

CLERGY, CIVIL LIABILITY AND THE CHURCH IN WALES

An analysis of the areas and extent of Church in Wales clergy exposure to tortious liability, arising from the performance of their clerical duties, and the implications which this has for the wider church.

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Thesis Summary

Chapters 1 and 2 deal with the relationship between the Church in Wales and its clergy; the way in which ministerial working arrangements might be interpreted by the secular courts and the civil law consequences which would flow from this interpretation. The study begins with an analysis of the relationship in the general context of employment law. From this examination it emerges that civil law does not adopt a single, universal definition of employment status, but categorizes working agreements differently for different purposes. Consequently, the discussion moves on to look at how the working arrangements of Church in Wales clergy would be construed in relation to vicarious liability in tort, concluding that vicarious liability would almost certainly attach to torts committed in the course of performing ministerial duties.

Having established that the church will be vicariously liable, Chapters 3 and 4 go on to consider the scope of the potential liability in connection with trespass and negligence respectively. The common theme which emerges from these chapters, is the difficulty of defining the boundaries of ministerial duties, given the breadth of activities which these duties can encompass, and the underlying Anglican belief that Holy Orders confer not just a set of tasks but a permanent state of being.

The conclusion in chapter 5 proposes dealing with this challenge by analysing the clerical role *for the purposes of tort* in relation to the professional tasks, expertise and undertakings set out in the Clergy Terms of Service. This analysis can be separated from the theological understanding adopted by the church in the context of doctrine, and gives a workable framework for establishing the scope of tortious liability. This approach is then tested and illustrated with a series of case studies.

DECLARATION

This work has not been submitted in substance for any other degree or award at this or any other university or place of learning, nor is being submitted concurrently in candidature for any degree or other award.

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This thesis is being submitted in partial fulfilment of the requirements for the degree of PhD

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Other sources are acknowledged by explicit references. The views expressed are my own.

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Table of Abbreviations

| Abbreviation | Full Title |
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| Alberta L.R. | Alberta Law Review |
| BCP | Book of Common Prayer |
| CFLQ | Child and Family Law Quarterly |
| CIC | Code of Canon Law of the Roman Catholic Church |
| Const. | Constitution of the Church in Wales |
| CSR | Company Secretary's Review |
| CTS | Church in Wales, <i>Clergy Terms of Service</i> , Clergy Handbook 2011 |
| ELJ | Ecclesiastical Law Journal |
| ELA Briefing | Employment Lawyers Association Briefing |
| ICCPR | International Covenant on Civil and Political Rights |
| Ind Law J | Industrial Law Journal |
| JIBFL | Journal of International Banking and Financial Law |
| LS | Legal Studies |
| MMS | Church in Wales Maintenance of Ministry Scheme |
| NLJ | New Law Journal |
| Ox. J Law Religion | Oxford Journal of Law and Religion |
| PCL | The Principles of Canon Law Common to the Churches of the Anglican Communion |
| PN | Professional Negligence |
| UNCRC | United Nations Convention on the Rights of the Child |
| Val U L Rev | Valparaiso University Law Review |

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INTRODUCTION

Two separate and ongoing developments make the present moment an apt time to consider the civil liability of clergy and its implications for the Church in Wales. First, the gradual evolution of secular employment law relating to ministers of religion,¹ accompanied by changes which the Church in Wales has introduced,² has seen a shift in both the construction and understanding of the working arrangements of clergy and their legal relationship with the church. Secondly, there have been a number of recent cases on vicarious liability in the context of religious organisations.³

The combined impact of these parallel changes has reshaped the landscape of tortious liability and the church. The bonds of mutual obligation between Anglican clergy and the church within which they operate are no longer expressed solely, or even primarily, in the sphere of ecclesiastical law and office holding as was once thought to be the case⁴. Now courts recognise that the secular law of contract,⁵ and various branches of labour law,⁶ have a role in enforcing and policing the relationship between ministers and religious

¹ *Percy v Church of Scotland Board of National Mission (respondents)* [2005] UKHL 73; *New Testament Church of God v Stewart* [2008] IRLR 134; *Macdonald v Free Presbyterian Church of Scotland* [2010] All ER (D) 265 (Mar); *JGE v Trustees of the Portsmouth Roman Catholic Diocese* [2012] EWCA Civ 938 etc

² Clergy Terms of Service Canon 2010.

³ *Maga (by his Litigation Friend, the Official Solicitor to the Senior Courts) v Trustees of the Birmingham Archdiocese of the Roman Catholic Church CA Civil Division 16 March 2010 Judgements*; *JGE v Trustees of the Portsmouth Roman Catholic Diocese* [2012] EWCA Civ 93; *Various Claimants v The Catholic Society Welfare and Others* [2010] EWCA Civ 1106; *Various Claimants v The Catholic Society Welfare and Others* [2012] UKSC 56.

⁴ *Re National Insurance Act 1911: Re Employment of Church of England Curates* (1912) 2 Ch 563.

⁵ *Macdonald v Free Presbyterian Church of Scotland* [2010] All ER (D) 265 (Mar).

⁶ *Percy v Church of Scotland Board of National Mission (respondents)* [2005] UKHL 73; *New Testament Church of God v Stewart* [2008] IRLR.

organisations. Furthermore, the law of tort also acknowledges these ties, and is prepared where appropriate to impose vicarious liability on the strength of them.⁷

This study examines some of the implications of this, focusing particularly on the specific case of the Church in Wales. Whilst there is some engaging secondary literature on the employment status of clergy, and this considered in the course of the discussion, there has been surprisingly little academic examination of the issues relating to Anglican clergy and tortious liability. What does exist tends to focus on the arena of vicarious liability, and leaves wider issues largely untouched. This study attempts to explore some of the hitherto neglected territory in relation to clergy and tort.

It begins in Chapter 1 with an examination of the current position of clergy in the context of secular employment law, arguing that the case for treating ministers of religion as a special category of worker entirely distinct from those employed in secular activities has been overstated in both case law and academic commentary.

It considers the progressive shifts in judicial thinking on the intention to create legal relations in the context of ministers of religion and their working arrangements, particularly the possible emergence and certain extinction of a presumption against such an intention.

It then sets out the current position of fact finding tribunals considering the matter without any presumption, but examining the legal and factual context of each case, and considering it on its merits. It is submitted that this not in reality an innovative move, but a return to the methodology adopted by judges in the leading historic cases. As is the case for workers in the secular sphere, ministers of religion may or may not be employees, depending upon

⁷ *JGE v Trustees of the Portsmouth Roman Catholic Diocese* [2012] EWCA Civ 93.

the terms of their working agreement, and also the purposes for which they are attempting to establish employment status.

The analysis then considers the human rights implications of state courts applying secular labour law in a religious context, particularly in relation to the Article 9 right to freedom of conscience, belief and religion.⁸ It concludes that despite theoretical concerns being raised in recent judicial pronouncements, the probability of Article 9 presenting serious obstacles to these developments is small. In contexts in which labour law was likely to be applied to a minister of religion, it is likely that either: i) the specific situation rule could be invoked; or ii) that the conduct of the religious community demonstrated an intention to create legal relations, and such conduct was incompatible with the assertion that legal relations with ministers infringed the religious doctrines of the community.

Consequently, the overall conclusion of Chapter 1 is that the position of religious ministers (including Church in Wales clergy) is in reality much the same as that of other individuals with complicated working arrangements and systems of supervision. In addition to which, recent decisions indicate that the UK courts have firmly rejected a one size fits all approach to employment status. An individual may be deemed an employee for some legal purposes and not for others, and this situation is especially likely in the context of non-standard working arrangements. Workers like clergy who have complex patterns of work and accountability are especially likely to be classified differently for different legal purposes.

This finding leads on naturally to the examination in Chapter 2 of the specific issue of vicarious liability and Church in Wales clergy. The discussion considers the recent development of the law of vicarious liability in general, with particular regard to the UK

⁸ ECHR Article 9.

courts partial adoption of the Canadian concept of enterprise risk. It concludes that whilst the appellate courts in Britain continue to refer to risk in analysing vicarious liability, they do not systematically look at the factors which may generate or enhance such risk, in a way comparable to that seen in the Canadian case law. It is suggested that this is regrettable, as the Canadian approach would provide greater clarity, and would be entirely in keeping with historic UK case law on the issue.⁹

It is noted however, that whatever approach is taken to risk, the questions accompanying it are inevitably tied to the questions of scope of duties of care discussed in relation to negligence. What are clergy tasked with doing, what are clergy publically held out as doing and what are the risks inherent in them doing it? The question of enterprise risk cannot be considered in isolation from the question of clergy duties. Hence the outcome of cases will always be fact specific.

Nevertheless, having acknowledged that the current state of the general law of vicarious liability means that the outcome of individual cases will often be uncertain, it is concluded that the relationship between Church in Wales clergy and the church is such that in at least some circumstances vicarious liability will ensue. The most persuasive element of the argument for this comes from recent case law on Roman Catholic clergy.¹⁰ The courts were prepared to treat Roman Catholic priests as being in a position akin to employment for the purposes of vicarious liability.

Given that the Church in Wales has now adopted the Clergy Terms of Service,¹¹ working arrangements consciously modelled on those found in the secular world, the relationship

⁹ *Lloyd v Grace Smith & Co* [1911-13] All ER Rep 51.

¹⁰ *JGE v Trustees of the Portsmouth Roman Catholic Diocese* [2012] EWCA Civ 93.

