⁰

Ward J referred with approval to *Viasystems (Tyneside) Ltd v Thermal Transfer (Northern) Ltd*³¹ (hereafter *Viasystems*). In this case the employee of a subcontractor who caused extensive damage to a client's building was regarded as an employee of both the contractor and subcontractor who performed work on a

²⁴ *JGE v the Diocese of Portsmouth* 2012 EWCA Civ 938 (hereafter *JGE*).

²⁵ *JGE* para 14.

²⁶ *Percy v Board of National Mission of the Church of Scotland* 2005 UKHL 73, 2006 SC (HL) 1.

²⁷ *JGE v English Province of Our Lady of Charity & Portsmouth Roman Catholic Diocesan Trust* 2011 EWWCH 2871 (QB), 2012 2 WLR 709.

²⁸ *JGE* para 11.

²⁹ *JGE* para 59.

³⁰ *JGE* para 59.

³¹ *Viasystems (Tyneside) Ltd v Thermal Transfer (Northern) Ltd* 2005 EWCA Civ 1151, 2006 QB 510 (hereafter *Viasystems*).

client's premises.³² The decision in *Viasystems* extended the conventional boundaries which dictated that the wrongdoer had to be an employee of the defendant before the latter could be held vicariously liable.

Ward J in *JGE* remarked that the test for employment for the purposes of establishing vicarious liability should not be the same as a test for establishing whether someone is an employee for other purposes such as dismissal, taxation or discrimination. The judge was of the opinion that the following factors should be taken into account to ascertain if a person is in a relationship akin to employment:

- 1 Control by the defendant of the wrongdoer: Is he accountable to the employer?
- 2 Control by the contractor himself: Does the contractor arrange *inter alia* his own work, use of assets and amount of payment?
- 3 The organisation test: How central is the activity to the enterprise?
- 4 The integration test: Is the activity integrated into the organisational structure of the enterprise?
- 5 The entrepreneurial test: Is the person in business on his own account or for another person?³³

In *JGE* the court found that there was in fact control as the priest was subject to the oversight of the bishop and to diocesan laws and regulations. "Abusing a little girl is the most gross breach of ecclesiastical law and if it came to the bishop's knowledge he would be bound to dismiss the priest."³⁴ Regarding the organisation test, Ward J found that the Roman Catholic Church could be regarded as a "business" with the objective of spreading the word of God. A priest has a central role in meeting that target and "the more relevant the activity is to the fundamental objectives of the business, the more appropriate it is to apply the risk to the business".³⁵

³² *Viasystems* para 79.

³³ *JGE* para 74.

³⁴ *JGE* para 74.

³⁵ *JGE* para 77.

Regarding the integration test, the court found that "the role of the parish priest is wholly integrated into the organisational structure of the Church's enterprise".³⁶ Although the priest was not paid a salary, he was also not an entrepreneur. He was required by canon law to live in the parochial house close to his church, which the court said is like an employee making use of the employer's tools of the trade.³⁷

The court concluded by stating "that the time has come to emphatically announce that the law of vicarious liability has moved beyond the confines of the contract of employment. The test I set myself is whether the relationship of the bishop and Father Baldwin is so close in character to one of employer/employee that it is just and fair to hold the employer vicariously liable".³⁸

The decision in *JGE* was followed in *Catholic Child Welfare Society & Ors v Various Claimants & The Institute of Brothers of the Christian Schools*³⁹ (hereafter *Catholic Child Welfare Society*). The issue in this case was whether the Institute could be held liable for the sexual abuse of boys by the brothers in the schools where they were teachers. One hundred and seventy claimants alleged that they had suffered abuse between 1958 and 1992 at the hands of members of the Institute who were at the time teachers at the St Williams School. The brother teacher who was the housemaster at the school was found guilty of sexual offences against pupils over a period of 20 years and sentenced to a total of 21 years of imprisonment.⁴⁰

The court remarked that even though there were some aspects of the relationship which differed from an employment relationship in that the brothers did not conclude a contract with the Institute, they were bound by their vows, and that even though they were not paid, the Institute did cater for their needs. The court found that the relationship between the brothers teachers and the Institute had many of the elements (although not all), but all of the essential elements, of the relationship

³⁶ *JGE* para 76.

³⁷ *JGE* para 79.

³⁸ *JGE* para 73.

³⁹ *Catholic Child Welfare Society & Ors v Various Claimants & Institute of Brothers of the Christian Schools* 2012 UKSC 56 (hereafter *Catholic Child Welfare Society*).

⁴⁰ *Catholic Child Welfare Society* para 15.

between an employer and employees, and was thus sufficiently akin to that of employment to satisfy the test for vicariously liability.⁴¹

2.3 South Africa

Although there are no court cases in South Africa in which the church was held vicariously liable for the acts of its priests or ministers, there are judgments in other contexts in which the question of whether a minister was an employee was decided. In *Schreuder v NG Kerk Wilgespruit*⁴² the Labour Court found that the minister was an employee of the congregation of the Dutch Reformed Church where he worked, because a letter of calling (*beroepsbrief*) in which the rights and duties of parties were set out created a contract of employment. The agreement was that the minister would receive a wage (*traktament*) in exchange for his services to the congregation, which was also regarded as an indication that this was an employment contract.

The court also took the provisions of the "Kerkorde", which *inter alia* contains rules and regulations for the employment of ministers and the termination of their services into account.⁴³ From the "Kerkorde" it is clear that the minister is regarded as an employee of the church, since it prescribes the requirements for a fair dismissal in terms of the *Labour Relations Act* 66 of 1995 (hereafter the LRA). The court in *Schreuder* accepted that the minister served more than one employer entity within the church group, namely the congregation, "die ring" and the synod.

In contrast to the *Schreuder* case the Labour Court found in *Church of the Province of Southern Africa, Diocese of Cape Town v CCMA*⁴⁴ (hereafter *Church of the Province*), which also dealt with a claim for unfair dismissal, that a priest in the Anglican Church could not be regarded as an employee. The court based its finding on the fact that the parties did not intend concluding an employment contract. The

⁴¹ Catholic Child Welfare Society para 60.

