Michaelmas Term
[2012] UKSC 56
On appeal from: [2010] EWCA Civ 1106

JUDGMENT

The Catholic Child Welfare Society and others (Appellants) *v* Various Claimants (FC) and The Institute of the Brothers of the Christian Schools and others (Respondents)

before

Lord Phillips
Lady Hale
Lord Kerr
Lord Wilson
Lord Carnwath

JUDGMENT GIVEN ON

21 November 2012

Heard on 23 and 24 July 2012

Appellant	*Respondent*
George Leggatt QC Nicholas Fewtrell (Instructed by Hill Dickinson LLP)	Patricia Leonard (Instructed by Jordans Solicitors)
	Respondent Lord Faulks QC Alastair Hammerton (Instructed by Wedlake Bell LLP)

LORD PHILLIPS (with whom Lady Hale, Lord Kerr, Lord Wilson and Lord Carnwath agree)

Introduction

1. In 1680, in the city of Rheims, Jean-Baptiste De La Salle founded an Institute known as the Brothers of the Christian Schools ("the Institute"). The members of the Institute are lay brothers of the Catholic Church. They are now to be found in many countries, including the United Kingdom. Their Rules, approved by Papal Bull in 1724, provided that

> "they should make it their chief care to teach children, especially poor children, those things which pertain to a good and Christian life."

That has remained the mission of the Institute and the mission and "apostolate" of each brother. This appeal is concerned with the legal implications of acts of physical and sexual abuse committed, or alleged to have been committed, by brothers who were, or should have been, pursuing that mission at a residential institution at Market Weighton for boys in need of care called St William's ("the school")

2. The Institute is, in civil law, an unincorporated association of its members. It has, however, corporate features, including a hierarchy of authority. Steps have been taken on behalf of the Institute to create legal bodies that are capable of owning property and entering into legal relations in pursuance of the Institute's mission. Some of these are reflected in the identity of the individual defendants who have been described collectively as "the De La Salle Defendants". Expert evidence was given as to the nature and status of the Institute as a matter of canon law. These matters have not been explored before this Court. The preliminary issue with which this Court is concerned is

> "whether the Institute is responsible in law for the alleged acts of sexual and physical abuse of children at St William's committed by its members."

To a large extent this preliminary issue has been canvassed as if the Institute were a corporate body having separate legal identity. I shall refer to "the Institute" as if

this were the case, although it will be necessary in due course to grapple with the nature of the Institute.

3. This appeal requires this Court to review the application of the principles of vicarious liability in the context of sexual abuse of children. Unhappily this is today not an unusual context and it is one in which vicarious liability has received recent consideration not merely by other courts in the United Kingdom, but at the highest level in Canada and Australia.

4. The claims in this group action are brought by 170 men in respect of abuse to which they allege that they were subjected at St William's between 1958 and 1992. The claims are brought against two groups of defendants. The first group consists of "the Middlesbrough Defendants". They took over the management of the school in 1973 and inherited, under statute, the liabilities of the managers of the school before that date. They, or those they represent, concluded contracts of employment with the brother teachers. They were held at first instance to be vicariously liable for acts of abuse by those teachers and no longer challenge that liability. By this appeal they seek, however, to challenge the judge's finding, confirmed by the Court of Appeal, that the second group of defendants, the De La Salle Defendants, were not also vicariously liable for the acts of abuse committed by members of the Institute. The claimants are content to look to the Middlesbrough Defendants for their relief and anxious not to risk liability in respect of the costs of the appeal to this Court. Accordingly they have played no part in the appeal.

5. This case is almost a carbon copy of *McE v De La Salle Brothers* [2007] CSIH 27; 2007 SC 566, in which a similar preliminary issue was tried. In that case a single pursuer claimed damages in respect of physical abuse to which he had been subjected by Brother Benedict, a De La Salle brother, while at a school in Scotland. The claim was however a test case as there were pending some 150 additional cases where abuse was alleged at the hands of brothers at that school. The Court of Session held that there was no basis upon which the allegation of vicarious liability on the part of the Institute could succeed and the claim was accordingly dismissed.

The facts

6. No significant challenge has been made in respect of the facts found by the judge of first instance, His Honour Judge Hawkesworth QC, sitting as a judge of the High Court and these have formed the basis of the Statement of Agreed Facts and Issues.

The Institute

7. The head of the Institute is the Superior General in Rome, elected by the General Chapter of the brothers, which is itself made up of elected representatives of all brothers. For the purposes of administration the Institute is divided into districts called Provinces, each headed by a "Provincial". At different times there has been a London Province, an English Province and a Great Britain Province. Within a province the brothers live in communities, each headed by a Director.

8. The brothers are bound together by lifelong vows of chastity, poverty and obedience and by detailed and very strict rules of conduct ("the Rule"). The Rule has its origin in the rules approved by the Pope in 1724, but these were amended from time to time. During the period to which this action relates the relevant rules were the Common Rules of 1947. The vow of obedience carries the obligation to obey the superiors of the Institute, including the Provincial and the Director of the community. Each brother undertakes to "go wherever I may be sent and to do whatever I may be assigned by the [Institute] or its superior"'

9. The Rule is highly particular and governs all aspects of the life and conduct of a brother including such matters as the taking of communal meals and other required communal activities. It contains provisions governing how the children taught are to be treated, including a chapter on correction or punishment which prohibits touching a child or corporal punishment. One chapter deals with chastity and this includes a provision that "They shall not touch their pupils through playfulness or familiarity, and they shall never touch them on the face". There is a requirement to advertise to each other any faults of which they are conscious and extreme reserve is required, for example in speaking to women. Pursuant to the vow of poverty, any brother who is employed to teach by an outside body has to hand over all his earnings to the Institute. In England this duty is performed by entering into a deed of covenant to pay the earnings to a charitable trust. The pleadings disclose that there is a 1947 Trust relating to property held in connection with first the London province and subsequently the Great Britain province, and a 1953 trust relating to property held in connection with the England province. Judge Hawkesworth at paras 30 and 31 recorded that Brother Thomas gave evidence that "the DLS trust had substantial funds derived from the sale of its properties and from the covenanted funds of the brothers employed in education at St William's and elsewhere". The Institute provides the brothers with the "wherewithal to live" and looks after them after their retirement.

10. The Institute owns schools, presumably through its charitable trusts. Where it does so the teaching is provided by a community of brothers who will usually live within the school. The Director of the community almost always acts as the headmaster of the school. However the Institute never owned St William's.