¹¹ Church in Wales, *Clergy Terms of Service*, Clergy Handbook 2011 ('CTS').

between the church and its ministers and even closer to that of employment than is the case in the Roman Catholic sphere. It would be difficult to conceive of a convincing argument for treating Roman Catholic priests as quasi-employees for the purposes of vicarious liability, but categorise Anglican priests differently for the same purpose, when their relationship with the church which they serve is far more closely akin to secular employment.

Having thus established that vicarious liability will ensue for the tortious activities of Church in Wales clergy, at least in some circumstances, Chapters 3 and 4 go on to examine torts which might be committed in the course of ministerial activity. Chapter 3 considers trespass to the person, and focuses on two main contexts: firstly in relation to pastoral care and relationships; and secondly in relation to liturgical actions, particularly the administration of baptism.

Chapter 4 goes on to look at negligence. It ultimately observes that clergy, like all other legal persons, will be liable for causing harm to third parties, if the necessary elements of the tort of negligence (duty of care, causation, remoteness) can be established. However, when considering whether the clergy have any special duty to actively promote and safeguard the welfare of others, it reaches a more reassuring conclusion from the perspective of exposure to civil liability. Properly read and understood, the *Maga* case demonstrates that clergy (including Church in Wales clergy) are not subject to any special duty to take steps to protect third parties from harm. Such duties generally only arise if they are well-established in law by virtue of a relationship of responsibility and control (e.g. parent and child, prison and prisoner etc), or if they are assumed by the defendant.

The Church in Wales as an institution does not hold out its clergy as having any technical skills or expertise which would give third parties reason to believe that its priests are more capable than anyone else of safeguarding interests protected by the tort of negligence (i.e. physical and mental health and integrity, property and economic interest). Whilst they may claim to have expertise in spiritual and liturgical matters, spiritual harm is not a species of damage recognised in tort.

Neither does the Church in Wales make promises that its clergy will provide a measurable standard or frequency of pastoral attention, allowing third parties to rely on such promises to their detriment.

Therefore, the only duties of care which individual clergy are likely to assume are those arising out of specific factual contexts in which they find themselves, putting them in the same position as the general population, and subject to the general law.

But Chapters 3 and 4 still leave some fundamental questions unanswered, which are addressed more fully in the conclusion set out in Chapter 5. The preceding chapters revealed a common and consistent theme: namely, that determining the scope of ministerial duties is deeply problematic, but also an unavoidable necessity in establishing the potential and limits of civil liability for the wider church.

Chapter 5 starts from the position that the Church in Wales will be liable for the actions of its priests, deacons and bishops when they are functioning as bishops, priests, and deacons therefore furthering its organisational aims. It then acknowledges the challenge which this poses in light of the doctrinal context. The Anglican theology of Holy Orders does not allow for individuals who are ordained to divide their time into sacred and secular moments;

priesthood is about being rather than doing, and being is a constant state. Therefore in some sense Anglican clergy can never be said to be acting in a purely personal and private capacity.

Taken at face value this situation would leave courts with a stark choice between:

- i) finding that the church is liable for the torts of its clergy in all circumstances;
- ii) finding that the church is never liable for the torts of its clergy; and
- iii) finding that the church is liable for the torts of its clergy in some circumstances but not others, and drawing arbitrary distinctions between cases.

However, none of these possibilities is palatable or wholly satisfactory. The first would be placing an extremely heavy burden on the church. Yet the second option is no more acceptable; it would simply give rise to an opposite and equal injustice. In objective terms there is no reason why the Church in Wales should be granted complete immunity, or why potential claimants should suffer the accompanying hardship of being denied any remedy for injury and harm suffered.

But the third option raises a different set of problems for both courts and parties to claims. It is not in the interests of justice for the process of litigation to function in an arbitrary or unpredictable fashion. Neither is it easy for parties to establish appropriate pre-trial settlements when they do not have a clear legal framework within which to conduct negotiations. It is impossible to bargain in the shadow of the law unless there is reasonable clarity about where the law is to be found.

Therefore, an alternative approach to the situation is required. Chapter 5 proposes such an alternative. Namely, that if courts consider clerical ministry in terms of professional tasks,

expertise and undertakings as set out in the Clergy Terms of Service, rather than in terms of the all-encompassing priestly role.

This involves asking:

- i) What specific tasks are Church in Wales clergy required by the CTS to perform in the relevant context?
- ii) What professional expertise, in terms of skills and training, are Church in Wales clergy held out as bringing to the given situation?
- iii) What undertakings have been made by the Church in Wales or individual clergy in this situation? Did any third parties reasonably rely on these undertakings to their detriment?

On this basis, it *is* possible to draw meaningful and helpful distinctions. Consequently adopting this approach, courts would be able to distinguish cases in a way which was logical and justifiable. Inevitably borderline cases will always arise and certain grey areas will always remain, but at least consistent principles can be applied to the chaotic problems generated by human life and litigation.

It is argued that this approach is consistent and compatible with the way in which *both* employment and tort law operate. In the context of labour law, courts have for sometime been prepared to adopt a flexible and even creative approach. The same individual may be an employee for some legislative purposes but not for others, and contractual intent to create legal relations may be found to exist for some aspects of a working relationship but not for others. In the complex world of contemporary employment claims, a simple, monochrome approach has long since given way to something more toned and nuanced. If

courts are capable of making distinctions in this arena, then they should be equally of capable of doing so in relation to the law of tort.

Chapter 5 then concludes with three case studies which demonstrate how the Clergy Terms of Service may be used to provide guidance on the tasks and expertise required of Church in Wales clergy, and the types of undertakings given in respect of their service. This guidance can then be applied to provide a framework for considering the kinds of claims and liability which may arise in the contemporary United Kingdom.

CHAPTER 1

THE RELATIONSHIP BETWEEN THE CHURCH IN WALES AND ITS CLERGY IN THE CONTEXT OF SECULAR EMPLOYMENT LAW

1.1 Overview

This chapter examines how secular employment law would be likely to construe the relationship between the Church in Wales and its clergy. In order to do this it considers firstly how secular employment law deals with ministers of religion in general, and then analyses this position in the particular context of the Church in Wales.

- 1) The case for treating ministers of religion as a special category of worker entirely distinct from those employed in secular activities has been overstated in both case law and academic commentary.
- 2) The presumption against an intention to create legal relations in cases of ministers of religion which began to emerge in EAT decisions, and was identified by some commentators, never in fact existed in the law as articulated by the higher courts.
- 3) The current position of examining the legal and factual context of each case, and considering it on its merits, is not a new departure but a reaffirmation of the approach taken in the leading historic cases. In common with other workers ministers of religion may or may not be employees, depending upon the terms of their working agreement, and the purposes for which they are attempting to establish employment status.

- 4) The potential human rights issues raised by conferring employment status on ministers of religion have been overstated in recent *obiter* judicial pronouncements. In most instances finding an intention to create legal relations would not breach the Article 9 rights of the religious community or organisation for which they worked. In the majority of cases it could be shown that either: i) the specific situation rule applied; or ii) the conduct of the religious community demonstrated an intention to create legal relations, and such conduct was incompatible with the assertion that legal relations with ministers infringed the religious doctrines of the community.
- 5) The position of religious ministers is therefore in many respects no different from that of other people whose working pattern and context is complicated. Furthermore recent decisions suggest that in such circumstances, the courts are moving away from a monochrome understanding of employment status. An individual may be deemed an employee for some legal purposes and not for others.

1.2 Determining employment status - the secular law position

Both judges,¹² and commentators,¹³ acknowledge that the determination of employment status remains a complex area, generating pitfalls for the unwary and an abundance of litigation. As Lord Hoffman noted in *Carmichael v National Power*, it is an issue which requires tribunals to negotiate the subtle interplay between questions of fact and questions of law, particularly when establishing the terms of the working agreement between parties

¹² See for example *Autoclenz Ltd v Belcher* [2010] IRLR 70 para 1 per Lady Justice Smith; *Cotswold Developments Construction Ltd v Williams* [2006] IRLR 181 para 1 per Langstaff J; and *Staffordshire Sentinel Newspapers Ltd v Potter* [2004] IRLR 752 para 1 per Judge Peter Clark.

¹³ S Ravenscroft and A Attwood, 'Determining Employment Status', 33 CSR 213 (February 2010) 166; I Smith, 'Employment: A fine century!' 159 NLJ (20 November 2009) 1604, and N Baker, 'Employee Status-Ongoing Saga', 29 CSR 23, 8 (March 2000) 177.

in dispute.¹⁴ Because the content and circumstances of such agreements are key to the question of employment status, and are also almost infinitely variable, it is not always easy to find helpful guidance within the plethora of case-law.¹⁵

Furthermore, in addition to untangling the terms of the agreement negotiated by the parties, courts must also assess which of the many legislative provisions regulating the employment sphere are relevant in any given case.¹⁶ An individual's employment status and working arrangements may qualify him or her for rights or protection under some statutory provisions but not others. It is entirely possible for an individual to be an employee for the purpose of one piece of legislation, whilst failing to meet the criteria for employment status set out in another.

The recent case of *Jivraj v Haswani* illustrates the current complexity and difficulties very well.¹⁷ The Court of Appeal was prepared to find that the Employment Equality (Religion and Belief) Regulations¹⁸ covered 'employment' in the broadest sense, and construed this to

¹⁴ *Carmichael v National Power* [2000] IRLR 43 per Lord Hoffman.

¹⁵ N Baker, 'Employee Status-Ongoing Saga' 29 CSR 23, (8 March 2000) 177.