⁴² *Schreuder v NG Kerk Wilgespruit* 1999 20 ILJ 1936 (LC) (hereafter *Schreuder*).

⁴³ In terms of this document, upon the termination of the services of a minister "die ring" (circle of congregations in a certain area, similar to a diocese in the Anglican Church and Roman Catholic Church) disengages the relationship between the congregation and the minister, while the synod further acts as an appeal body.

⁴⁴ *Church of the Province of Southern Africa, Diocese of Cape Town v CCMA* 2002 3 SA 385 (LC) (hereafter *Church of the Province*).

court accepted the church's evidence that it only provided the space and opportunity for the priest to fulfil his calling to work for God. The court held that "the relationship between a church and a minister is not apt, in the absence of clear indications of a contrary intention in the document, to be regulated by a contract of service".⁴⁵

In similar vein, in *Salvation Army (South African Territory) v Minister of Labour*⁴⁶ (hereafter "*Salvation Army*") the court granted a declaratory order to the effect that officers (preachers) of the Salvation Army are not its employees and that the Salvation Army is thus not bound by labour legislation. The reasoning in *Church of the Province*⁴⁷ was followed and, since it was clearly stated in the contract with the officers that no employment relationship is created, the court found that there was no intention to create an employment relationship.⁴⁸ The court accepted evidence that the Salvation Army only provides the space for the officer to answer his call of duty to God and that the officer is only given guidance on administrative tasks, not on how God is to be served. The fact that no remuneration is paid, but only a living allowance, and that there was no guarantee that this would be paid, also indicated to the court that there was no employment relationship.⁴⁹

What is clear from the above is that the stance of the South African courts was that in the light of the perceived special calling of a priest, he will not be regarded as an employee of the church unless it is clear that there was indeed an intention to create such a relationship, as was demonstrated in *Schreuder*.⁵⁰

Since those judgments were handed down, South African courts have been prepared to hold that even though a contract specifies that it is not an employment contract, the court could, by taking the reality of the relationship into consideration, decide

⁴⁵ Church of the Province 386.

⁴⁶ *Salvation Army (South African Territory) v Minister of Labour* 2005 26 ILJ 126 (LC) (hereafter *Salvation Army*).

⁴⁷ *Church of the Province of Southern Africa, Diocese of Cape Town v CCMA* 2002 3 SA 385 (LC).

⁴⁸ *Salvation Army* para 13.

⁴⁹ *Salvation Army* para 13.

⁵⁰ *Schreuder v NG Kerk Wilgespruit* 1999 20 ILJ 1936 (LC).

that an employment relationship did exist between the parties.⁵¹ In cases dealing with unfair dismissal, protection was extended to persons who could not strictly be regarded as employees, since they had no valid contracts. In these cases the courts gave effect to the right of fair labour practices conferred on "everyone" in section 23 of the *Constitution* by regarding these persons as employees.⁵²

These considerations will not be applicable to the question of whether someone is an employee for the purposes of establishing vicarious liability, since different policy considerations would be at play. However, to protect the victim's constitutional rights to dignity, freedom and security of person,⁵³ South African courts could develop the common law rule requiring that the wrongdoer must be an employee for the purposes of vicarious liability to require only a relationship akin to employment. The Constitutional Court in *K v Minister of Safety and Security*⁵⁴ recently developed the close connection test for vicarious liability to protect the victim's constitutional rights. This development will be discussed in the next section.

Factors almost identical factors to those enumerated in *JGE* to establish a relationship akin to employment were applied by the South African Labour Appeal Court to establish if someone was an employee of a certain employer. In *State Information Technology Agency (SITA) (Pty) Ltd v CCMA*⁵⁵ (hereafter *SITA*) the court held that the three prime factors for deciding whether someone is an employee or not are whether there was control over such a person, whether the person is integrated into the organisation of the person for whom he performs work, and whether the worker is economically dependent on the other person. The court in this judgment focused on two elements which for many years have formed part of the dominant impression test for distinguishing between an employee and an

⁵¹ In *Denel v Gerber* 2005 26 ILJ 1256 (LAC) the court held in terms of the reality of the relationship test that a person who performed certain services was an employee, even though it was explicitly stated in the contract that this was not the case.

⁵² In *Kylie v CCMA* 2010 4 SA 383 (LAC) and *Discovery Health v CCMA* 2008 29 ILJ 1480 (LC) the Labour Appeal Court held that a sex worker (who had no legitimate contract of employment as her "work" was unlawful) was entitled to protection against unfair dismissal, because she was in an employment relationship. Likewise, in *Discovery Health v CCMA* 2008 29 ILJ 1480 (LC) an immigrant without a work permit, who could as a result not be lawfully employed was regarded as an employee for the purpose of protection against unfair dismissal.

⁵³ Sections 10, 12 and 14 of the Constitution of the Republic of South Africa, 1996.

⁵⁴ *K v Minister of Safety and Security* 2005 26 ILJ 681 (SCA).

⁵⁵ *State Information Technology Agency (SITA) (Pty) Ltd v CCMA* 2008 29 ILJ 2234 (LAC).

independent contractor, and further emphasised the economic dependence test, which is more in line with international developments and the "deeming" provisions in the LRA. This element of the test had not previously featured as strongly as the other factors.⁵⁶ The test in *SITA*⁵⁷ and *JGE*⁵⁸ was very similar, since the entrepreneurial test could be equated to the economic dependency test. However, it must be kept in mind that not all of the factors constituting an employment relationship need to be present if the requirement for liability is a relationship akin to employment. This has the implication that a church could even in certain circumstances be held liable for the wrongful acts of a volunteer.⁵⁹

3 The development of a close connection test for vicarious liability

3.1 Canada

Up until 1999, when the Canada Supreme Court handed down the ground-breaking decision in *Bazley v Curry*⁶⁰ (hereafter *Bazley*), claimants in vicarious liability cases had to prove that the act in question was performed within the course and scope of the employee's employment.⁶¹ This was based on the so-called Salmond rule, which also made provision for liability for acts that were not authorised, on condition that these acts constituted an improper mode of performing authorised acts.⁶² The difficulty with this mode of thought was that an employee could not be held liable for an intentional act of misconduct, which could not be seen as "a mode of doing an authorised act." A prime example is sexual assault, which can never be seen as a mode of doing an authorised act.