St William's

11. In paras 25 to 34 of the leading judgment in the Court of Appeal [2010] EWCA Civ 1106 Hughes LJ has set out the history of St William's, as found by Judge Hawkesworth. It was founded in or about 1865 by a group of Catholic benefactors who placed the school in the ownership of a charitable trust. It was managed by a group of local people as a reformatory school for boys. They entrusted the running of the school to a religious congregation called the Rosminians. They did not prove satisfactory and, in 1912 the managers replaced them with the Institute, under a formal agreement made with the Superior General of the Institute. This agreement effectively delegated the running of the school to the Institute. Thereafter, up to 1933, the school was entirely staffed by brothers of the Institute. These were members of a community whose bedrooms and refectory were within the school grounds. Most of the brothers in the community worked in the school, but there were some who did not. The Director of the community was almost always the headmaster of the school.

12. In 1933 the regime changed pursuant to provisions of the Children and Young Persons Act 1933. St William's became an approved school, for the detention of boys up to the age of 17 who had been convicted of custodial offences. Under the 1933 Act, and the Approved School Rules 1933 made under it, the staff became the direct statutory responsibility of the managers. All teaching staff had to be employed by them under written contracts and the headmaster was made responsible to the managers for the efficient conduct of the school. The managers at this time, as described by the judge, at para 25, were "a self-perpetuating group of like-minded people, linked by their Catholic faith, who would be appointed subject to the Bishop's approval". From this time the managers began to employ lay teachers in addition to the brothers and the proportion of brother teachers to lay teachers fluctuated but generally diminished. In 1954 there were 5 brother teachers and 5 lay teachers.

13. The regime changed again in 1973 when the provisions of the Children and Young Persons Act 1969 took effect. St William's then became an "assisted community home" for children in the care of the local authority. Under section 42 of the 1969 Act the responsibility for managing St William's was vested in "the voluntary organisation responsible for its management, equipment and maintenance" or "the responsible organisation". The Middlesbrough Diocesan Rescue Society ("MDRS") undertook this role, replacing the previous managers. The MDRS was an unincorporated association consisting of the Catholic bishop of the diocese, as President, and priests appointed by him. On 28 July 1982 the Catholic Child Welfare Society (Diocese of Middlesbrough) ("CCWS"), an incorporated charitable company, replaced the MDRS as the responsible organisation.

14. After 1973 the proportion of brother teachers to lay staff diminished further. After 1976 there were never more than two brother teachers and for much of the time there was only one, while there were as many as a dozen lay teachers. Some of these lived on the site in premises apart from those of the dwindling community of brothers. Other lay teachers lived in the town.

15. At all times the managers chose to leave it to the Institute, in the form of the relevant Provincial, to designate a brother to act as headmaster of the school. In 1976 the headmaster, Brother Reginald, retired. With the agreement of the MDRS the Provincial replaced him with Brother James, who had been a brother teacher and housemaster at St William's since 1968. Brother James is now Mr Carragher, having been expelled from the Institute. This expulsion followed his dismissal in disgrace from the post of headmaster in 1990 because it had been discovered that he had been guilty of systematic sexual abuse of the boys in his care. In 1993 Mr Carragher pleaded guilty to a number of offences of sexual abuse and was sentenced to 7 years imprisonment. In 2004, after a 10 week trial, he was found guilty of 21 counts of serious sexual offences against boys, spanning a period of some 20 years, and sentenced to 14 years imprisonment. Some of the claimants allege that they were abused by Mr Carragher. Others allege abuse by other brothers. Of the 150 claimants on whose behalf particulars have been given, 146 allege that they were abused by members of the Institute.

16. After the dismissal of Mr Carragher the number of boys at the school dwindled. The Institute disengaged from the school and it finally closed in 1994.

Control

17. The undertaking by each brother to go wherever he might be sent meant that the Institute controlled where it was that the brothers taught. The Institute could not, of course, control whether schools owned by third parties engaged brothers as teachers. It could, however, control whether a brother worked in a school that was prepared to engage him. Because the managers of St William's were always keen to have a brother as headmaster of the school, the Institute in effect determined who the headmaster of the school should be. Thus in 1963 the Provincial informed the managers of the school that Brother Dominic would replace Brother Vincent as headmaster and this was accepted. In 1965, by decision of the Superior General in Rome responsibility for St William's was transferred from the English province to the London province. This resulted in the three brothers, including the headmaster and the deputy headmaster, resigning and being replaced by other brothers. The managers, with a degree of reluctance, accepted this.

18. It is an agreed fact that “If a brother was sent to a school managed by a third party, the Institute’s control over his life remained complete”. He remained bound by his vows, and every year the Provincial made an annual visit of inspection of the community and the brothers living in it, which embraced their role within the school.

An overview of the issues

19. The law of vicarious liability is on the move. On 12 July 2012, shortly before the hearing of the appeal in this case, the Court of Appeal handed down its judgments in *JGE v The Trustees of the Portsmouth Roman Catholic Diocesan Trust* [2012] EWCA Civ 938. That case was concerned with the preliminary issue of whether the Diocesan Trust could be vicariously liable for acts of sexual abuse committed by a parish priest in the diocese. The court held, by a majority, that he could. Before us Mr Leggatt QC, for the Middlesbrough Defendants, suggested that the Court would no doubt wish to read the judgments in full. He was right to do so. The hearing of that case before the Court of Appeal lasted but a day, but the impressive leading judgment of Ward LJ evidences consideration of case law and academic writings that goes far beyond the material to which counsel can have had time to refer in that short hearing. At paras 20 and 21 of his judgment Ward LJ traces the origin of vicarious liability back to the middle ages, but rightly identifies that the law upon which he and I cut our teeth rendered the employer, D2, liable for the tortious act of the employee, D1, provided that the act in question was committed “in the course of the employee’s employment”. Thus, in a case about vicarious liability, the focus was on two stages: (1) was there a true relationship of employer/employee between D2 and D1? (2) was D1 acting in the course of his employment when he committed the tortious act?

20. Since Ward LJ and I cut our teeth the courts have developed the law of vicarious liability by establishing the following propositions:

> i) It is possible for an unincorporated association to be vicariously liable for the tortious acts of one or more of its members: *Heaton’s Transport (St Helens) Ltd v Transport and General Workers’ Union* [1973] AC 15, 99; *Thomas v National Union of Mineworkers (South Wales Area)* [1986] Ch 20, 66-7; *Dubai Aluminium Co Ltd v Salaam* [2002] UKHL 48; [2003] 2 AC 366.
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> ii) D2 may be vicariously liable for the tortious act of D1 even though the act in question constitutes a violation of the duty owed to D2 by D1 and even if the act in question is a criminal offence: *Morris v CW Martin &*

Sons Ltd [1966] 1 QB 716; *Dubai Aluminium; Brink's Global Services v Igrox* [2010] EWCA Civ; [2011] IRLR 343.

iii) Vicarious liability can even extend to liability for a criminal act of sexual assault: *Lister v Hesley Hall* [2001] UKHL 22; [2002] 1 AC 215.

iv) It is possible for two different defendants, D2 and D3, each to be vicariously liable for the single tortious act of D1: *Viasystems (Tyneside) Ltd v Thermal Transfer (Northern) Ltd and others* [2005] EWCA Civ 1151; [2006] QB 510.