¹⁶ In the context of employment status, see inter alia: Collective Redundancies and Transfers of Undertakings (Protection of Employment) (Amendment) Regulations 1999; Disability Discrimination Act 1995; Equality Act 2010; Employment Act 2002; Employment Equality (Sexual Orientation) Regulations 2003; Equal Pay Act 1970; Employment Rights Act 1996; Health and Safety at Work Act 1974; Health and Safety (Consultation with Employees) Regulations 1996; Management of Health and Safety at Work Regulations 1999; National Minimum Wage Act 1998; Part-time Workers (Prevention of Less Favourable Treatment) Regulations 2000; Employment Equality (Religion or Belief) Regulations 2003; Reporting of Injuries, Diseases and Dangerous Occurrences Regulations 1995; Race Relations Acts 1976; Right to Time Off for Study or Training Regulations 2001; Transitional Information and Consultation of Employees Regulations 1999; Transfer of Undertakings (Protection of Employment) Regulations 1981; Trade Union and Labour Relations (Consolidation) Act 1992; Trade Union Reform and Employment Rights Act 1993 and Working Time Regulations 1998.

¹⁷ *Jivraj v Hashwani Hashwani v Jivraj* (2009) All ER (D) 272 (Jun); *Jivraj v Hashwani* [2010] EWCA Civ 712; IRLR 797; *Jivraj v Hashwani* [2011] IRLR 872.

¹⁸ Employment Equality Religion and Belief Regulations 2003 (SI 2003/1660). Their protection extends beyond employees to an individual 'engaged under a contract personally to do work'. The same definition has been adopted for all equality protection enshrined within the Equality Act 2010.

mean the personal provision of services under any form of contract, whilst the Supreme Court took a far more restrictive view when construing the ambit of the protection.

The facts were as follows: the parties had entered into a joint venture agreement for investing in real estate. One of the terms of this agreement dealt with appointing arbitrators in the event of any dispute, and stated that all arbitrators were to be respected, office-holding members of the Ismaili community. Ismailism is a branch of Shia Islam, and the term therefore clearly stipulated that the appointee be drawn from a specific religious group. However, when the need to appoint arbitrators arose, one side appointed Sir Anthony Colman, who did not satisfy this requirement. They argued that the Employment Equality (Religion and Belief) Regulations had rendered the contractual term requiring membership of that community void. The judge at first instance rejected this argument, finding that the regulations only applied where there was a relationship of employment and there was none in this case.

He found that although the relationship between an arbitrator and the parties to a dispute could potentially be classified as contractual, the contract in place could not be an employment contract.¹⁹ The arbitrator has no client but acts independently and impartially, the parties may not give instructions about the manner in which the work is to be carried out or the outcome which is to be achieved. The closest analogy to the role of arbitrator is that of judge;²⁰ in the general context of employment, judges, magistrates and the chairpersons of tribunals are not employed but office holders.²¹

¹⁹ *Jivraj v Hashwani Hashwani v Jivraj* (2009) All ER (D) 272 (Jun) para 26.

²⁰ *Ibid* para 27.

²¹ *Ibid* para 28.

The Court of Appeal took a radically different approach, and found that the Employment Equality (Religion and Belief) Regulations did apply to Mr Colman, even though they acknowledged that he was effectively acting as an independent contractor providing a professional service. The court made an analogy between appointing an arbitrator and instructing a solicitor or consulting a doctor.²² The arbitrator almost certainly could not have established employee status for the purposes of the Employment Rights Act 1996.²³ Section 230 of the Act defines employee as:

‘an individual who has entered into or works under (or, where the employment has ceased, worked under) a contract of employment.’

Any tribunal applying a conventional test²⁴ for establishing a contract of employment, such as the one framed by Mackenna J in *Ready Mixed Concrete (South East) v Minister of Pensions and National Insurance*, would have found that the arbitrator failed to satisfy its requirements.²⁵ The criteria laid out by Mackenna J are: 1) mutuality of obligation; 2) remuneration; 3) a commitment to provide personal service; 4) control by the employer; and 5) the absence of any contractual terms incompatible with a contract of employment.

²² *Jivraj v Hashwani* [2010] IRLR 797 per Moore-Bick LJ para 16: ‘The paradigm case of appointing an arbitrator involves obtaining the services of a particular person to determine a dispute in accordance with the agreement between the parties and the rules of law, including those to be found in the legislation governing arbitration. In that respect it is no different from instructing a solicitor to deal with a particular piece of legal business, such as drafting a will, consulting a doctor about a particular ailment or an accountant about a tax return. Since an arbitrator (or any professional person) contracts to do work personally, the provision of his services falls within the definition of ‘employment’, and it follows that his appointor must be an employer within the meaning of reg. 6(1).’

²³ Employment Rights Act 1996 s. 230.

²⁴ For a recent application of this test see *Weight Watchers (UK) Ltd and others v HMRC* [2010] UKFTT 54.

²⁵ *Ready Mixed Concrete (South East) Ltd v Minister of Pensions and National Insurance* [1968] 2 QB 497.

The arbitrator would have fallen down on all of these points save, possibly, the commitment to provide personal service.

However, the arbitrator's inability to assert rights flowing from section 230 of the Employment Rights Act 1996²⁶ had no bearing on his status for the purposes of the Employment Equality (Religion and Belief) Regulations 2003 in the view of the Court of Appeal. The court found that his working arrangements were indeed covered by the regulations in question. The Regulations were made to give effect to Council Directive (EC) 2008/78, and the scope of that directive was an important consideration for the Court of Appeal.²⁷

'The recitals to the Directive and the structure and language of art 3(1) as a whole indicate that it is concerned with discrimination affecting access to the means of economic activity, whether through employment, self-employment or some other basis of occupation'.²⁸

In light of the breadth of the Directive, the Court of Appeal held that it was appropriate to adopt a broad definition of employment for the purpose of interpreting the Employment Equality (Religion and Belief) Regulations. They also noted that there was European case law which determined that for some purposes arbitrators were deemed to be providing services.²⁹ Furthermore, they found that as the function of arbitrators was to determine the dispute in accordance with English law, there was no genuine occupational requirement

²⁶ Employment Rights Act 1996 s. 230.

²⁷ *Jivraj v Hashwani* [2010] EWCA Civ 712 para 15.

²⁸ *Ibid.*

²⁹ *Ibid* para 16 per Moore-Bick LJ, citing *von Hoffmann v Finanzamt Trier* (Case C-145/96) [1997] ECR I-4857.

which justified stipulating that all arbitrators be drawn from the Ismaili community.

Consequently the contractual term did indeed fall foul of the Regulations.

When the Supreme Court came to examine the case however, the judgement of the Court of Appeal was overturned.³⁰ In interpreting the regulations, the Supreme Court found it essential to consider in detail the decisions of the European Court of Justice (ECJ).³¹

Particular importance was attached to the *Allonby* case.³² In *Allonby* the court considered an equal pay claim made by a lecturer who was dismissed but then reengaged by the defendant college, ostensibly as a self-employed subcontractor sourced from an agency.³³

In that case the Supreme Court noted that the ECJ had drawn a clear distinction between workers and independent suppliers for services for the purposes of Article 141 (1) of the EC treaty.³⁴ The authors of the Treaty did not intend the term 'worker' in that article to include individuals providing services who were not in a '*subordinate relationship*' with the recipient of those services.³⁵ Following *Allonby* the definition of worker contained within the Equal Pay Act s.1(6) must be construed to exclude those who are genuinely self employed; and the nearly identical definition in s83(2) of Equality Act (the domestic legislation within which the regulations were enacted) must logically be interpreted in the same fashion.³⁶

³⁰ *Jivraj v Hashwani* [2011] IRLR 827.

³¹ *Ibid* per Lord Clarke para 24.

³² *Allonby v Accrington and Rossendale College* (case C-256/01) [2004] IRLR 224.

³³ *Ibid*.

³⁴ *Jivraj v Hashwani* [2011] IRLR 827 per Lord Clarke para 26.

³⁵ *Ibid* para 26: '*It is clear from that definition that the authors of the Treaty did not intend that the term 'worker', within the meaning of Article 141 (1) EC, should include independent providers of services who are not in a relationship of subordination with the person who receives the services.*'

³⁶ *Ibid* para 27.

Therefore, because an arbitrator is in no sense in a subordinate relationship with the parties in dispute his or her working arrangements will not be covered by the European directive or the provisions of the Equality Act.³⁷ The Supreme Court found that it was not necessary to speculate about the position in factual contexts outside of arbitration;³⁸ but were nevertheless unable to resist the temptation to immediately do so. Lord Clarke expressed extreme doubt that a person engaging a plumber to do a one off job would be subject to the whole gamut of antidiscrimination legislation.³⁹ However, it was emphasised that ultimately whether the regulations applied to a plumber, doctor or other worker would always depend upon the facts of the case in relation to *Allonby*, bearing in mind that this decision requires something more than the obligation to do work personally cited by the Court of Appeal in *Jivraj*.⁴⁰

Academic commentators have taken different views on the reasoning of the Supreme Court in *Jivraj*. McCrudden analyses the decision in terms of opposing normative justifications, and offers an explanation for the requirement of subordination on this basis.⁴¹ He poses the question as to whether employment discrimination law should properly be regarded as a subset of employment law, or as a subset of discrimination law. If it belongs to the world of employment law, then the requirement of subordination imposed by the Supreme Court

³⁷ Ibid para 40.

³⁸ Ibid para 46.