In *Bazley* a warden of a school for troubled children (appointed without the management's knowing that he was a paedophile) assaulted the children while performing his duties, namely bathing the children and putting them to bed. McClaghlan J stated that courts should openly confront the question of whether the

⁵⁶ *Pam Golding (Pty) Ltd v Erasmus* 2010 31 ILJ 1460 (LC) para 14.

⁵⁷ *State Information Technology Agency (SITA) (Pty) Ltd v CCMA* 2008 29 ILJ 2234 (LAC).

⁵⁸ *JGE v English Province of Our Lady of Charity & Portsmouth Roman Catholic Diocesan Trust* 2011 EWWCH 2871 (QB), 2012 2 WLR 709.

⁵⁹ On this subject see Morgan 2012 *CLJ* 615-650.

⁶⁰ *Bazley v Curry* 1999 2 SCR 534 (hereafter "*Bazley*").

⁶¹ See Calitz 2007 *Stell LR* 455.

⁶² Heuston and Buckley *Law of Torts* 443.

employer should be held liable, rather than obscuring this decision with phrases such as the "scope of employment" and "modes of doing authorised acts".⁶³ The fundamental question was whether the wrongful act was sufficiently connected to the conduct authorised by the employer. The court held that where there is a significant connection between the enhancement of the risk that unlawful conduct will occur (brought about by the enterprise of the employer), it would be generally appropriate to hold the employer liable. Liability in these circumstances would serve the policy considerations of fairly compensating the victim and acting as a deterrent, so that employers would take preventative measures to ensure that such conduct would not occur.⁶⁴

McClachlan J pointed out that factors such as the opportunity that the enterprise afforded an employee to abuse his power, the extent of the power conferred on the employee in relation to the victim, and the vulnerability of potential victims should be taken into account to establish if the enterprise enhanced the risk that such wrongful acts could occur.⁶⁵ In this case the connection between the authorised duties of the employee and the wrongful acts was regarded as being sufficiently close and the employer was held liable.

In *John Doe*⁶⁶ the court followed *Bazley* and found that the bishop provided Bennett with great power in relation to vulnerable victims as well as the opportunity to abuse this power.⁶⁷ The remoteness of the parishes, the lack of sophistication of some parishioners⁶⁸ and the psychological intimacy inherent in his role as a priest gave him the opportunity to control his victims.⁶⁹ The court was satisfied that a strong connection was created between the wrongful acts and the risk which the enterprise introduced into the community.

Although the close connection test in *Bazley* extended the liability of employers for the wrongful conduct of their employees, the limits of the close connection test were

⁶³ *Bazley* para 36.

⁶⁴ *Bazley* para 41.

⁶⁵ *Bazley* para 41.

⁶⁶ *John Doe v Bennett* 2004 1 SCR 436, 2004 SCC 17.

⁶⁷ *John Doe* para 31.

⁶⁸ Some of them believed that Father Bennett could turn them into a goat (*John Doe* para 31).

⁶⁹ *John Doe* para 31.

illustrated in *Jacobi v Griffiths*.⁷⁰ In this case a youth worker met his victims at a club which he organised for youths. He invited the children to his house where he sexually assaulted them. The court found that the connection between the acts and the risk created by the employer's business was not sufficiently close to justify vicarious liability. The employment did provide him with the opportunity to commit the acts, but he did not occupy a position of trust and power *vis-à-vis* the children.⁷¹ Similarly, in *B(E) v Order of the Oblates of Mary Immaculate (British Columbia)*⁷² the educational authority was not held liable for the sexual assault of children by an employee in the school's bakery. Clearly there was no close connection between the duties of the baker and the sexual assault. Similarly in *LEW v United Church of Canada*⁷³ (hereafter *LEW*) regarding the sexual assault of children by a volunteer, the court held that the church was not vicariously liable since "nothing regarding Bolton's authorised role with the defendant church provided him with a greater opportunity than any other member of the community for intimacy with children".⁷⁴ It is significant that the court did not exclude the possibility that the unlawful acts of a volunteer could lead to the vicarious liability of a church.

3.2 The United Kingdom

Shortly after the decision in *Bazley* the House of Lords applied the close connection test in *Lister v Hesley Hall*⁷⁵ (hereafter *Lister*) and thus the English courts also replaced the scope of employment test with the close connection test, at least in cases of intentional misconduct. The facts in *Lister* were almost identical to those in *Bazley*, in that a warden of residential facilities at a school for boys from troubled backgrounds sexually assaulted some of the boys. Lord Steyn for the majority did not require a close (or sufficient) connection between the risk of the employer's business and the acts of the employee, but required a close connection between the wrongful acts of the employee and his employment. Only Lord Millet based the liability on a close connection between the enterprise risk and the wrongful acts, as

⁷⁰ *Jacobi v Griffiths* 1999 2 SCR 570.

⁷¹ *Jacobi v Griffiths* 1999 2 SCR 570 para 83.

⁷² *B(E) v Order of the Oblates of Mary Immaculate (British Columbia)* 2005 SCC 60.

⁷³ *LEW v United Church of Canada* 2005 BCJ No 832 (hereafter *LEW*).

⁷⁴ *LEW* para 81.

⁷⁵ *Lister v Hesley Hall* 2001 UKHL 22 (hereafter *Lister*).

was done in *Bazley*.⁷⁶ Although the Canadian test links the test to the policy considerations underlying the doctrine of vicarious liability, there would arguably be little difference in the end result of the application of the test.⁷⁷

In *The Catholic Child Welfare Society & Ors v Various Claimants & The Institute of the Brothers of the Christian Schools*,⁷⁸ (hereafter *Catholic Child Welfare Society*) the UK Supreme Court analysed previous judgments to establish what would constitute a close connection and concluded that:

... what has weighed with the courts has been the fact that the relationship has facilitated the commission of the abuse by placing the abusers in a position where they enjoyed both physical proximity to their victims and the influence of authority over them both as teachers and as men of god.⁷⁹

The court further stated that the creation of risk in itself is not enough to give rise to vicarious liability for sexual abuse, but it is always an important factual element in establishing vicarious liability.⁸⁰ The court emphasised that the children in this case were vulnerable because they were school children living cloistered on the school premises, and their personal histories made it less likely that they would be believed if they disclosed the abuse to anyone.⁸¹ The requirements for a close connection was satisfied, since teachers were placed in a position of authority over vulnerable children, which gave them the opportunity to abuse their position in circumstances in which there was an increased risk that such conduct could occur.