21. None of these developments of the law of vicarious liability has been challenged by Lord Faulks QC, who has represented the Institute. I consider that he was right not to challenge them, for they represent sound and logical incremental developments of the law. They have, however, made it more difficult to identify the criteria that must be demonstrated to establish vicarious liability than it was 50 years ago. At para 37 of his judgment in this case Hughes LJ rightly observed that the test requires a synthesis of two stages:

i) The first stage is to consider the relationship of D1 and D2 to see whether it is one that is capable of giving rise to vicarious liability.

ii) Hughes LJ identified the second stage as requiring examination of the connection between D2 and the act or omission of D1. This is not entirely correct. What is critical at the second stage is the connection that links *the relationship between D1 and D2* and the act or omission of D1, hence the synthesis of the two stages.

22. Both stages are in issue in the present case. There is an issue as to whether the relationship between the Institute and the brothers teaching at St William's was one that was capable of giving rise to vicarious liability. There is also an issue as to whether the acts, or alleged acts, of sexual abuse were connected to that relationship in such a way as to give rise to vicarious liability.

23. It is the Institute's case that the relationship of the individual brothers to the Institute, considered as a body, is insufficiently close to give rise, of itself, to vicarious liability on the part of the Institute for sexual abuse by brother teachers. Only a body managing a school and employing a brother in that school as a teacher, will have a sufficiently close relationship to that brother teacher to be vicariously liable for his wrongdoing. That is why the Middlesbrough Defendants are liable and the De La Salle Defendants are not, as held by the courts below.

24. It is the Middlesbrough Defendants' case, as developed by Mr Leggatt, that the courts below have failed to give effect to the principles properly to be derived from the relevant authorities, particularly those dealing with vicarious liability for sexual abuse. The necessary closeness of connection between the relationship between the Institute and the brothers and the abuses committed by the brothers is 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 significantly increased the risk that brothers would sexually abuse the children with whom they were in close physical proximity. This is indeed a synthesis of stage 1 – the relationship of the brothers with the Institute and stage 2 – the connection between that relationship and the acts of abuse.

A closer view of the issues

25. I turn then to the central issue that divides the parties. Is the relationship between the individual brothers who taught at the school and the Institute such as to give rise to vicarious liability on the part of the Institute for acts of sexual abuse committed in the school? The Institute accepts that the relationship between the brother teachers and the Middlesbrough Defendants has given rise to vicarious liability on the part of the latter, but contends that this is because the Middlesbrough Defendants entered into contracts of employment with the brothers and managed and controlled both them and the school. The Institute contends that the relationship between the brothers and the Institute lacks these critical features. The Institute further contends that it cannot be held to be vicariously liable *in addition to* the Middlesbrough Defendants unless the criteria for dual liability laid down by the Court of Appeal in *Viasystems* are demonstrated. It contends that these criteria are not demonstrated. Hughes LJ reached a similar conclusion. His judgment focussed largely on the extent to which the brothers were under the *control* of the Institute, and he concluded that this was insufficient to give rise to vicarious liability.

26. The Middlesbrough Defendants rely on the recent decisions on vicarious liability for sexual abuse as demonstrating that the relationship of employer/employee is not an essential prerequisite. They submit that the closeness of the relationship between brothers and the Institute, the fact that the brothers were sent out to further the object of the institute, namely to teach boys, and the fact that this created a risk of sexual abuse of the boys by the brothers, sufficed to render the Institute vicariously liable for the abuse committed by the brothers.

The nature of "the Institute"

27. Before considering stage 1 of the test for vicarious liability I must address the problem of the Institute. Hughes LJ held, and Lord Faulks now accepts, that it is possible for vicarious liability to arise out of the relationship between one member of an unincorporated association and the other members, at least where the former acts on behalf of the others. He held, however, at para 57 that there was not a sufficiently close connection between the brothers of the Institute scattered all over the world and the torts committed by the brother teachers at St William's to give rise to vicarious liability. This raises the question of whether it is right to treat the De La Salle Defendants as being simply an unincorporated band of brothers scattered around the world.

28. A similar problem perplexed Ward LJ in *JGE*. The issue in that case was whether there was vicarious liability for sexual abuse committed by a Roman Catholic priest. He observed at para 5 that there had been other occasions on which the Church had been called on to answer for the acts of its clergy and that *JGE* was the first occasion on which the Church had challenged the allegation that it was the employer of its clergy. The issue had always before been simply whether the acts of abuse had been committed in the course of that employment.

29. The defendants against whom the claim was brought were "the Trustees of the Portsmouth Roman Catholic Diocesan Trust". Ward LJ observed at para 8 that because English law did not recognise the Catholic Church as a legal entity in its own right but saw it as an unincorporated association with no legal personality, the diocese usually established a charitable trust to enable it to own and manage property and otherwise conduct its financial affairs in accordance with domestic law. At para 18 Ward LJ remarked that there had been understandable confusion as to whom to sue and that the case had proceeded effectively against the Bishop, though it was the trustees who would be covered by the relevant insurance should liability be established. He added that intuitively one would think that, as a priest is always said to be "a servant of god", the Roman Catholic Church itself would be the responsible defendant, but the Roman Catholic Church could not be a party as it had no legal personality. In those circumstances Ward LJ treated the Bishop as being the person whose vicarious liability was in issue.

30. There are parallels between this aspect of *JGE* and the present case. The choice of defendants suggests that the claimants may well have been in doubt as to whom they should sue, as they have adopted something of a scatter gun approach. Of the 35 defendants on the pleadings, the action has proceeded against 13. Of these I select as a typical De La Salle defendant the 10th defendant, Patrick Joseph Campbell "sued on his own behalf and as a former trustee of the 1947 trust and as representing all persons (other than any other party to the claim) who were at any time relevant to the claimant's claims:

i) members of the Order

ii) members of the English Province or the Great Britain Province

iii) responsible for the supervision management or direction of brothers carrying on the work of the England Province or the Great Britain Province, or

iv) Trustees of the 1947 trust before 14 July 1992."

31. I can appreciate Hughes LJ's difficulty in accepting that a De La Salle brother in Australia could be vicariously liable for the sexual assault by a brother at St William's. Indeed, there is something paradoxical in the concept of an attempt to hold vicariously liable a world wide association of religious brothers, all of whom have taken vows of poverty and so have no resources of their own. So far as individual defendants are outside the jurisdiction this might also have given rise to an interesting question of conflict of laws. This is, however, a long way from the realities of these proceedings and Lord Faulks has not taken any point on the nature of the Institute.