³⁹ Ibid: '*In reaching this conclusion it is not necessary to speculate upon what the positions might be in other factual contexts. It was submitted that the effect of the decision of the Court of Appeal is that a customer who engages a person on a one-off contract as, say, a plumber, would be subject to the whole gamut of discrimination legislation. It would indeed be surprising if that were the case, especially given the fact that the travaux préparatoires contained no such suggestion.*'

⁴⁰ Ibid: '*This is not to say that the Regulations may not apply in the case of a plumber, solicitor, accountant or doctor referred to by the Court of Appeal in paragraph 16. As already stated, all will depend upon the application of Allonby to the particular case. As I see it, the problem with the approach adopted by the Court of Appeal is that it focuses only on the question whether there is a contract to do work personally, whereas it is necessary to ask the more nuanced questions identified in Allonby.*'

⁴¹ C McCrudden, 'Two views of subordination: the personal scope of employment discrimination law in *Jivraj v Hashwani*', *Ind Law J* 41(1) (2012), 30.

makes sense, as the original rationale of employment law was based upon the inherent inequality of the parties. Furthermore McCrudden sees the decision as a move away from the human rights or dignitarian model of working relations and labour law, championed by Freeland and Kountoris, as an alternative to the traditional employment, subordination model.⁴² Effectively the Supreme Court placed employment discrimination law within the realm of employment law rather than discrimination law in making application of the legislation contingent upon subordination, thus demonstrating a preference for an employment as opposed to a human rights based approach.

However Freeland and Kountoris offer a very different analysis in reply.⁴³ They argue that in confining the scope of the regulations to subordinate working relationships, the Supreme Court are effectively limiting their scope to employment in the conventional sense, as subordination is the '*defining attribute*' of employment relationships.⁴⁴

The difficulty with this interpretation is, in their view, that it renders meaningless the final category of working relationship set out in the legislation; namely '*employment personally to do work*'. If only contracts involving a subordinate relationship qualify as employment personally to do work and attract anti-discrimination protection, then only contracts of employment or apprenticeship would come within the scope of the provision. Thus the

⁴² Ibid, 54: '*For at least the last decade Mark Freeland (more recently with Nicola Countouris) has developed a radical approach to the broader issue that would see it as focusing on the personal work relationship and frame this is much more dignitarian (or human rights) terms than in a traditional employment-subordination (or labour market) terms*'.

⁴³ M Freeland and N Kountoris, 'Employment equality and personal work relations-a critique of Jivraj v Hashwani', Ind Law J 41 (2012) (1), 56.

⁴⁴ Ibid 58.

words '*employment personally to do work*' add nothing to the previously listed categories, i.e. contracts of employment or apprenticeship.⁴⁵

Since the 1970s equality legislation has referred to '*employment under a contract of employment, a contract of apprenticeship or a contract personally to do work*'.⁴⁶ Freeland and Kountoris argue that there is every reason to believe that the inclusion of this third category or worker was a serious and deliberate attempt to extend the scope of protection *beyond* contracts of employment or apprenticeship. Therefore, individuals such as an arbitrator, who are clearly *not* employed in a subordinate relationship pursuant to a contract of employment or apprenticeship, may nevertheless be covered by the statutory protection.

Furthermore Freeland and Kountoris propose that not only did the Supreme Court adopt a misguided approach to both European and domestic legislation, their analysis of case law was also questionable. Although they do not concede that the Supreme Court arrived at the correct understanding of the ECJ concept of 'worker' as it emerged from *Allonby* and subsequent case law, Freeland and Kountoris argue that *Allonby* is in any event not directly on point in relation to religious discrimination.⁴⁷ Directive 2000/78⁴⁸ which related to the *Jivraj v Hashwani* litigation applies to 'employment or occupation' whereas Article 141 which related to equal pay deals with 'workers' and their employers.

⁴⁵ Ibid: '*The notion of 'employment under a contract personally to do work' where the contract is not a contract of employment or apprenticeship is thereby emptied of all content; the legislator has on that view simply evoked a logically non-meaningful category or empty box*'.

⁴⁶ Ibid. See also Equal Pay Act 1970 s1(6)(a).

⁴⁷ Ibid 61.

⁴⁸ This established a general framework for equal treatment in employment and occupation.

The Supreme Court found that the protection afforded by Directive 2000/78 extended to self employment or training only in relation to the opportunity to qualify for or set up in such a field. It did not prevent customers choosing to discriminate between independent businesses or service providers. Freeland and Kountoris accepted that the unique role of an arbitrator might be seen to have complicated the picture, but cited barristers as example of the difficulties posed by the wider implications of the approach taken by the Supreme Court.⁴⁹ Prospective barristers would be protected from discrimination when applying for academic and vocational courses or a seat in chambers, but not when it came to obtaining work and remuneration from instructing solicitors or clients, a position which was neither logical nor satisfactory.⁵⁰

It must be acknowledged that Freeland and Kountoris make a persuasive case in relation to the flaws in the reasoning by the Supreme Court. It is difficult to find a convincing alternative understanding of the purpose of the formula '*other contracts to do work personally*' if it is not interpreted as extending the reach of the provision beyond '*contracts of employment or apprenticeship*'. Furthermore, it does seem challenging to justify protecting individuals like barristers and plumbers from discrimination in access to training and setting up, but not from discrimination in actually obtaining work and remuneration.

⁴⁹ Ibid 62.

⁵⁰ Ibid 63: '*Article 3(1)(a) applies to the barrister's access to professional qualification and training, and, we would suggest, to selection for tenancy in chambers, since that is clearly integral to 'setting up' as a barrister-but would apparently not apply to any criteria which the client or instructing solicitor might impose upon the selection of counsel for briefing in a particular case or matter. One is forced to ask whether it is not positively ironical, having (quite rightly in our view) protected the would-be barrister from discrimination while he or she makes an enormous personal investment in qualifying for and obtaining a seat in chambers, then to leave him or her to face possibly discriminatory selection criteria when he or she seeks to realise that investment by obtaining actual engagements for work*'.

But it is also clear that Freeland is correct to observe that the view of the Supreme Court is indicative of the current state and indeed direction of UK law. For present purposes the *Jivraj* litigation demonstrates the complexity of the contemporary position with regard to employment status, and how the sands are continually shifting. The radically different conclusions and approaches of the Court of Appeal and the Supreme Court show how difficult it can be to predict the outcome of cases in novel factual contexts. Like arbitrators, clergy often have working arrangements with no obvious or easy analogies in other fields.

The differing decisions of the appellate courts in *Jivraj* and the deliberations involved also illustrate how critical it is to establish clearly the *purpose* for which an individual's employment status is to be construed. There is no universal definition of 'employment' within either European or domestic law. Everything turns upon the context in which the question is being posed.

Other recent cases confirm this broader picture. In *Autoclenz v Belcher*⁵¹ the Supreme Court considered the position of car valeters in relation to holiday pay. The question arose as to whether they were 'workers' for the purposes of the Employment Rights Act, the National Minimum Wage Regulations and the Working Time Regulations.⁵²

⁵¹ *Autoclenz Limited v Belcher and others* [2011] UKSC 41, [2011] IRLR 820.

⁵² The term 'worker' is defined in s. 230(3) of the Employment Rights Act 1996, reg. 2 of the Working Time Regulations 1998, SI 1998/1833 and reg. 2 of the National Minimum Wage Regulations 1999, SI 1999/584. The definitions are the same for all material purposes. The 1998 Regulations state that 'worker' means '*an individual who has entered into or works under (a) a contract of employment; or (b) any other contract, whether express or implied and (if it is express) whether oral or in writing, whereby the individual undertakes to do or perform personally any work or services for another party to the contract whose status is not by virtue of the contract that of a client or customer of any profession or business undertaking carried on by the individual*'.

The valeters were ostensibly self-employed, and a number of terms within their written agreements supported this conclusion. For instance the valeters were not obliged to provide services on any particular occasion, and the company was not obliged to engage them.⁵³ However the Supreme Court endorsed the approach of the lower courts in considering the circumstances as a whole. An employment tribunal should seek to determine the reality of the relationship and obligations between the parties; written agreements are not the only factor in this and may contain clauses which do not reflect the genuine position.⁵⁴

A similar approach was taken in the subsequent case of *Quashie v Stringfellows Restaurants*.⁵⁵ Here the EAT looked beyond the written statement of terms, which unambiguously defined the working relationship provision of services by a self employed individual.⁵⁶ Considering the totality and reality of the situation, the EAT found that the claimant was an employee for the purposes of the Employment Rights Act 1996, and therefore able to bring a claim for unfair dismissal. Although this finding was reversed by

⁵³ Ibid per Lord Clarke para 8.

⁵⁴ See ibid paras 23 & 24: *'I would accept the submission made on behalf of the claimants that, although the case is authority for the proposition that if two parties conspire to misrepresent their true contract to a third party, the court is free to disregard the false arrangement, it is not authority for the proposition that this form of misrepresentation is the only circumstance in which the court may disregard a written term which is not part of the true agreement. That can be seen in the context of landlord and tenant from Street v Mountford [1985] AC 809 and Antoniadis v Villiers [1990] 1 AC 417, especially per Lord Bridge at p.454, Lord Ackner at p.466, Lord Oliver at p.467 and Lord Jauncey at p.477. See also in the housing context Bankway Properties Ltd v Pensfold-Dunsford [2001] 1 WLR 1369 per Arden LJ at paragraphs 42–44.*

Those cases were examples of the courts concluding that relevant contractual provisions were not effective to avoid a particular statutory result. The same approach underlay the reasoning of Elias J in Kalwak in the EAT, where the questions were essentially the same as in the instant case. One of the questions was whether the terms of the written agreement relating to the right to refuse to work or to work for someone else were a sham.'