In *Maga v Trustees of the Birmingham Archdiocese of the Roman Catholic Church*⁸² (hereafter *Maga*) the court of first instance held that the Archdiocese could not be held liable for the acts of a priest who sexually assaulted a boy, since the boy and his parents were not members of the Roman Catholic Church. One of the reasons for

⁷⁶ *Bazley* para 41.

⁷⁷ The close connection test was subsequently not applied only in the context of the sexual assault of children by persons in whose care they were, but also in other contexts. In *Mattis v Pollock* 2003 1 WLR 2158, for instance, the test was applied in holding a club owner vicariously liable for the injuries of a customer who was assaulted by a bouncer at the club.

⁷⁸ *Catholic Child Welfare Society & Ors v Various Claimants & Institute of Brothers of the Christian Schools* 2012 UKSC 56.

⁷⁹ *Catholic Child Welfare Society* para 84.

⁸⁰ *Catholic Child Welfare Society* para 87.

⁸¹ *Catholic Child Welfare Society* para 91.

⁸² *Maga v Trustees of the Birmingham Archdiocese of the Roman Catholic Church* 2010 EWCA Civ 256, 2010 All ER (D) 141 (hereafter *Maga*).

this decision was that the priest met the victim while he organised sporting events and discos for youths and not while he was engaged in evangelical duties.

The Court of Appeal overturned this decision and held that in order to evangelise people, the priest also had to gain the trust of non-members of the church. In getting to know the victim he was thus ostensibly performing his duties as a priest. The court concluded that "his role as priest in the Archdiocese 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".⁸³ The court further remarked that:

A priest has a special role, which involves trust and responsibility in a more general way even than a teacher, a doctor, or a nurse. He is, in a sense, never off duty; thus, he will normally be dressed in "uniform" in public and not just when at his place of work. So, too, he has a degree of general moral authority which no other role enjoys; hence the title of "Father Chris", by which Father Clonan was habitually known. It was his employment as a priest by the Archdiocese which enabled him, indeed was intended to enable him, to hold himself out as having such a role and such authority.⁸⁴

The court held that a material increase in the risk of harm occurring as a result of the employment was satisfied in this case.⁸⁵

The following factors seem to be a basis for a close connection between the wrongdoer's employment and the wrongful deeds:

- 1 The position in which the wrongdoer was appointed was a position of trust, respect and authority;
- 2 the specific duties to promote the goals of the enterprise gave him the opportunity to commit the wrongful acts;
- 3 the victims were vulnerable; and
- 4 a material risk of increase of harm was created by the enterprise.

⁸³ *Maga* para 48.

⁸⁴ *Maga* para 45.

⁸⁵ *Maga* para 53.

3.3 South Africa

The South African Constitutional Court followed the *Bazley*⁸⁶ and *Lister*⁸⁷ cases in *K v Minister of Safety and Security*,⁸⁸ which concerned the rape of a young woman by three policemen on duty, in uniform and driving a police vehicle while doing their patrol rounds. The court found a basis for the development of the South African doctrine of vicarious liability in *Minister of Police v Rabie*⁸⁹ in which the court stated that an act done by a servant, where he subjectively intended to act solely for his own purposes, may fall outside the course and scope of his employment. However, if there is a sufficiently close link between the servant's acts for his own interests and the business of his master, the master may still be held liable.⁹⁰ The Constitutional Court developed the common law in terms of section 39(2) of the *Constitution* to require a sufficiently close connection between the wrongdoer's actions and the business of his employer. The court held that the second (objective) part of this test does not only include a factual closeness, but that explicit recognition must also be given to the normative content of this part of the test to include constitutional rights and duties.⁹¹

O'Reagan J held that the police had a constitutional duty to protect the public and that the public needed to trust the police to enable them to do their duties.⁹² This is exactly what the victim did. The fact that the perpetrators were provided with uniforms and an official vehicle played a role in persuading the victim to trust them and enabled them to rape her. They breached their duty by way of a commission (the rape) and an omission (failing to protect the victim in accordance with their constitutional duty).⁹³ The court found that there was a sufficiently close connection between their wrongful acts and the business of their employer to hold the Minister vicariously liable.⁹⁴ Like the majority in the House of Lords in *Lister v Hesley Hall*,⁹⁵

⁸⁶ *Bazley v Curry* 1999 2 SCR 534.

⁸⁷ *Lister v Hesley Hall* 2001 UKHL 22.

⁸⁸ *K v Minister of Safety and Security* 2005 9 BCLR 835 (CC).

⁸⁹ *Minister of Police v Rabie* 1986 1 SA 117 (A).

⁹⁰ *Minister of Police v Rabie* 1986 1 SA 117 (A) 134.

⁹¹ *K v Minister of Safety and Security* 2005 9 BCLR 835 (CC) para 32.

⁹² *K v Minister of Safety and Security* 2005 9 BCLR 835 (CC) para 52.

⁹³ *K v Minister of Safety and Security* 2005 9 BCLR 835 (CC) para 53.

⁹⁴ *K v Minister of Safety and Security* 2005 9 BCLR 835 (CC) para 57.

the Constitutional Court did not link the wrongful acts to the enterprise risk. Some authors have welcomed this approach,⁹⁶ while others have raised concerns that the liability of the state has become near absolute.⁹⁷

In apparently further broadening an employer's vicarious liability, the South African Constitutional Court subsequently held the Minister liable for the rape of a girl by a policeman in plain clothes, on standby duty and driving an unmarked vehicle. In *F v Minister of Safety and Security*⁹⁸ the court held that the policeman's employment secured the trust that the vulnerable person placed in him and further facilitated the commission of the wrongful act.⁹⁹ The court acknowledged that if a policeman was off duty that would be a relevant factor in determining the closeness of the connection, but held that this factor was rendered less significant by the fact that the policeman nevertheless had the duty to protect the girl and that a vulnerable young girl was led to believe that the policeman had assumed the responsibility to protect her.¹⁰⁰ The connection was found to be sufficiently close.