32. It is open to the claimants on the pleadings to seek to establish vicarious liability on the part of an unincorporated association made up at the relevant times of the brothers world wide, or of members of the London Province, or of the England Province, or of the Great Britain Province. At the end of the day what is likely to matter will be access to the funds held by the trusts, or to insurance effected by the trustees. Whether one looks at the picture world wide, or within Great Britain, the salient features are the same. The Institute is not a contemplative order. The reason for its creation and existence is to carry on an activity, namely giving a Christian education to boys. To perform that activity it owns and manages schools in which its brothers teach, and it sends its brothers out to teach in schools managed by other bodies. The Institute is, for administrative purposes divided into Provinces, each administered by its Provincial. To carry out its activities it has formed trusts that have recognised legal personality. The trusts are funded in part from the earnings of those brothers who receive payment for teaching. The trust funds are used to meet the needs of the brothers and the financial requirements of the teaching mission.

33. It seems to me more realistic to view the brothers of the Province from time to time responsible for the area in which Market Weighton lies as members of the relevant unincorporated association rather than the Order as a whole, but I doubt if it makes any difference in principle. Because of the manner in which the

Institute carried on its affairs it is appropriate to approach this case as if the Institute were a corporate body existing to perform the function of providing a Christian education to boys, able to own property and, in fact, possessing substantial assets.

Stage 1: the essential elements of the relationship

34. Vicarious liability is a longstanding and vitally important part of the common law of tort. A glance at the Table of Cases in *Clerk & Lindsell on Torts,* 20th ed (2010) shows that in the majority of modern cases the defendant is not an individual but a corporate entity. In most of them vicarious liability is likely to be the basis upon which the defendant was sued. The policy objective underlying vicarious liability is to ensure, insofar as it is fair, just and reasonable, that liability for tortious wrong is borne by a defendant with the means to compensate the victim. Such defendants can usually be expected to insure against the risk of such liability, so that this risk is more widely spread. It is for the court to identify the policy reasons why it is fair, just and reasonable to impose vicarious liability and to lay down the criteria that must be shown to be satisfied in order to establish vicarious liability. Where the criteria are satisfied the policy reasons for imposing the liability should apply. As Lord Hobhouse pointed out in *Lister* at para 60 the policy reasons are not the same as the criteria. One cannot, however, consider the one without the other and the two sometimes overlap.

35. The relationship that gives rise to vicarious liability is in the vast majority of cases that of employer and employee under a contract of employment. The employer will be vicariously liable when the employee commits a tort in the course of his employment. There is no difficulty in identifying a number of policy reasons that usually make it fair, just and reasonable to impose vicarious liability on the employer when these criteria are satisfied:

> i) The employer is more likely to have the means to compensate the victim than the employee and can be expected to have insured against that liability;
>
> ii) The tort will have been committed as a result of activity being taken by the employee on behalf of the employer;
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> iii) The employee's activity is likely to be part of the business activity of the employer;

iv) The employer, by employing the employee to carry on the activity will have created the risk of the tort committed by the employee;

v) The employee will, to a greater or lesser degree, have been under the control of the employer.

The significance of control

36. In days gone by, when the relationship of employer and employee was correctly portrayed by the phrase "master and servant", the employer was often entitled to direct not merely what the employee should do but the manner in which he should do it. Indeed, this right was taken as the test for differentiating between a contract of employment and a contract for the services of an independent contractor. Today it is not realistic to look for a right to direct how an employee should perform his duties as a necessary element in the relationship between employer and employee. Many employees apply a skill or expertise that is not susceptible to direction by anyone else in the company that employs them. Thus the significance of control today is that the employer can direct what the employee does, not how he does it.

Control and the transfer of vicarious liability

37. There is one area of the law of vicarious liability where control has been of critical importance. I must explore it because it is relevant on the facts of this case. It has long been recognised that there are circumstances in which vicarious liability for the tortious act of a workman can be transferred from his employer to a third person who is using the employee's services under a contract, or other arrangement, with his employer – see *Donovan v Laing, Wharton & Down Construction Syndicate Ltd* [1893] 1 QB 629. The circumstances in which such a transfer could take place were considered by the House of Lords in *Mersey Docks and Harbour Board v Coggins & Griffith (Liverpool) Ltd* [1947] AC 1. Their Lordships imposed a test that was so stringent as to render a transfer of vicarious liability almost impossible in practice. It may well be that that was their intention. The negligence in question was that of the driver of a crane, which had been hired, together with the services of the driver, by the driver's employer to a firm of stevedores.

38. Viscount Simon at pp10 and 11 said that a heavy burden of proof lay on the general or permanent employer to shift responsibility for the negligence of servants engaged and paid by such employer to the hirer for the time being who had the benefit of the services rendered. This could only be achieved where the

hirer enjoyed the right to "control the way in which the act involving negligence was done". The inquiry should concentrate on the relevant negligent act and then ask whose responsibility it was to prevent it. Lord Macmillan at p 14, Lord Porter at p 17 and Lord Uthwatt at pp 22-23 applied the same test.

39. *Mersey Docks* remained the leading case in this area of the law at the time of the decision in *Viasystems* where, unusually for a case of such importance, only two members of the Court of Appeal sat on the appeal. Modern construction enterprises often involve a chain of contractors and sub-contractors working together to a common end, and such a situation can lead to a dispute between them as to who is vicariously liable for the negligence of a workman employed on the project. That was the position in *Viasystems.* The claimants engaged the first defendants to install air conditioning in their factory. The first defendants sub-contracted ducting work to the second defendants. The second defendants contracted with the third defendants to provide fitters and fitters' mates on a labour only basis. They were working under the supervision of a self-employed fitter contracted to the second defendants. One of the fitters' mates in a moment of folly crawled through a section of ducting and negligently fractured the fire protection filter system, flooding the factory. At first instance the third defendants were held vicariously liable for the damage caused and the second defendants held not to be vicariously liable.

40. The Court of Appeal raised the question of whether it was possible in law to have dual vicarious liability and, after considering the authorities, decided that, although for 180 years courts had always proceeded on the basis that only one defendant could be vicariously liable for a tortious act, there was no case that bound the court so to find. Academic writers favoured the possibility of dual vicarious liability and, on the facts of the case, this was the principled solution.

41. At para 16 May LJ, applying *Mersey Docks,* held that the enquiry should concentrate on the relevant negligent act and then ask whose responsibility it was to prevent it. Who was entitled, and perhaps theoretically obliged, to give orders as to how the work should or should not be done? The answer on the facts of the case was both the second and the third defendants. There was dual control and thus there should be dual vicarious liability.