⁵⁵ *Quashie v Stringfellows Restaurants Ltd* [2012] IRLR 536.

⁵⁶ Ibid per Judge McMullen QC para 11-12.

the Court of Appeal, the underlying approach of assessing the facts and drawing an overall conclusion was firmly endorsed.⁵⁷

The claimant was a lap-dancer in the defendant's club. She was not paid directly or in a conventional way by the club, but received vouchers (referred to as Heavenly Money) from customers in return for dancing services.⁵⁸ If a customer did not have enough Heavenly Money and paid in sterling, the claimant was required to go and exchange it for Heavenly Money as soon as the dance was over. The absence of an orthodox and narrowly defined work/wage bargain was not sufficient reason for finding that the claimant was not an employee however; in the modern labour market workers provide services for consideration in a wide variety of forms.⁵⁹

A key point for the EAT was the degree of control which the club exercised over the claimant in relation to her working arrangements; she was required to work one Saturday and one Monday twice a month and to work one night a week. She had to be present on Thursday evenings, to give 'free' dances and if the club directed her to a customer she could not

⁵⁷ *Quashie v Stringfellows Restaurants Ltd* [2012] All ER (D) 229 (Dec).

⁵⁸ *Quashie v Stringfellows Restaurants Ltd* [2012] IRLR 536 para 19.

⁵⁹ *Ibid* para 51: 'In my judgement, the judge was wrong to focus narrowly on the wage/work bargain. The problem with it is that it does not encompass all forms of bargains within employment relationships. Arguably, it answers itself: only employees get wages. More systematically though, the signpost to this is the citation of *Buckley J* by *Langstaff J* in paragraph 47 of *Cotswold (Cotswold Developments Construction Ltd v Williams* [2006] IRLR 362 CA). These days, it is not uncommon to find a person agreeing to work for no pay (to gain work experience) or to attend for the mere opportunity of being given work for which remuneration would be available. The wage/work bargain would be satisfied if *Ms Quashie* agreed to dance in exchange for accommodation, for free meals, for fees paid directly to her university or even for payment of 1p a night. She could make the bargain to dance to the respondent's tune if the respondent agreed to let her be seen at the club so as to enhance her reputation, or to keep her hand in, or even just maintain networking in a congenial workplace'

refuse to attend to him. It was this element of control which established that the claimant was in fact an employee.⁶⁰

The Court of Appeal took a different view, primarily because they did not regard it as appropriate in the circumstances for the EAT to have interfered with the findings of fact made by the first instance tribunal, particularly in relation to the existence of a contract of employment.⁶¹ The conclusions of the tribunal were not perverse, and there were no grounds which justified the EAT in opening them up again and substituting its own judgement.⁶²

The only substantial judgement in the Court of Appeal was given by Elias LJ, who found that the economic risk taken by the claimant, coupled with the lack of obligation on the part of the defendants to provide *any* remuneration, supported the tribunal's conclusion that there was no contract of employment.⁶³ However, the remuneration point was not determinative, and it was necessary to look at the circumstances in the round.⁶⁴ Ultimately the critical point was not whether the findings of fact made by the employment tribunal were preferable to the findings of fact by the EAT; but that the EAT should not have been interfered with the findings at all.

⁶⁰ Ibid para 49: '*As I see it, a contract exists between me and an emergency plumber. It contains mutual obligations: the plumber must turn out and fix the leak and I must pay her. She is not my employee because control is wanting. The finding of mutual obligations to do with work does not go far enough without control.*'

⁶¹ *Quashie v Stringfellows Restaurants Ltd* [2012] All ER (D) 229 (Dec) per Elias LJ para 46.

⁶² Ibid.

⁶³ Ibid para 51.

⁶⁴ Ibid para 47: '*I would accept, as the EAT found, that in some cases waiters or waitresses may be employed under a contract of service notwithstanding that they are paid at least substantially from the tips left by the customers. As Cozens-Hardy MR observed in Penn v Spiers and Pond Ltd [1912] 3 KB 576, 10 LGR 1050, 77 JP 11, "... there are many classes of employee whose remuneration is derived largely from strangers", citing hotel porters. Each case turns on the particular arrangements under which the contract is made and performed. But in my judgment, it is impossible to say that the only legitimate inference on the facts was that the club was paying the dancers.*'

Another case which supports the approach of considering the situation in its entirety is *Knight v Fairway and Kenwood Car Service*; here a mini-cab driver failed to establish employment status in relation to the cab firm which supplied him with customers.⁶⁵ As Pigott suggests the absence of control appears to have been a significant factor in this failure.⁶⁶ The claimant was not even obliged to work at all.⁶⁷ Furthermore, it was significant that not only were there written terms, on the facts there was no reason to doubt that they were genuine and accurately reflected the arrangement between the parties.⁶⁸

In other recent cases courts and tribunals have considered the totality of the relationship between the parties, and assessed whether the facts in the round support a conclusion that the arrangement amounted to employment for the purposes of relevant statutory provisions.⁶⁹

So in summary an individual's employment status will depend upon two issues: 1) the terms upon which he or she is providing services to another party. In establishing these the fact finding tribunal will look at *all* of the circumstances of the case, and not confine itself to the

⁶⁵ *Knight v Fairway and Kenwood Car Service* [2012] All ER (D) 03 (Sep) 2012 UKEAT/0075/12.

⁶⁶ C Pigott, 'Employment: In search of a common thread', 162 NLJ 1241.

⁶⁷ *Knight v Fairway and Kenwood Car Service* UKEAT/0075/12/LA, (Transcript) per Judge Shanks para 12.

⁶⁸ Ibid para 16: 'It seems to me that the *St Ives* decision is quite distinguishable from the one I am concerned with. The first very important thing to note is that in that case there were, as far as I can see, no written terms governing the overall relationship. Here there were terms governing the relationship and no-one has suggested they were not genuine terms; they enabled the Claimant to sign on at any point in the week as and when he wished or not to do so as and when he wished, and if he signed on the obligations of the Respondent company were clear. In the *St Ives* case, as I say, it appears there were no written terms to start with.'

⁶⁹ See for example *Westwood v Hospital Medical Group* [2012] All ER (D) 264 (Jul), [2012] EWCA Civ 1005, in which a cosmetic surgeon was held to be an employee in relation to the defendant clinic, even though his written agreement stated that he was a self-employed professional; and, *Pulse Healthcare v Carewatch Care Services Ltd* [2012] UKEAT/0123/12/BA in which a number of care-workers had been engaged for several years under zero-hours contracts, but were found to be employees engaged under global or umbrella employment contracts, as the written agreements in place did not reflect the true position.

ambit of any written agreements; and 2) the scope of the legislative provisions upon which he or she is seeking to rely.

In the case of Church in Wales clergy, the first of these issues encompasses specific legal questions relating to the employment status of ministers of religion. These questions are explored in detail below. However it must be remembered that the particular complexities which apply to religious ministers exist *in addition to* the wider complexities which have been introduced above.

1.3 Employment status - special considerations relating to ministers of religion in general

It would clearly be futile to discuss particular aspects of employment protection in relation to Church in Wales clergy, if their status as ministers of religion barred them from any recourse to employment law. Until the closing decades of the twentieth century, the prevailing orthodoxy was that this was indeed the case.

In *Re National Insurance Act 1911: Re Employment of Church of England Curates*⁷⁰ the High Court concluded that curates were not employees, but were office holders; and that the functions and control of curates was determined by ecclesiastical jurisdiction rather than contract. Parker J stated that:

⁷⁰ *Re National Insurance Act 1911: Re Employment of Church of England Curates* (1912) 2 Ch 563

*'I have come to the conclusion that the position of a curate is the position of a person who holds an ecclesiastical office, and not the position of a person whose rights and duties are defined by contract at all.'*⁷¹

And:

*'whatever authority either [the bishop or vicar] exercises over him is an authority which can be exercised by virtue of the ecclesiastical jurisdiction, and not an authority which depends in any case upon contract'*⁷²

His conclusion raised two questions for later courts and tribunals to address: 1) Does holding an office automatically preclude an individual from claiming employment status?

And; 2) Is it ever possible for work encompassing spiritual duties to be governed by contract, rather than the exclusive jurisdiction of the spiritual authority which confers them?

With regard to the first question, it should be emphasised that although Parker J found that Church of England curates were office holders and were not employees, he did not assert that office-holding and employment were mutually exclusive states.⁷³ The conclusion that a particular group of workers had duties which derived exclusively from their office and not from any contractual agreement, does not amount to a finding that office-holding and

⁷¹ Ibid, 569.

⁷² Ibid, 570.