The close connection test was applied by South African courts not only where the victims were vulnerable women and children. The Supreme Court of Appeal followed the Constitutional Court's development of the close connection test in *K v Minister of Safety and Security* and *F v Minister of Safety and Security* in *Minister of Defence v Von Beneke*¹⁰¹ (hereafter "*Von Beneke*"), which concerned an employee in the Defence Force who stole a defence force firearm that was later used in a robbery. Someone was injured in the incident and claimed damages from the Minister of Defence. After finding that the Minister was vicariously liable, the court remarked:

It should however be made clear that I have reached this conclusion in the limited perspective of the agreed facts. If the Minister were, for example, to have satisfied me that the defence force had taken all reasonable steps to prevent the theft of weapons by its responsible employees, appropriate to its constitutional

⁹⁵ *Lister v Hesley Hall* 2001 UKHL 22.

⁹⁶ Roederer 2005 *SAJHR* 606.

⁹⁷ Wagener 2008 *SALJ* 680.

⁹⁸ *F v Minister of Safety and Security* 2012 1 SA 536 (CC).

⁹⁹ *F v Minister of Safety and Security* 2012 1 SA 536 (CC) paras 62-64.

¹⁰⁰ *F v Minister of Safety and Security* 2012 1 SA 536 (CC) para 67.

¹⁰¹ *Minister of Defence v Von Beneke* 2013 34 ILJ 275 (SCA) (hereafter *Von Beneke*).

responsibilities, I might have been persuaded that such was not a proper case for the extension of the remedy despite the closeness of the connection.¹⁰²

The last sentence is a reason for concern, since the court is apparently not taking into consideration that vicarious liability is a form of strict liability. If direct liability had been the issue, then it could be a defence if the employer had done everything to keep employees from wrongdoing, but this can never be a defence where the claim is based on vicarious liability. Even the most careful employer will not be successful with this defence. If there is a sufficiently close relationship between the wrongdoer's acts and the business of the employer, the employer may be held vicariously liable without being at fault.

The close connection test was applied not only in the case of an employer being a state department which owes a constitutional duty to the public, but also in the case of employers in the private sector. This was illustrated in *Grobler v Naspers*,¹⁰³ in which Naspers was held liable for the damages of a victim who was sexually harassed by a manager employed by Naspers.¹⁰⁴

In the case of a claim against a church for the sexual assault on a child by a priest, the court will apply the close connection test as developed by the Constitutional Court. The court will without doubt follow the judgments in Canada and the United Kingdom regarding the exact duties of the priest, the authority bestowed on the priest by the church, which could have facilitated the wrongful act, and the vulnerability of the victim.

4 Prescription of stale claims

In cases of historical sexual abuse of children, claimants who institute action years after the wrongful acts do so because they want acknowledgment of the fact that a wrong has been done to them and need an apology, which the defendant or wrongdoer is not always willing to give. After years of keeping quiet because of threats and stigmatisation if they should tell, as well as experiencing the

¹⁰² *Von Beneke* para 26.

¹⁰³ *Grobler v Naspers* 2004 4 SA 220 (C).

¹⁰⁴ On appeal, in *Media 24 v Grobler* 2005 7 BLLR 649 (SCA), the court held the employer directly liable because it was negligent in not following up the victim's complaints.

psychological effects of the suppression of the facts,¹⁰⁵ victims wish to attempt to prevent similar crimes, to experience restorative justice, and to establish the truth. They are then confronted with the ordinary time limits for civil claims in different countries. While in earlier cases courts mostly held that claims have prescribed if victims claimed out of the ordinary time limits, there is now recognition of the singular psychological barriers which prevent victims of sexual abuse from claiming within normal time limits, as will be discussed below.

4.1 Canada

In *M(K) v M(H)*,¹⁰⁶ a case of incest brought 25 years after the complainant was assaulted and raped by her father, the Canada Supreme Court held that:

The tort claim, although subject to limitations legislation, does not accrue until the plaintiff is reasonably capable of discovering the wrongful nature of the defendant's acts and the nexus between those acts and the plaintiff's injuries. In this case, that discovery occurred only when the appellant entered therapy, and the lawsuit was commenced promptly thereafter ... Various psychological and emotional harms immediately beset the victim of incest, but much of the damage is latent and extremely debilitating. When the damages begin to become apparent, the causal connection between the incestuous activity and present psychological injuries is often unknown to the victim. A statute of limitations provides little incentive for an incest victim to prosecute his or her action in a timely fashion if the victim has been rendered psychologically incapable of recognizing that a cause of action exists.¹⁰⁷

Although this case was about incest, the causes for the delay in bringing a claim are essentially the same as in the case of sexual assault by non-family members.

The court in *M(K) v M(H)* applied the common law "reasonable discoverability rule", which has the implication that the limitations period should start running only when the victim "discovers" the harm done to her and its likely cause. The court emphasised that the fact that the subjective shifting of the responsibility for the assaults to the wrongdoer (instead of the victim blaming herself) usually happens only during psychotherapy. The court's view was that this creates a presumption that incest victims will discover the necessary connection between their injuries and the wrong done to

¹⁰⁵ Balboni and Bishop 2010 *CJR* 151.

¹⁰⁶ *M(K) v M(H)* 1992 3 SCR 6, 96 DLR 4th 289.