42. Rix LJ reached the same conclusion, but his reasoning was not the same. At para 55 he commented that the basis of vicarious liability was, generally speaking, that those who set in motion and profit from the activities of their employees should compensate those who are injured by such activities, even when performed negligently. Liability was extended to the employer on the practical assumption that because he could spread the risk through pricing and insurance, he was better

organised and able to bear the risk and was, at the same time, encouraged to control the risk.

43. Dealing with the test of control, Rix LJ observed at paras 59 and 64 that the right to control the method of doing work had long been an important and sometimes critical test of the master/servant relationship. The courts had, however, imperceptibly moved from using the test of control as determinative of the relationship of employer and employee to using it as the test of vicarious liability of a defendant. At para 79 he questioned whether the doctrine of vicarious liability was to be equated with control. Vicarious liability was a doctrine designed for the sake of the claimant, imposing a liability incurred without fault because the employer was treated at law as picking up the burden of an organisational or business relationship which he had undertaken for his own benefit. Accordingly, what one was looking for was:

> "a situation where the employee in question, at any rate for relevant purposes, is so much a part of the work, business or organisation of both employers that it is just to make both employers answer for his negligence. "

44. The brothers who taught at the school were not contractually employed by the Institute; they were contractually employed by or on behalf of the Middlesbrough Defendants. By this appeal the Middlesbrough Defendants seek to establish dual vicarious liability. The question arises of whether the approach of May LJ or that of Rix LJ should be applied in determining whether the Institute is also vicariously liable for the brothers' torts.

45. The test that May LJ applied was that applied in *Mersey Docks*. I do not consider that there is any justification for applying this stringent test when considering whether there is dual vicarious liability. Where two defendants are potentially vicariously liable for the act of a tortfeasor it is necessary to give independent consideration to the relationship of the tortfeasor with each defendant in order to decide whether that defendant is vicariously liable. In considering that question in relation to each defendant the approach of Rix LJ is to be preferred to that of May LJ.

46. Two subsequent decisions of the Court of Appeal, *Hawley v Luminar Leisure Ltd* [2006] EWCA Civ 18; [2006] Lloyd's Rep IR 307 and *Biffa Waste Services Ltd v Maschinenfabrik Ernst Hese GmbH* [2008] EWCA Civ 1257; [2009] QB 775 applied the test of control when holding only one of two defendants to be vicariously liable. It is arguable that the facts of each case could have supported a finding of dual vicarious liability.

47. At paragraph 35 above I have identified those incidents of the relationship between employer and employee that make it fair, just and reasonable to impose vicarious liability on a defendant. Where the defendant and the tortfeasor are not bound by a contract of employment, but their relationship has the same incidents, that relationship can properly give rise to vicarious liability on the ground that it is "akin to that between an employer and an employee". That was the approach adopted by the Court of Appeal in *JGE*.

48. *JGE* was specifically concerned with stage 1 of the test of vicarious liability. The claimant alleged that when, as a young girl, she was resident in a children's home run by the first defendants, an order of nuns, she was sexually abused by a visiting Roman Catholic priest who had been appointed by the second defendant trust, which stood in the place of, and could be equated with, the diocesan bishop. A preliminary issue was ordered as to whether the relationship between the priest and the trust was one that was capable of giving rise to vicarious liability. Although this issue was restricted to the stage 1 test MacDuff J at first instance held that it could not be considered in isolation from stage 2, as the test of vicarious liability involved a synthesis of the two stages. In a lucid and bold judgment he held that the relationship could give rise to vicarious liability: see *E v English Province of Our Lady of Charity* [2011] EWHC 2871 (QB); [2012] 2 WLR 709. There was no contract of employment between the trust and the priest. As the headnote summarised the evidence, there were no terms, conditions, wages or right of dismissal except through the church in Rome and effectively no control over a priest once appointed since, although he was subject to canon law and owed the bishop obedience, he was free to conduct his ministry as he saw fit without interference from the bishop, whose role was advisory not supervisory. But at paras 35 and 36 MacDuff J queried the relevance of these matters when the question was whether, in justice, the trust should be responsible for the tortious acts of "the man appointed and authorised by it to act on its behalf". The "crucial features" were that the priest was 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.

49. In the Court of Appeal [2012] EWCA Civ 938 Ward LJ essentially adopted the reasoning of MacDuff J. He did so, however, on the footing that what MacDuff J had identified as the crucial features created a relationship between the priest and the bishop that was "akin to employment". When considering vicarious liability it was not appropriate to apply tests of employment laid down by the courts when dealing with unfair dismissal, or taxation, or discrimination. Nor was control any longer to be treated as the critical touchstone of employment, albeit that it was an important consideration. The question of control should not be approached merely by enquiring whether an "employer" could tell the workman how to do his work,

but in terms of whether the workman was under the management of and accountable to an "employer". It was necessary to identify whether the workman was working on behalf of an enterprise or on his own behalf and, if the former, how central the workman's activities were to the enterprise and whether these activities were integrated into the organisational structure of the enterprise. In applying these criteria Ward LJ acknowledged the assistance that he had derived from an article by Professor Richard Kidner, "Vicarious Liability: for whom should the 'employer' be liable?" (1995) 15 LS 47.

50. Ward LJ concluded that the relationship of the bishop and the priest was so close in character to one of employer/employee that it was "just and fair to hold the employer vicariously liable" (para 73). He was accountable to the bishop in as much as he owed him reverence and obedience and could be dismissed from his office by him in the event of gross breach of his duties under Canon law. His activities in ministering to the souls of the faithful were central to the objectives of the organisation – the Roman Catholic Church, which in its organisational structure looked like a business. He was part and parcel of that organisation and wholly integrated in it. In his work he behaved more as if he was an employee than someone in business on his own account (paras 73 to 79).

51. Davis LJ delivered a concurring judgment. He also concluded that the relationship between the bishop and the priest was sufficiently akin to employment to be capable of giving rise to vicarious liability. The bishop had a degree of control over the priest. The priest's activity of visiting the residential home where the claimant lived was carried out in furtherance of the bishop's aims and purposes, namely perpetuating the works of Christ in the diocese.

52. Tomlinson LJ dissented. He agreed with the passage in Lord Millett's speech in *Lister* that I have quoted at para 71 below, but held that it could not be transposed so as to treat a priest as carrying on his work for the benefit of the bishop.

53. In *JGE* the claimant is also seeking to establish vicarious liability on the part of the charity which ran the home in which the abuse is alleged to have taken place. The Court of Appeal did not consider that the possibility of dual vicarious liability affected the test to be applied.

54. In summary, in *JGE* MacDuff J found the bishop vicariously liable for the acts of the priest notwithstanding that the relationship between them was "significantly different from a contract of employment" (para 35). In the Court of Appeal, Ward and Davis LJJ found it possible to describe the relationship between the bishop and the priest as being "akin to employment". Ward LJ achieved this by

treating the ministry of the Roman Catholic Church as a business carried on by the bishop, by finding that the priest carried on that business under a degree of control by the bishop and by finding that the priest was part and parcel of the organisation of the business and integrated into it.