⁷³ Whether classifying an assistant curate as an 'office-holder' was correct in relation to Edwardian ecclesiastical law is debatable. Certainly the position did not confer comparable security of tenure and other rights attached to ecclesiastical offices such as Incumbent. Ultimately the appropriateness of the term depends upon the definition of 'office-holder' which is adopted. There is no all encompassing definition of office in contemporary law (see for example HM Revenue & Customs, 'Specific Issues, Office Holders, Recognising Office Holders', <http://www.hmrc.gov.uk/manuals/vbnbmanual/vbnb41000.htm> (accessed 14/3/2013) and there is no evidence that a universal definition existed historically in UK Common Law. If Parker J categorised an assistant curate as an office holder because this status denoted a legal relationship, but one based in ecclesiastical law rather than contract, then this definition is at least defensible. Certainly the point was not raised on appeal, and was not a feature of subsequent cases, many of which concerned ministers who were not Anglican and therefore clearly not holders of ecclesiastical offices in the Church of England.

employment are necessarily incompatible in all circumstances. Nevertheless, some commentators still appear to treat office holding and employment as mutually exclusive states.⁷⁴

Cranmer asserts that:

*“the Church of England, whose Review of Clergy Terms of Service concluded unequivocally that parish clergy should continue to be office-holders rather than employees”.*⁷⁵

The words *‘rather than’* convey a clear sense that employment status and office holding are either or choices. However, an alternative and more nuanced phrasing would have been *‘parish clergy should retain the status of office holders and not take on the additional status of employment’*.

Recent case law has clearly affirmed the view that the question of whether an individual is an employee is entirely separate from the question of whether he or she is an office holder.⁷⁶ Office holders, including some clergy, may or may not also be employees.⁷⁷ However the issue has generated sufficient controversy to merit closer examination.

⁷⁴ F Cranmer, ‘Clergy Employment, Judicial Review and the Free Presbyterian Church of Scotland’, *Ecc LJ* 12 (2010) 355, 359-378.

⁷⁵ *Ibid*, 360.

⁷⁶ *Percy v Church of Scotland Board of National Mission (respondents)* [2005] UKHL 73 per Lord Nicholls para 18; *New Testament Church of God v Stewart* [2008] IRLR 134, and [2010] All ER (D) 265 (Mar) *Macdonald v Free Presbyterian Church of Scotland*.

⁷⁷ *Macdonald v Free Presbyterian Church of Scotland* [2010] All ER (D) 265 (Mar).

In *Diocese of Southwark v Coker*⁷⁸ the chairman of the employment tribunal, Prof. Rideout, found that the claimant who was an assistant curate, was not an office holder. This conclusion was related to Prof. Rideout's finding that Coker was an employee, and it drew criticism both from the EAT⁷⁹ and the Court of Appeal.⁸⁰ Mummery LJ concluded:

*"The critical point in this case is that an assistant curate is an ordained priest. The legal effect of the ordination of a person admitted to the order of priesthood is that he is called to an office, recognised by law and charged with functions designated by law in the Ordinal, as set out in the Book of Common Prayer..... It is unnecessary for him to enter into a contract for the creation, definition, execution or enforcement of those functions."*⁸¹

However, even this statement does not amount to an assertion that it is impossible for an individual to be both an office holder and an employee; rather Mummery LJ argued that the nature of the office to which Church of England curates are appointed made it 'unnecessary' for them to enter into contractual obligations. Therefore, his reasoning on the issue of office holding/employment appeared to leave open the possibility of the Church of England entering into contractual relations with its clergy should it deem it necessary or even expedient at some future point. Furthermore, there was once again no attempt to define 'office holding', or to clarify which aspects of the curate's relationship with the church meant that it was properly characterised as an 'office'.

⁷⁸ *Diocese of Southwark v Coker* [1995] ICR 563.

⁷⁹ *Diocese of Southwark v Reverend Doctor Coker* EAT 25 March 1996 Official Transcripts (1990-1997).

⁸⁰ *Diocese of Southwark v Coker* [1998] ICR 140, The Times 17 July 1997.

⁸¹ *Ibid*, per Mummery LJ para 3.

In *Percy v Church of Scotland Board of National Mission*,⁸² Lord Hoffman took a stronger line, arguing that the concepts of office holding and employment had always been distinct in UK law, and that clergy had always been understood to be office holders.

The case concerned a female Church of Scotland minister, who was alleged to have had an affair with a married elder in her parish. She was suspended with pay whilst the allegations were investigated, but resigned before formal disciplinary proceedings could be carried out. Ms Percy issued a claim in the employment tribunal, asserting that she had been discriminated against on grounds of her sex and unfairly dismissed. She cited s.6 of the Sex Discrimination Act 1975, and argued that the Church of Scotland had treated her differently from male ministers against whom similar allegations had been made, and who had not been subjected to formal investigation and proceedings.

The employment tribunal rejected her claim on the ground of lack of jurisdiction, and the EAT and the Court of Session both dismissed her appeal.⁸³ In the Court of Session the Lord President held that where duties were essentially spiritual, there was a rebuttable presumption against an intention to create legal relations, and was not satisfied that the presumption could be rebutted on the facts before him.⁸⁴

⁸² *Percy v Church of Scotland Board of National Mission (respondents)* [2005] UKHL 73 per Lord Hoffman paras 67-74.

⁸³ The jurisdiction point related to the Church of Scotland Act 1921, as Article IV in the Schedule to the Act gave the church exclusive jurisdiction over spiritual matters. However s.3 of Act expressly preserved the jurisdiction of the civil courts in relation to civil matters, and the House of Lords concluded that a sex discrimination claim relating to a minister's working arrangements was a civil matter. Per Lord Nicholls, para 40: '*The theme running through these provisions is that in matters spiritual the church and its courts have exclusive jurisdiction. The expression 'matters spiritual' is not defined. But, on any ordinary understanding of this expression, if the church authorities enter into a contract of employment with one of its ministers, the exercise of statutory rights attached to the contract would not be regarded as a spiritual matter.*'

⁸⁴ *Ibid.*

In considering the appeal, Lord Hoffman found that The Church of Scotland *had* intended to create legal relations with its ministers, but on the basis of office holding and not employment, and it was for courts and tribunals to apply the law on this basis. In particular, it was not appropriate to confer statutory employment protection which applied to all employees, but only the office holders named in the statute. Parliament must have been aware that such legislation would exclude clergy, and it was not for the courts to extend its remit.⁸⁵

However, Lord Hoffman was dissenting; Lord Nicholls who gave the leading speech took a different view, and also dealt with the office holding point at length. He acknowledged the one element of Parker J's reasoning in *Re: Employment of Church of England Curates*⁸⁶ was that curates were appointed to ecclesiastical office as distinct from entering into a contract of service. Nevertheless he cautioned that:

*'The contrast is capable of misleading. It needs to be handled with care in the present context.'*⁸⁷

He noted that before modern statutory employment protection was introduced, office holders generally enjoyed greater legal protection than employees or servants, particularly in relation to dismissal. Furthermore the legal concept of holding an office was of uncertain ambit.⁸⁸ In contemporary law holding an office, even an ecclesiastical one, was not

⁸⁵ Ibid, per Lord Hoffman para 67.

⁸⁶ *Re National Insurance Act 1911: Re Employment of Church of England Curates* (1912) 2 Ch 563.

⁸⁷ *Percy v Church of Scotland Board of National Mission (respondents)* [2005] UKHL 73 per Lord Nicholls para 14.

⁸⁸ Ibid, para 17.

incompatible with simultaneously being party to a contract to provide services.⁸⁹ He cited Slynn J in *Barthorpe v Exeter Diocesan Board of Finance*,⁹⁰ and the EAT in *Johnson v Ryan*,⁹¹ to support this conclusion. In the Johnson case the claimant was a rent office and consequently statutory office holder, but it did not automatically follow that she was therefore not an employee. If legal obligations deriving from an office could coexist with obligations deriving from contract in that context, why not in the ecclesiastical sphere?

The Court of Appeal in *New Testament Church of God v Stewart*,⁹² and the EAT in *Macdonald v Free Presbyterian Church of Scotland*,⁹³ both followed Lord Nicholl's reasoning on this point, and it is submitted that it represents the current legal position. Firstly, it is the clearly expressed majority view of the House of Lords in *Percy v Church of Scotland*,⁹⁴ and is therefore binding authority.

Secondly, even Lord Hoffman, the firmest critic of this analysis, did not put forward an argument as to *why* employment and office holding could not coexist. Thirdly, as will be discussed further below, the concept of 'employment' is proving increasingly malleable. An individual may be an employee for some purposes but not for others.⁹⁵ Therefore whether an individual may be both an employee and an office holder must surely depend upon what is meant by 'employee' in the given context. As there is no longer a broad or firm

⁸⁹ Ibid, para 18.

⁹⁰ *Barthorpe v Exeter Diocesan Board of Finance* [1979] ICR 900, p 904.

⁹¹ *Johnson v Ryan* [2000] ICR 236.

⁹² *New Testament Church of God v Stewart* [2008] IRLR 134.

⁹³ *Macdonald v Free Presbyterian Church of Scotland* [2010] All ER (D) 265 (Mar).

⁹⁴ *Percy v Church of Scotland Board of National Mission (respondents)* [2005] UKHL 73 per Lord Nicholls para 14.

⁹⁵ *Jivraj v Hashwani* [2010] EWCA Civ 712.

understanding of employment, it is no longer appropriate to make unyielding generalisations about the consequences of applying the label employee.

Consequently, the first question raised by Parker J's conclusions: 1) Does holding an office automatically preclude an individual from claiming employment status?, must now be answered negatively. Which leaves the second question: 2) Is it ever possible for work encompassing spiritual duties to be governed by contract, rather than the exclusive jurisdiction of the spiritual body which confers them?

Evans⁹⁶ interprets the decision in *Re: Employment of Church of England Curates* as drawing a distinction between:

'contractual obligation and spiritual authority which is of its nature extra-legal, and which it was argued, was what bound a curate in the Church of England to his vicar. And it was taken that if such a distinction existed, the relationship must be one thing or the other and could not be both'

However, it is not clear that this interpretation can be supported by a careful reading of the judgement given by Parker J.⁹⁷ His thorough judicial analysis did not focus on the question of whether a contractual obligation and ties of spiritual authority could theoretically co-exist. Instead it revolved around the very practical issue of how precisely the appointment and working arrangements of curates were regulated. The judge was quite properly not concerned with the hypothetical question of whether things could be arranged differently,

⁹⁶ G Evans, *Discipline and Justice in the Church of England* (Gracewing, Leominster 1998) 26.