¹⁰⁷ *M(K) v M(H)* 1992 3 SCR 6, 96 DLR 4th 289.

them (thus discovering their cause of action) only during some form of psychotherapy.¹⁰⁸

- 1 The reasonable discoverability rule, developed to bring a balance in limitations acts which previously protected only the interests of the defendant,¹⁰⁹ was subsequently enshrined in legislation regulating limitation periods in Canadian provinces. The limits of extending the prescription period were illustrated in Quebec in *OW v WP*.¹¹⁰ In this case the court held that prescription did run against the claimant who brought a claim in 1999, more than 50 years after she had been raped by her brother. Evidence to the effect that she discussed the possibility of claiming in 1972 persuaded the court that she already at that time appreciated the causal link between the sexual assaults and her injuries even before she went for therapy.¹¹¹
- 2 In *Shirley Christensen v Roman Catholic Archbishop of Quebec and Paul-Henri Lachance*¹¹² the claimant was sexually assaulted by a priest as a child in the late 1970s when she was between 6 and 8 years old. She disclosed the assaults to her parents, who went to see the Archbishop. He persuaded the parents not to publicise the matter, since the diocese would take further steps. Ms Christensen's deeply religious parents complied. The claimant later learnt that the priest simply switched parishes. She instituted a claim only in 2006 when she realised, after a very specific incident, what devastating consequences the abuse had had on her life.¹¹³ The Quebec Superior Court in *C(S)c Lachance SC v L'archevêque Catholique Romain de Québec*¹¹⁴ (in a notice of motion for dismissal) held that her claim had prescribed in terms of relevant legislation two years after the incident, since her parents had not

¹⁰⁸ *M(K) v M(H)* 1992 3 SCR 6, 96 DLR 4th 289 para 30.

¹⁰⁹ McLachlin J in *Novak v Bond* 1909 1 SCR 808 (SCC) discussed in Derer, McDougall and Bottom Line Research 2014 <http://www.bottomlineresearch.ca/articles/articles/pdf/The%20Discoverability%20Principles%20in%20the%20Limitations%20Act.pdf>.

¹¹⁰ *OW v WP* 2012 ABQB 252 (CanLII).

¹¹¹ *OW v WP* 2012 ABQB 252 (CanLII) para 43.

¹¹² *Shirley Christensen v Roman Catholic Archbishop of Quebec and Paul-Henri Lachance* 2010 SCC 44, 2010 CSC 4 (hereafter *Shirley Christensen*).

¹¹³ *Shirley Christensen* para 45.

¹¹⁴ *C(S)c Lachance SC v L'archevêque Catholique Romain de Québec* 2009 QCCA 1349.

taken action within the time limits.¹¹⁵ Article 2904 of the *Quebec Civil Code*¹¹⁶ provides that prescription does not run against claimants if it is impossible in fact for them to act by themselves or to be represented by others. This was interpreted by the court to mean that even though it was impossible for the claimant to act because of her psychological condition, it was not impossible for her parents to do so. The court held that they could have claimed even though they had been requested to refrain from doing so, since they were aware of the link between the sexual assaults and the behavioural problems of their daughter.¹¹⁷ Chamberland JCA held in a dissenting opinion that the claim had not prescribed, since:

... prescription simply cannot run when the cause of action has not yet crystallised. So, in this case, the appellant alleges that she had no knowledge until June 2006, due to a triggering event which was very specific and which occurred at this time, of the link between psychological difficulties and the acts committed by the respondent Lachance 25 years earlier.¹¹⁸

As to the knowledge of the parents, Chamberland JCA was of the view that testimony must be heard on whether the parents were aware that the claimant's behavioural problems were caused by the assaults. The Quebec Court of Appeal confirmed the majority decision¹¹⁹ but the Canada Supreme Court¹²⁰ agreed with the dissenting opinion of Chamberland and remanded the case to the Quebec Superior Court to hear evidence on the reasons for the delay in bringing the claim. The fact that it was remanded means that if evidence points towards the parents not being aware of the link between the assaults and their daughter's behaviour, the claimant could still be successful.

The position in Quebec seems to be unfair towards a minor whose parents or guardian did not institute action due to negligence, carelessness or reasons of their own, before prescription. Minors in the United Kingdom and South Africa are better protected, since if no action was taken on their behalf, limitation will start running

¹¹⁵ Shirley Christensen para 119.

¹¹⁶ Civil Code of Québec, LRQ, c C-1991.

¹¹⁷ Shirley Christensen para 119.

¹¹⁸ Shirley Christensen para 138.

¹¹⁹ Shirley Christensen para 144.

¹²⁰ Shirley Christensen v Roman Catholic Archbishop of Québec 2010 SCC 44, 2010 2 SCR 694.

only on the complainants' eighteenth birthday.¹²¹

4.2 The United Kingdom

In the United Kingdom, in terms of section 11 of the *Statute of Limitations Act* 1980 (hereafter *Limitations Act*), prescription will run for three years from the date on which the debt accrued or on the date of knowledge (if later) of the person injured. According to section 14(1), the "date of knowledge" is the date upon which the claimant first had knowledge of various facts, including "that the injury ... was significant". An injury is "significant" in terms of section 14(2) if the person would reasonably have considered it sufficiently serious to justify his instituting proceedings for damages against a defendant who did not dispute liability and was able to satisfy a judgment.

The court in *A v Hoare*¹²² dealt with five cases of historical sexual abuse brought outside the limitation period. The court held that section 14(2) could not be interpreted to accommodate a subjective test of the mental state of the victim to extend the limitation period. The court thus favoured an objective test in interpreting section 14(2), which meant that prescription would run in the normal way. The court remarked that¹²³ "that does not mean that the law regards as irrelevant the question of whether the actual claimant, taking into account his psychological state in consequence of the injury, could reasonably have been expected to institute proceedings". The court held that the psychological state of the claimant should rather be dealt with in terms of section 33 of the *Limitations Act*, which gives the court a discretion to extend the period when it is equitable to do so.

Section 33 of the *Limitations Act* 1980 provides that:

- (1) If it appears to the court that it would be equitable to allow an action to proceed having regard to the degree to which -
 - (a) the provisions ... of this Act prejudice the plaintiff or any person whom he represents; and

¹²¹ Section 28 of the United Kingdom *Statute of Limitations Act* 1980 and s 13 of the South African *Prescription Act* 68 of 1969.

¹²² *A v Hoare* 2008 UKHL 6.

¹²³ *A v Hoare* 2008 UKHL 6 para 44.