55. Ward and Davis LJJ distinguished the decision of the Court of Appeal in the present case. Ward LJ did so implicitly and Davis LJ for reasons that I do not find persuasive. The truth is that the case for finding vicarious liability is much stronger in the present case than it was in *JGE*.

56. In the context of vicarious liability the relationship between the teaching brothers and the Institute had many of the elements, and all the essential elements, of the relationship between employer and employees:

i) The institute was subdivided into a hierarchical structure and conducted its activities as if it were a corporate body.

ii) The teaching activity of the brothers was undertaken because the Provincial directed the brothers to undertake it. True it is that the brothers entered into contracts of employment with the Middlesbrough Defendants, but they did so because the Provincial required them to do so.

iii) The teaching activity undertaken by the brothers was in furtherance of the objective, or mission, of the Institute.

iv) The manner in which the brother teachers were obliged to conduct themselves as teachers was dictated by the Institute's rules.

57. The relationship between the teacher brothers and the Institute differed from that of the relationship between employer and employee in that:

i) The brothers were bound to the Institute not by contract, but by their vows.

ii) Far from the Institute paying the brothers, the brothers entered into deeds under which they were obliged to transfer all their earnings to the Institute. The Institute catered for their needs from these funds.

58. Neither of these differences is material. Indeed they rendered the relationship between the brothers and the Institute closer than that of an employer and its employees.

59. Hughes LJ held at para 54 that the brothers no more acted on behalf of the Institute "than any member of a professional organisation who accepts employment with that status is acting on behalf of the organisation when he does his job". I do not agree with this analysis. The business of the Institute was not to train teachers or to confer status on them. It was to provide Christian teaching for boys. All members of the Institute were united in that objective. The relationship between individual teacher brothers and the Institute was directed to achieving that objective.

60. For these reasons I consider that the relationship between the teaching brothers and the Institute was sufficiently akin to that of employer and employees to satisfy stage 1 of the test of vicarious liability.

61. There is a simpler analysis that leads to the conclusion that stage 1 was satisfied. Provided that a brother was acting for the common purpose of the brothers as an unincorporated association, the relationship between them would be sufficient to satisfy stage 1, just as in the case of the action of a member of a partnership. Had one of the brothers injured a pedestrian when negligently driving a vehicle owned by the Institute in order to collect groceries for the community few would question that the Institute was vicariously liable for his tort.

Stage 2: The connection between the brothers' acts of abuse and the relationship between the brothers and the Institute.

62. Where an employee commits a tortious act the employer will be vicariously liable if the act was done "in the course of the employment" of the employee. This plainly covers the situation where the employee does something that he is employed to do in a manner that is negligent. In that situation the necessary connection between his relationship with his employer and his tortious act will be established. Stage 2 of the test will be satisfied. The same is true where the relationship between the defendant and the tortfeasor is akin to that of an employer and employee. Where the tortfeasor does something that he is required or requested to do pursuant to his relationship with the defendant in a manner that is negligent, stage 2 of the test is likely to be satisfied. But sexual abuse can never be a negligent way of performing such a requirement. In what circumstances, then, can an act of sexual abuse give rise to vicarious liability?

Vicarious liability for sexual abuse

63. The extension of statutory periods of limitation coupled with the identification of the serious psychiatric injury that is often caused by child abuse has led to something of a proliferation of claims by adults for personal injury caused by sexual abuse in their childhood. Unhappily in quite a number of cases the abuse was perpetrated by a priest or a member of a religious order. Such cases can raise problems both at stage 1 and at stage 2 of the analysis. Although the law in this area is developing, there are some priests who do not serve under contracts of employment and the question then arises of whether the priest has a relationship with any body that can give rise to vicarious liability on the part of the body. If there is such a body, the second question is whether there is a connection between the priest's relationship with that body and the sexual abuse committed by the priest that can make that body vicariously liable for the priest's actions. *JGE* was such a case, albeit that the preliminary issue focussed on stage 1. In dealing with stage 2 I propose to start with two Canadian cases on sexual abuse, where the tortfeasors were lay employees, so that no issue arose in relation to stage 1. These cases have had a significant influence on the English jurisprudence.

64. *Bazley v Curry* (1999) 174 DLR (4th) 45 was one of two decisions involving child abuse given by the Supreme Court of Canada on the same day. A not-for-profit organisation, D2, ran two residential care facilities for the treatment of emotionally troubled children. They unwittingly employed a paedophile, D1, who sexually abused one of the children in the home. The court, in a judgment delivered by McLachlin J, held D2 vicariously liable for the abuse. The issue related to stage 2. Could acts of sexual abuse properly be the subject of vicarious liability and, if so, on what basis? The court held that this question should be directly addressed in the light of considerations of policy. Two particular principles of policy were identified. The first was that where an employer puts into the community an enterprise carrying with it certain risks and those risks materialise and cause injury it is fair that, having created the enterprise and the risk, the employer should bear the loss. The second was that holding the employer vicariously liable might have a deterrent effect, causing employers to exercise a greater degree of care in relation to the appointment and supervision of employees. So far as the legal test of liability was concerned, para 42 of the judgment summarised the position as follows:

> "…there must be a strong connection between what the employer was asking the employee to do (the risk created by the employer's enterprise) and the wrongful act. It must be possible to say that the employer *significantly* increased the risk of the harm by putting the employee in his or her position and requiring him to perform the assigned tasks."

65. *Markesinis and Deakin's Tort Law*, 6th ed (2007) describe this as the "enterprise risk" approach. The court had no difficulty in finding that the test was satisfied in *Bazley,* for D1's duties under his employment by D2 included bathing the children and putting them to bed, In *Jacobi v Griffiths* (1999) 174 DLR (4th) 71, the other decision reached on the same day, the court applied the same test but, by a majority, reached a different conclusion on the facts. In that case D1 was employed by D2 to run a youth club. D1 sexually abused two children whom he had met in the club, but the abuse did not take place on the club's premises or in connection with club activities. The majority held that there was not the strong connection between D1's employment at the club and his acts of abuse that was necessary to give rise to vicarious liability.