⁹⁷ *Re National Insurance Act 1911: Re Employment of Church of England Curates* (1912) 2 Ch 563, 570.

but analysed the arrangements which were in fact in place. He concluded that the curate's duties were imposed by ecclesiastical jurisdiction not a contract for service. Given that curate's working arrangements were not regulated by an agreement purporting to be binding in secular contract law, there was no need to speculate about such an agreement (and any such speculation would technically have been non-binding *obiter dicta*).

This point is significant because this case has remained the starting point for academic⁹⁸ and judicial⁹⁹ discussions of the employment status of Church of England clergy for almost one hundred years, and has not been overruled. It is therefore important to be clear about exactly what precedent the decision sets.

It is also worth noting that Parker J was considering whether there was an employment relationship between a vicar and a curate, and that this was a material consideration for him:

*'If I were to hold that the vicar and his curate were in the position of master and servant, I might be imposing on the vicar at common law very serious liabilities, from which I think, in all common sense, he ought to be exempt.'*¹⁰⁰

⁹⁸ See for example N Doe, 'Ministers of religion and employment law in the UK: recent judicial developments', *Anuario de Derecho Eclesiastico del Estado*, Vol XIII (1997) 349, 351.

⁹⁹ It was cited and discussed in: *Rogers v Booth* [1937] 2 All ER 751; *The President of the Methodist Conference v Parfitt* [1984] IRLR 141; *Davies v Presbyterian Church of Wales* [1986] IRLR 194; *Guru Nanak Sikh Temple v Sharry* EAT 21 Dec 1990 Official Transcripts (1990-1997); *Coker v Diocese of Southwark* [1995] ICR 563; and *Percy v Church of Scotland Board of National Mission* [2006] IRLR 195.

¹⁰⁰ *Re Employment of Church of England Curates* (1912) 2 Ch 563, p 570.

Although Parker J did not elaborate upon what he meant by ‘serious liabilities’ at common law, it appears from the context that he had in mind the contractual liabilities which would flow from finding that curates were employed by their vicars. In rejecting this approach and concluding that the curates’ working arrangements were governed solely by the ecclesiastical jurisdiction, he shielded vicars from the personal liability in contract to which they would otherwise have been exposed.

The arrangements for appointing and paying Church of England and Church in Wales clergy have changed radically since the case was decided, and it seems unlikely that a vicar or other priest tasked by the church with supervising and training a curate would be the choice of ‘employer’ in any proceedings brought by a curate in a contemporary court. Training incumbents are not directly involved in the remuneration of curates, and the Draft Clergy Terms of Service¹⁰¹ treat senior clergy as having a managerial and pastoral role with regard to junior colleagues.¹⁰² Training incumbents are presented as acting as line-managers within the greater structure of the Church in Wales, and like curates are subject to the direction and discipline of that organisation.¹⁰³ It would therefore be difficult to construe training incumbents as employers, rather than senior colleagues.

¹⁰¹ Church in Wales, *Clergy Terms of Service* (CTS).

¹⁰² See for example CTS 3.2: ‘Clergy are often placed in a position of power over others, in pastoral relationships with lay colleagues and sometimes with other clergy. This power needs to be used to sustain others and harness their strengths, and not to bully, manipulate or denigrate. They should be aware of the Church in Wales Bullying and Harassment Policy’ and CTS 3.15: ‘It is important to safeguard the right of parishioners to share personal information with one minister and not another. In a team situation, or in an area where clergy are seeking to work collaboratively, it may be advisable to create a policy to avoid the danger of ministers within a team of being manipulated and divided by the sharing of personal information with one and not another. Assistant clergy in training posts should make it clear to those to whom they are ministering that information given to them will normally be shared with their training incumbent’.

¹⁰³ CTS 3, CTS 8, CTS 10, CTS 12.

In the later case of *Rogers v Booth*,¹⁰⁴ a Salvation Army Officer argued that she was a worker for the purpose of the Workmen's Compensation Act.¹⁰⁵ Greene MR concluded that the relationship between the officer and her General was spiritual rather than contractual. Once again Evans interprets this as evidence that the court saw spiritual and contractual obligations as being incompatible, quoting the judgement and adding emphasis:

*'relationship between the appellant and the General of the Salvation Army was a purely spiritual one, and not [my emphasis] a contractual one'*¹⁰⁶

However it could be argued that the judgement is in fact more nuanced than this interpretation acknowledges. Greene MR examined the 'Orders and Regulations for Officers of the Salvation Army'¹⁰⁷ and concluded that they described a rule of life and work for individuals electing to follow a chosen spiritual path, rather than setting out terms of employment. For instance, he noted that it was clear that money was paid to officers so that they did not have to find other means of supporting themselves; it was not paid as remuneration for work done:

'Then Appendix I sets out a number of undertakings which are embodied in the application form which the intending officer has to sign, and to which I shall refer in a moment. On p 444 of the book is a chapter entitled "Salary," and para 1 says this:

'Every officer becomes such upon the distinct understanding that no salary or allowance is guaranteed to him.'

Then there is this:

'The officer is pledged to do his duty, with or without pay; he works from love to God and souls, whether he receives little or much.'

¹⁰⁴ *Rogers v Booth* (1937) 2 All ER 751.

¹⁰⁵ Workmen's Compensation Act 1925.

¹⁰⁶ G Evans, *Discipline and Justice in the Church of England* (Gracewing, Leominster 1998) 26.

¹⁰⁷ *Rogers v Booth* (1937) 2 All ER 751.

This supported his conclusion that this *particular* arrangement was exclusively spiritual in character. However, he did not assert that it was impossible to envisage any arrangement with a substantial spiritual element also having a contractual dimension.

As Hoskins observes,¹⁰⁸ there are dicta from later cases which acknowledge the possibility of spiritual and employment relationships co-existing, even though such co-existence was not found on the facts before the court. She cites Slynn J in *Barthorpe v Exeter Diocesan Board of Finance*¹⁰⁹ (see further discussion below), and Dillon LJ in *President of the Methodist Conference v Parfitt*.¹¹⁰

However, these judicial pronouncements were made in cases which, taken as a whole, tended to weaken any argument for the possibility of spiritual and contractual obligations being held together.

*Barthorpe v Exeter Diocesan Board of Finance*¹¹¹ concerned a stipendiary lay-reader rather than an ordained minister. Barthorpe was licensed by the bishop, but had also been given a document headed 'Terms of Reference for Employment'. Consequently, it could be argued that there was evidence of an intent to enter into contractual relations, *in addition* to the ecclesiastical relationship conferred by the licence and set out in its terms. Although Slynn J did acknowledge the theoretical possibility of finding an employment contract in an area regulated by ecclesiastical jurisdiction, he also flagged up the difficulty of establishing the

¹⁰⁸ Maria P Hoskins, 'Servants of God in Employment', ELA Briefing Volume 14 Number (2 March 2007), 22.

¹⁰⁹ *Barthorpe v Exeter Diocesan Board of Finance* (1979) ICR 900.

¹¹⁰ *President of the Methodist Conference v Parfitt* 1983 3 All ER 747.

¹¹¹ *Barthorpe v Exeter Diocesan Board of Finance* (1979) ICR 900.

contracting parties and doubted that office holders such as bishops, incumbents and cathedral deans could be employees.

In *President of the Methodist Conference v Parfitt*,¹¹² the recognition by Dillon LJ that a person undertaking spiritual work could have a contract covering matters such as holidays and remuneration, was accompanied by an assertion that this would be unusual.

Furthermore, May LJ based his findings on the conclusion that there was no intention to create legal relations, and therefore could be no enforceable contract of any kind.

The House of Lords continued on this somewhat confused trajectory in *Davies v Presbyterian Church of Wales*,¹¹³ seeming to affirm the possibility of ministers having employment contracts, whilst at the same time being unwilling to conclude that one existed on the facts at issue, and cautious about when such a finding might properly be made. The only substantial judgement was given by Lord Templeman. Like Dillon LJ in *President of the Methodist Conference v Parfitt*,¹¹⁴ he acknowledged the theoretical possibility of a contract existing in relation to a spiritual post:

'My Lords, it is possible for a man to be employed as a servant or as an independent contractor to carry out duties which are exclusively spiritual'.¹¹⁵

However, he then went even further than Dillon LJ in describing the practical limitations of this possibility:

¹¹² *President of the Methodist Conference v Parfitt* 1983 3 All ER 747.

¹¹³ *Davies v Presbyterian Church of Wales* (1986) 1 All ER 705.

¹¹⁴ *President of the Methodist Conference v Parfitt* 1983 3 All ER 747.

¹¹⁵ *Davies v Presbyterian Church of Wales* (1986) 1 All ER 705, per Lord Templeman para 20.

*'A pastor is called and accepts the call. He does not devote his working life but his whole life to the Church and his religion. His duties are defined and his activities are dictated not by contract but by conscience. He is the servant of God. If his manner of serving God is not acceptable to the Church, then his pastorate can be brought to an end by the Church in accordance with the rules.'*¹¹⁶

In characterising those in ministerial appointments as 'servants of God' undertaking a whole life commitment to serve God when accepting their appointments, he restricted the scope for clergy to argue that they were employees. They would need to show a clear and definite agreement being made with an earthly entity as well as with God; evidence of appointment to a spiritual post would not be enough, as Davies' failure demonstrated. Even if this could be established, it would also be necessary to show that there were clear contractual terms of the sort enforceable in the secular courts, and that the parties intended for them to be legally binding.