(b) any decision of the court under this subsection would prejudice the defendant or any person whom he represents;
the court may direct that those provisions shall not apply to the action, or shall not apply to any specified cause of action to which the action relates.

The interests of both the claimant and the defendant must thus be taken into account by the court before exercising its discretion to extend the period for a claim. Section 33 further specifically provides in subsection (3)(a) that one of the matters to be taken into account in the exercise of the discretion is the reasons for the delay on the part of the plaintiff. This opens the door for the mental state of a victim of sexual abuse to be taken into account. However, the court is obliged to also have regard to the extent to which the evidence is likely to be less cogent as a result of the delay.

The approach of the court in *A v Hoare* was followed in *Raggett v the Society of Jesus Trust 1929 for Roman Catholic Purposes*¹²⁴ (hereafter *Raggett*). The court accepted that child victims of sexual assault often suppress memories of the assault and on this ground ruled that in spite of a delay of 30 years the claim had not prescribed and could be brought in terms of section 33.¹²⁵

However, the court declined to exercise its jurisdiction in terms of section 33 in *EL v The Children's Society*,¹²⁶ a case of child abuse brought almost 50 years after the acts. Because of the fact-sensitivity of cases of this kind, the long lapse of time, the fact that the wrongdoer (who committed suicide) as well as some of the witnesses were deceased, and that the memories of other witnesses failed them, the court was not prepared to extend the normal period for claims.

The application of the "objective date of knowledge" test of section 14 by the courts was seen by some as a positive development in creating certainty. However, concerns were raised because of the generous application of section 33, especially in *Raggett*, where there were delays of many decades.¹²⁷

¹²⁴ *Raggett v the Society of Jesus Trust 1929 for Roman Catholic Purposes* 2009 EWHC 909 (QB) (hereafter *Raggett*).

¹²⁵ *Raggett* para 129.

¹²⁶ *EL v The Children's Society* 2012 EWHC 365 (QB).

¹²⁷ Kemp 2009 Plymouth Law Review 46.

4.3 South Africa

The South African Supreme Court of Appeal held in 2004 in *Esmé Van Zijl v IM Hoogenhout*¹²⁸ (hereafter *Van Zijl*) that a claim by a woman who was repeatedly sexually assaulted and raped by a friend of her parents in her youth had not prescribed, even though she brought the claim only 30 years after the assaults.

The court had to interpret the South African *Prescription Act* 18 of 1943, (hereafter the 1943 *Prescription Act*)¹²⁹ since the wrongful deeds had been committed while that Act was in force. Section 5(1)(c) of the 1943 *Prescription Act* provided as follows:

Extinctive prescription shall run in respect of any action for damages, except defamation, from the date on which the wrong for the claim for damages has been based was first brought to the knowledge of the creditor or from the date on which the creditor could reasonably have been expected to have knowledge of such wrong, whichever is the earlier date.

Although the court *a quo* held that her claim had prescribed three years after the attainment of majority, the Supreme Court of Appeal held that since prescription started to run only when the identity of the wrongdoer was "first brought to the knowledge of the creditor," this presupposes a creditor who can appreciate that a particular person is responsible for the wrong. According to the court, there were valid reasons why the claimant did not realise who was responsible for the wrong done to her.¹³⁰

The claimant testified that she did not know that she had a claim. Until she was in her forties, she believed that the assault and rapes, which took place over a period of eight years, were her own fault. Only after she listened to a programme in which Oprah Winfrey said that she herself had been sexually assaulted as a child, and Van Zijl realised that Winfrey was not ashamed of the fact, did she realise that the acts were not her fault and that the wrongdoer was responsible for the acts.¹³¹

¹²⁸ *Esmé Van Zijl v IM Hoogenhout* 2004 4 All SA 427 (SCA) (hereafter *Van Zijl*).

¹²⁹ Prescription Act 18 of 1943.

¹³⁰ *Van Zijl* para 44.

¹³¹ *Van Zijl* para 38.

Expert evidence of a clinical psychologist indicated that the sexual assault of children by persons whom they trust traumatises them to such an extent that they have to believe that the assaults are their own fault in order to be able to carry on with their lives. This can last until they are middle-aged, usually when they experience some form of trauma. They can then not continue and their world falls apart. In between there are often years of maladjustment and failed relationships.¹³² The court accepted the evidence and held that Van Zijl's claim had not prescribed and that prescription started running only when she realised that the perpetrator was responsible for the deeds and that it was not her fault.¹³³

This interpretation of the court is to be welcomed and paved the way for the amendment to section 12 of the *Prescription Act* 68 of 1969 (hereafter the 1969 *Prescription Act*) by the *Sexual Offences Amendment Act*,¹³⁴ which provides that:

A debt shall not deem to be due until the creditor has knowledge of the identity of the debtor and of the facts from which the debt arises provided that the creditor shall be deemed to have the knowledge if he could have acquired it had he exercised reasonable care.

In terms of the amendment, subsection 4 now provides that:

Prescription shall not commence in respect of a debt based on the commission of an alleged sexual offence as contemplated in the Criminal Law (Sexual Offences and Related Matters) Amendment Act during the time in which the creditor is unable to institute proceedings because of his or her mental or psychological condition.

Since the amendment, it is no longer necessary for South African courts to rely on a somewhat strained interpretation of the 1969 *Prescription Act* to allow for a longer period for victims of sexual offences to bring a claim. However, courts will have to establish whether or not the victim who brought the claim late was in reality unable to bring the claim and at what time this "disablement" ceased. Extending the period for claims may seriously disadvantage the defendant. A solution to this is a provision in the same vein as section 33 of the *Limitations Act* in terms of which the court

¹³² *Van Zijl* para 12.

¹³³ *Van Zijl* para 44.

¹³⁴ Criminal Law (Sexual Offences and Related Matters) Amendment Act 32 of 2007.

must, in deciding whether it is equitable to extend the period for a claim or not, take the possibility of prejudice to the defendant into account.