66. The Canadian Supreme Court returned to the theme in *John Doe v Bennett* [2004] 1 SCR 436, a case whose facts are closer to those with which we are concerned, and even closer to those of *JGE.* On this occasion the court was presided over by McLachlin CJ, who gave the judgment of the court. A Roman Catholic priest had sexually assaulted boys in his parishes. The relevant issue was whether the diocesan Episcopal corporation sole, which was equated with the bishop, was vicariously liable. The priest was not employed by the corporation sole or the bishop. The court held, however, at para 27 that the relationship between a bishop and a priest in a diocese was "akin to an employment relationship", inasmuch as the priest took a vow of obedience to the bishop, the bishop exercised 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. At para 17 the court stated that the justification for vicarious liability was that "as the person responsible for the activity or enterprise in question, the employer or principal should be held responsible for loss to third parties that result from the activity or enterprise". At para 20 the court put forward a variation on this theme: "Vicarious liability is based on the rationale that a person who puts a *risky* enterprise into the community may fairly be held responsible when those *risks* emerge and cause loss or injury to members of the public" (my emphasis). Applying *Bazley*, the court held that "the necessary connection between the employer-created or enhanced risk and the wrong complained of" was established. The Bishop provided the priest with the opportunity to abuse his power, this opportunity being incidental to the functions of a parish priest. The priest's wrongful acts were strongly related to the psychological intimacy inherent in his role as priest. Finally, in his remote parishes the status of a priest carried with it immense power. The court declined, on the ground of inadequacy of the record, to consider whether the Roman Catholic Church itself was vicariously liable for the priest's wrongdoing.

67. In conclusion of this review of the Canadian authorities it is of interest to note that 11 days after the English Court of Appeal held in *Viasystems* that it was possible in law to have dual vicarious liability for a single tortious act, McLachlin

CJ, giving the judgment of the Supreme Court, reached the same conclusion in *Blackwater v Plint* (2005) 258 DLR (4th) 275. Applying the test in *Bazley*, the court held both the Government of Canada and the United Church of Canada vicariously liable for sexual assaults committed by a dormitory supervisor in a school which they jointly managed and controlled.

68. In *Lister v Hesley Hall Ltd* [2002] 1 AC 215 the House of Lords, reversing previous authority, held the owners and managers of a school vicariously liable for sexual assaults committed by the warden of a boarding house, employed by them. Although the result was unanimous the reasoning of the House was not identical. Lord Steyn at para 27 referred to *Bazley* and *Jacobi* as "luminous and illuminating" judgments which would henceforth be the starting point for consideration of similar cases. He held, however, that it was not necessary to express views on the full range of policy considerations examined in those decisions. At para 10 he stated that those cases enunciated a principle of "close connection" and at para 28 he said that the question was whether the warden's torts were so closely connected with his employment that it would be fair and just to hold the employers vicariously liable. He gave an affirmative answer to that question, observing that the sexual abuse was "inextricably interwoven" with the carrying out by the warden of his duties at the school.

69. Lord Clyde also referred with approval to the Canadian decisions. He held at para 48 that their essence lay in the recognition of a sufficient connection between the acts of the employee and the employment. At para 50 he found that connection in the fact that the warden's position brought him into close contact with the boys and the fact that the defendants had delegated to the warden the general duty to look after and care for the boys.

70. Lord Hutton agreed with the speech of Lord Steyn.

71. Lord Millett began his judgment with a review of academic writings about the nature of vicarious liability. These identified the underlying policy that an employer ought to be liable for those torts which could fairly be regarded as reasonably incidental risks to the type of business carried on. Lord Millett commented at para 65 that the relevant passages:

> "are not to be read as confining the doctrine to cases where the employer is carrying on business for profit. They are based on the more general idea that a person who employs another for his own ends inevitably creates a risk that the employee will commit a legal wrong. If the employer's objectives cannot be achieved without a serious risk of the employee committing the kind of wrong which he

> has in fact committed, the employer ought to be liable. The fact that his employment gave the employee the opportunity to commit the wrong is not enough to make the employer liable. He is liable only if the risk is one which experience shows is inherent in the nature of the business.”

72. At para 70 he also stated that it was critical that attention should be directed to the closeness of the connection between the employee’s duties and his wrongdoing and, in that context, referred with approval to the Canadian decisions. As to the test of closeness, Lord Millett placed importance on the employee’s act being an abnegation of a specific duty imposed upon him by his employment. At para 83, referring again to the Canadian decisions, he said:

> “Experience shows that in the case of boarding schools, prisons, nursing homes, old people’s homes, geriatric wards, and other residential homes for the young or vulnerable, there is an inherent risk that indecent assaults on the residents will be committed by those placed in authority over them, particularly if they are in close proximity to them and occupying a position of trust. ”

This suggests an endorsement of the Canadian Supreme Court’s approach to treating the creation of risk as a basis for the imposition of vicarious liability in cases of abuse.

73. Lord Hobhouse agreed with Lord Steyn (para 63). At para 55 he, like Lord Millett, singled out schools, prisons and hospitals as being places where vicarious liability was likely to be incurred, but in doing so he treated vicarious liability as being based on an assumption of a duty of care by the employer the performance of which is then entrusted to the employee. At para 60 he drew a distinction between the reasons of policy that justified vicarious liability and the legal criteria that gave rise to this. He expressed the view that creation of risk fell into the former rather than the latter category.

74. It is not easy to deduce from *Lister* the precise criteria that will give rise to vicarious liability for sexual abuse. The test of “close connection” approved by all tells one nothing about the nature of the connection. Lord Clyde and Lord Hobhouse found it significant that the tortfeasor’s employment involved exercising care for the victim. Only Lord Millett expressly endorsed the importance that the Canadian decisions attached to the creation of risk. This has, however, been identified as of significance in most of the cases that have followed.

75. The reasoning in *Lister* was applied by the House of Lords in a commercial context. In *Dubai Aluminium Co Ltd v Salaam* [2002] UKHL 48; [2003] 2 AC 366 the relevant issue was whether dishonest conduct by a solicitor could involve the firm in liability under section 10 of the Partnership Act 1890 as having been carried on "in the ordinary course of the business of the firm". Giving the leading speech Lord Nicholls held that it was necessary to apply the legal policy underlying vicarious liability, which he stated at para 21:

> "is based on the recognition that carrying on a business enterprise necessarily involves risks to others. It involves the risk that others will be harmed by wrongful acts committed by the agents through whom the business is carried on. When those risks ripen into loss, it is just that the business should be responsible for compensating the person who has been wronged."

This has strong echoes of the "enterprise risk" approach of the Canadian Supreme Court and, indeed, Lord Nicholls went on at para 23 to cite with approval from the judgment of McLachlin CJ in *Bazley*.

76. When considering the stage 2 test of "the ordinary course of employment" he suggested at para 23 that the wrongful conduct must be so closely connected with the acts the employee was authorised to do that the wrongful conduct might "fairly and properly be regarded" as done in the ordinary course of employment.

77. The authorities on vicarious liability for unauthorised wrongful acts were reviewed by Lord Steyn when giving the advice of the Board in *Bernard v Attorney General for Jamaica* [2004] UKPC 47; [2005] IRLR 398. He endorsed the "close connection" test, observing at para 23 that the principle of vicarious liability was not "infinitely extendable". At para 18 he held that a relevant factor was the risks to others created by an employer who entrusts duties, tasks and functions to an employee. He added that this strand in the reasoning in *Lister* was best expressed in the passage from the speech of Lord Millett that I have quoted at para 72 above.

78. In *Brown v Robinson* [2004] UKPC 56, a differently constituted Board of the Privy Council at para 11 of the advice delivered by Lord Carswell endorsed the view expressed by Lord Hobhouse in *Lister* that risk, while it might be a strong policy consideration, was not a criterion of vicarious liability.

79. In *Majrowski v Guy's and St Thomas' NHS Trust* [2006] UKHL 34 Lord Nicholls, with whom Lady Hale, Lord Carswell and Lord Brown agreed, again

stressed the importance of the creation or augmentation of risk in relation to the doctrine of vicarious liability.

80. *Maga v Archbishop of Birmingham and another* [2010] EWCA Civ 256; [2010] 1 WLR 1441 is a case that bears a factual resemblance to *JGE.* The difference is that employment was conceded. A claim was brought against the Birmingham Archdiocese of the Roman Catholic Church in respect of sexual abuse that had been committed by a priest, "employed" by the Archdiocese, upon the claimant when a boy. The claimant was not a Catholic and the "grooming" that preceded the sexual abuse occurred in the course of youth work carried on by the priest for the benefit of Catholics and non-Catholics alike. Nonetheless the Court of Appeal unanimously held that vicarious liability was established. Giving the leading judgment Lord Neuberger MR applied the "close connection" test, identifying a number of factors that led to the test being satisfied. He further held that the "material increase of risk" test applied in the Canadian cases was also satisfied.

81. Longmore LJ, concurring, also applied the "close connection" test, observing at para 86 that McLachlin J's exposition of the law in *Bazley,* including the material increase in risk test, was "highly relevant" to the position of the priest.

82. For completion I should add that the High Court of Australia, when considering whether a school authority could be vicariously liable for sexual assault committed on a pupil by a teacher, has shown a bewildering variety of analysis: *New South Wales v Lepore* [2003] HCA 4; 212 CLR 511. Only Gleeson CJ and Kirby J were prepared to consider following the approach of the Canadian and English decisions.

Discussion

83. Sexual abuse of children is now recognised as a widespread evil and the Criminal Records Bureau was established under Part V of the Police Act 1997 to reduce the risk of this by enabling screening of those seeking positions involving greater contact with young people and vulnerable adults. In *Lister* at para 48 Lord Clyde said that cases of sexual abuse by an employee should be approached in the same way as other cases in the context of vicarious liability. None the less the courts have been tailoring this area of the law by emphasising the importance of criteria that are particularly relevant to this form of wrong. In this way the courts have succeeded in developing the law of vicarious liability so as to ensure that a remedy for the harm caused by abuse is provided by those that should fairly bear that liability.

84. Where those who have abused children have been members of a particular church or religious order and have committed the abuse in the course of carrying out activities in that capacity claimants have had difficulty in establishing the conventional relationship of employer/employee. 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.

85. The precise criteria for imposing vicarious liability for sexual abuse are still in the course of refinement by judicial decision. Sexual abuse of children may be facilitated in a number of different circumstances. There is currently concern at the possibility that widespread sexual abuse of children may have occurred within the entertainment industry. This case is not concerned with that scenario. It is concerned with the liability of bodies that have, in pursuance of their own interests, caused their employees or persons in a relationship similar to that of employees, to have access to children in circumstances where abuse has been facilitated.

86. Starting with the Canadian authorities a common theme can be traced through most of the cases to which I have referred. 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 to further its own interests, has done so in a manner which has created or significantly enhanced the risk that the victim or victims would suffer the relevant abuse. The essential closeness of connection between the relationship between the defendant and the tortfeasor and the acts of abuse thus involves a strong causative link.

87. These are the criteria that establish the necessary "close connection" between relationship and abuse. I do not think that it is right to say that creation of risk is simply a policy consideration and not one of the criteria. Creation of risk is not enough, of itself, to give rise to vicarious liability for abuse but it is always likely to be an important element in the facts that give rise to such liability.

This case

88. In this case both the necessary relationship between the brothers and the Institute and the close connection between that relationship and the abuse committed at the school have been made out.

89. The relationship between the brothers and the Institute was much closer to that of employment than the relationship between the priest and the bishop in *JGE.* The Institute was subdivided into a hierarchical structure and conducted its activities as if it were a corporate body. The brothers were subject to the directions as to their employment and the general supervision of the Provincial, their superior within that hierarchical structure. But the relationship was not simply one akin to that of employer and employee. The business and mission of the Institute was the common business and mission of every brother who was a member of it.

90. That business was the provision of a Christian education to boys. It was to achieve that mission that the brothers joined and remained members of the Institute.

91. The relationship between the Institute and the brothers enabled the Institute to place the brothers in teaching positions and, in particular, in the position of headmaster at St William's. The standing that the brothers enjoyed as members of the Institute led the managers of that school to comply with the decisions of the Institute as to who should fill that key position. It is particularly significant that the Institute provided the headmasters, for the running of the school was largely carried out by the headmasters. The brother headmaster was almost always the Director of the Institute's community, living on the school premises. There was thus a very close connection between the relationship between the brothers and the Institute and the employment of the brothers as teachers in the school.

92. Living cloistered on the school premises were vulnerable boys. They were triply vulnerable. They were vulnerable because they were children in a school; they were vulnerable because they were virtually prisoners in the school; and they were vulnerable because their personal histories made it even less likely that if they attempted to disclose what was happening to them they would be believed. The brother teachers were placed in the school to care for the educational and religious needs of these pupils. Abusing the boys in their care was diametrically opposed to those objectives but, paradoxically, that very fact was one of the factors that provided the necessary close connection between the abuse and the relationship between the brothers and the Institute that gives rise to vicarious liability on the part of the latter.

93. There was a very close connection between the brother teachers' employment in the school and the sexual abuse that they committed, or must for present purposes be assumed to have committed. There was no Criminal Records Bureau at the time, but the risk of sexual abuse was recognised, as demonstrated by the prohibition on touching the children in the chapter in the Rule dealing with chastity. No doubt the status of a brother was treated by the managers as an assurance that children could safely be entrusted to his care. The placement of

brother teachers in St William's, a residential school in the precincts of which they also resided, greatly enhanced the risk of abuse by them if they had a propensity for such misconduct.

94. This is not a borderline case. It is one where it is fair, just and reasonable, by reason of the satisfaction of the relevant criteria, for the Institute to share with the Middlesbrough Defendants vicarious liability for the abuse committed by the brothers. I would allow this appeal.