5 Conclusion

In this article I have discussed three questions which courts in Canada and the United Kingdom have grappled with in cases of historical sexual abuse claims based on the vicarious liability of a church for the sexual assault of a child by a priest. Apart from having to prove that the acts were committed, victims firstly have to prove that the priest was an employee of the church. In the past, courts have held that priests are not employees, since they are servants of God and that the office to which a priest is appointed is thus not reconcilable with an employment contract being concluded, unless this was the express intention of the parties. However, the Canada Supreme Court in *John Doe*¹³⁵ and the United Kingdom Court of Appeal in *JGE*¹³⁶ have recently held that even though there is no contract between the priest and the church, a relationship akin to employment between the priest and the church is sufficient to hold the church vicariously liable.

A victim will, secondly, have to prove that there was a close connection between the duties of the employee and the wrongful act. In cases of the sexual abuse of children, the Canada Supreme Court in *Bazley*¹³⁷ and the House of Lords in *Lister*¹³⁸ replaced the traditional test that the act must have been done within the course and scope of employment (which created an obstacle for victims of intentional misconduct) with the close connection test. This test entails that there must be a sufficiently close connection between the authorised duties of the employee and the wrongful acts. Important factors indicating such a close connection in *John Doe*,¹³⁹ and in *JGE*¹⁴⁰ and *Maga*,¹⁴¹ were that the church materially increased the risk that such conduct would take place by bestowing the priest with authority, clerical garb,

¹³⁵ *John Doe v Bennett* 2004 1 SCR 436, 2004 SCC 17.

¹³⁶ *JGE v the Diosece of Portsmouth* 2012 EWCA Civ 938.

¹³⁷ *Bazley v Curry* 1999 2 SCR 534.

¹³⁸ *Lister v Hesley Hall* 2001 UKHL 22.

¹³⁹ *John Doe v Bennett* 2004 1 SCR 436, 2004 SCC 17.

¹⁴⁰ *JGE v the Diosece of Portsmouth* 2012 EWCA Civ 938.

¹⁴¹ *Maga v Trustees of the Birmingham Archdiocese of the Roman Catholic Church* 2010 EWCA Civ 256, 2010 All ER (D) 141.

a pulpit etc., which enabled him to be in a power relationship *vis-à-vis* vulnerable victims.

Although South African courts have not decided a case involving the vicarious liability of the church for a wrongful act of a priest, these developments will almost certainly be followed here, since the South African Constitutional Court followed the development of the doctrine of vicarious liability in Canada and the United Kingdom Court in *K v Minister of Safety and Security*.¹⁴² In this case the Constitutional Court developed the close connection test against the background of the constitutional duties of the police and the constitutional rights of the victim. South African courts will in all likelihood also apply the close connection test regarding the liability of the church in sexual assault cases on the same basis as the decisions in *John Doe*,¹⁴³ *JGE*¹⁴⁴ and *Maga*.¹⁴⁵

Regarding the akin to employment test, South African courts have in other contexts already moved away from requiring a contract of employment for protection against unfair dismissal, and have held that an employment relationship would suffice to protect the constitutional rights of persons working under such an arrangement. Although other policy considerations are at play when courts have to decide on vicarious liability, the constitutional rights of victims will play a role in deciding whether it is fair and just to hold the employer liable where there was no intention to create an employment contract.

Regarding sexual assault claims brought many years after the wrongful acts, the courts in all three countries have acknowledged the special mental state of victims of sexual assault, which is an impediment to institute action within legislative time limits for civil actions. Canadian courts have extended the time limits in terms of the "reasonable discoverability rule" in terms of which victims' claims will not prescribe until the victim "discovers" the harm done to her and its likely cause. Courts in the United Kingdom may in terms of section 33 of the *Limitations Act* exercise their discretion

¹⁴² *K v Minister of Safety and Security* 2005 9 BCLR 835 (CC).

¹⁴³ *John Doe v Bennett* 2004 1 SCR 436, 2004 SCC 17.

¹⁴⁴ *JGE v the Diocese of Portsmouth* 2012 EWCA Civ 938.

¹⁴⁵ *Maga v Trustees of the Birmingham Archdiocese of the Roman Catholic Church* 2010 EWCA Civ 256, 2010 All ER (D) 141.

on whether or not it is equitable to grant a longer period for claims pertaining to sexual abuse. In South Africa the Supreme Court of Appeal has interpreted the 1943 *Prescription Act* in *Van Zijl*¹⁴⁶ in such a way that the three years allowed for a claim before it becomes stale will start running only from the moment when the victim realises that the perpetrator is the person responsible for the wrongful acts. In a positive development an amendment of section 12 of the 1969 *Prescription Act* now provides that prescription shall not commence in respect of a debt based on the commission of an alleged sexual offence during the time in which the creditor is unable to institute proceedings because of his or her mental or psychological condition.

The vicarious liability of employers has been broadened in recent years by relaxing requirements for liability to such an extent that it can be asked whether this faultless liability of employers and especially of non-profit organisations is fair. The scales for fairness have undoubtedly been tipped in favour of victims. There are certainly grounds for criticism of this approach. The work of charities and churches creates the risk of abuse, since the work of these undertakings often implies personal relationships of care, where abuse can typically take place. These institutions may be discouraged from doing their work in the community because of the possibility of being held vicariously liable.

On the other hand, innocent victims have to be protected and compensated. Has the pendulum swung too far to benefit victims in sexual assault cases with less stringent requirements such as relationships akin to employment, the close connection test and extended periods for bringing a claim of sexual assault?

In the light of the above judgments, churches should apply strict screening of new employees and even volunteers in order to protect themselves and to minimise the risk of such conduct occurring. Monitoring systems should be implemented and children should be informed on how to react and to immediately report sexual advances. What is clear is that if sexual assault does occur even in spite of

¹⁴⁶ Esmé Van Zijl v IM Hoogenhout 2004 4 All SA 427 (SCA).

preventative measures, that could be a defence against direct liability based on negligence, but not on a claim based on vicarious liability.

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LIST OF ABBREVIATIONS

CJR	Contemporary Justice Review
CLJ	Cambridge Law Journal
SAJHR	South African Journal on Human Rights
SALJ	South African Law Journal
Stell LR	Stellenbosch Law Review