Subsequent judicial decisions indicated a marked reluctance by Employment Appeal Tribunals to find an intention to create legal relations. In *Santokh Singh v Guru Nanak Gurwara*¹¹⁷ and *Guru Nanak v Sharry*¹¹⁸ it was found that written agreements using the phrases 'employee of the temple' and 'contract' respectively were not sufficient to demonstrate an intention to create legal relations. In *Birmingham Mosque v Alavi*¹¹⁹ a

¹¹⁶ Ibid.

¹¹⁷ *Santokh Singh v Guru Nanak Gurwara* (1990) ICR 309.

¹¹⁸ *Guru Nanak v Sharry* EAT 21/12/90 (145/90).

¹¹⁹ *Birmingham Mosque v Alavi* (1992) ICR 435.

written statement of contractual intent, and clear terms about salary, hours and duties were not held to be sufficient to establish intention to form a contract.

The Court of Appeal took at similarly restrictive line in *Diocese of Southwark v Coker*.¹²⁰ Mummery LJ followed *Re National Insurance Act 1911: Re Employment of Church of England Curates* in finding that Church of England curates were covered by ecclesiastical jurisdiction rather than secular contract law. He also stated that *Davies v Presbyterian Church of Wales*¹²¹ and *President of the Methodist Conference v Parfitt*¹²² both turned on the absence of an intention to create legal relations.

Writing before *Percy v Church of Scotland Board of National Mission*¹²³ had been decided, Doe¹²⁴ argued that the cases of *Davies v Presbyterian Church of Wales* and *President of Methodist Conference v Parfitt* saw the first emergence of the judicial idea that there was a rebuttable presumption against an intention to create contractual relations in cases involving ministers of religion; and that the EAT in *Santokh Singh v Guru Nanak Gurwara*,¹²⁵ *Guru Nanak v Sharry*¹²⁶ and *Birmingham Mosque v Alavi*¹²⁷ had effectively moved to the point where the presumption had become irrebuttable.

¹²⁰ *Diocese of Southwark v Coker* (1997) Times, 16 July.

¹²¹ *Davies v Presbyterian Church of Wales* (1986) 1 All ER 705.

¹²² *President of the Methodist Conference v Parfitt* (1983) 3 All ER 747.

¹²³ *Percy v Church of Scotland Board of National Mission* [2006] IRLR 195.

¹²⁴ N Doe, 'Ministers of religion and employment law in the UK: recent judicial developments', *Anuario de Derecho Eclesiastico del Estado*, Vol XIII (1997) 349,353.

¹²⁵ *Santokh Singh v Guru Nanak Gurwara* (1990) ICR 309.

¹²⁶ *Guru Nanak v Sharry* EAT 21/12/90 (145/90).

¹²⁷ *Birmingham Mosque v Alavi* (1992) ICR 435.

Although Doe's analysis accurately reflects judicial decisions at the time his article was published, subsequent rulings by the higher courts¹²⁸ have rejected the existence of *any* presumption against an intention to create legal relations in the case of religious ministers, let alone an irrebuttable presumption. Furthermore, there is reason to doubt whether the presumption ever actually existed in a coherent form. At best it was an inchoate concept, which the higher courts chose in due course to retreat from rather than to crystallise.

Firstly, it was not clear from whence the supposed presumption originated. It was not referred to in *Re: Employment of Church of England Curates*¹²⁹ or *Rogers v Booth*.¹³⁰ As it could not be justified on the basis of authority, it needed a clear and reasoned underpinning if it was to survive and develop. In *Methodist Conference v Parfitt*¹³¹ Dillon LJ and May LJ gave different reasons for rejecting the existence of a contract between the minister and the Methodist church. Dillon LJ stressed the practical and legal difficulty of expressing spiritual duties in enforceable contractual terms,¹³² whilst May LJ¹³³ focused on the idea that the agreement between Parfitt and the Methodist church was not in its nature a contractual agreement. Neither discussed the point that secular organisations, such as NHS trusts, sometimes enter into contracts with clergy to perform the spiritual duties of chaplaincy.¹³⁴ If, as Dillon LJ in particular stressed, expressing spiritual duties in contractual terms was so challenging, why was it achievable in that context? What was it about religious organisations and ministers which made contractual relations so problematic?

¹²⁸ *Percy v Church of Scotland Board of National Mission* [2006] IRLR 195; *New Testament Church of God v Stewart* [2008] IRLR 134; and *Macdonald v Free Presbyterian Church of Scotland* [2010] All ER (D) 265 (Mar).

¹²⁹ *Re Employment of Church of England Curates* (1912) 2 Ch 563.

¹³⁰ *Rogers v Booth* (1937) 2 All ER 751.

¹³¹ *President of the Methodist Conference v Parfitt* 1983 3 All ER 747.

¹³² *Ibid*, per Dillon LJ paras 21-24.

¹³³ *Ibid*, per May LJ para 39.

¹³⁴ 'NHS Careers in Detail-Wider healthcare team-Types of careers-Corporate services-chaplain' www.nhscareers.nhs.uk/details/ accessed 9/2/2011

The House of Lords did little to elucidate the question in *Davies v Presbyterian Church of Wales*.¹³⁵ As set out above, Lord Templeman stated that the minister was a servant of God, not of the Church, and that his behaviour was governed by conscience rather than contract.¹³⁶ This statement was somewhat problematic when the church for which Davies served evidently expected his working life to be governed by its rules, and not solely by his conscience; Lord Templeman dealt extensively with the relevant 'book of rules' in his judgement.¹³⁷

He did not, however, articulate clearly why these rules, or Davies' agreement to abide by them, should not be contractual. Given that he also acknowledged the theoretical possibility of churches entering into contracts with ministers, this left the reason for the presumption, and its scope uncertain. If it was possible to rebut the presumption, what had to be proven in order to achieve this?

The decision of Mummery J in *Diocese of Southwark v Coker*¹³⁸ added no further explanation for the purported presumption, nor did it give further guidance about its extent or limitations. Therefore, even at the highpoint of this trend, the presumption was of uncertain scope, origin and purpose. It is not surprising that such a confused and unformed legal concept failed to survive. The now complete retreat from the presumption (in so far as it existed), endorsed by both the Supreme Court¹³⁹ and the Court of Appeal,¹⁴⁰ achieved

¹³⁵ *Davies v Presbyterian Church of Wales* (1986) 1 All ER 705.

¹³⁶ *Davies v Presbyterian Church of Wales* (1986) 1 All ER 705 per Lord Templeman para 20.

¹³⁷ See for example *ibid*, para 7.

¹³⁸ *Diocese of Southwark v Coker* (1997) Times, 16 July.

¹³⁹ *Percy v Church of Scotland Board of National Mission* [2006] IRLR 195.

without any of the authorities being reversed, is further evidence of the fragility of the concept.

The retreat began when the House of Lords considered *Percy v Church of Scotland Board of National Mission*.¹⁴¹ In this case the court found that a minister within the Church of Scotland was an employee for the purposes of the Sex Discrimination Act. Baroness Hale directly attacked the idea that the spiritual character of ministers' work sets them entirely apart from other professionals, putting out that other professionals, including lawyers, are obliged to serve higher principles and values.

In seeking to establish that there was a contract in place, Lord Scott argued that if Ms Percy's salary had been withheld, then she would surely have been able to sue for non-payment. This statement is striking, as it appears to take for granted that there must have been an intention to create legal relations in regard to the financial aspects of Ms Percy's working arrangements; it contrasts sharply the reluctance of the Employment Appeal Tribunals to find any such intention in the cases discussed above.

In the wake of this decision, Duddington argued that it had created a situation in which ministers were covered by discrimination law, but not by other aspects of employment law.¹⁴² It was not clear however that this was actually the case. The judicial pronouncements discussed above in *Davies v Presbyterian Church of Wales, President of the Methodist Conference v Parfitt* and *Diocese of Southwark v Coker* left open the possibility of

¹⁴⁰ *New Testament Church of God v Stewart* [2008] IRLR 134S.

¹⁴¹ *Percy v Church of Scotland Board of National Mission* [2006] IRLR 195.

¹⁴² J Duddington, 'Ministers of Religion and discrimination law: A tale from the Glens of Angus' *Law and Justice* 156 (2006) 9.

a minister and his faith community choosing to enter into a legally enforceable contract of employment.

The Court of Appeal affirmed this interpretation in *New Testament Church of God v Stewart*,¹⁴³ finding that the *Percy v Church of Scotland Board of National Mission*¹⁴⁴ did not overrule the earlier cases, but established that the fact finding tribunal is no longer required to approach its consideration of the minister/church relationship with the presumption that there was no intention to create legal relations. A spiritual motivation for engaging in work does not necessarily preclude an intention to create legal relations. As a result the minister in this case was permitted to bring a claim for unfair dismissal.

This conclusion is consistent with the general approach which UK law takes towards the intention to create legal relations. As Hibbert argues,¹⁴⁵ the courts are reluctant to allow parties to escape from purported agreements on the basis that they had no intention to create legal relations. He cites the cases of (1) *Maple Leaf Macro Volatility Master Fund (2) Astin Capital Management Ltd v Rouvroy and another*,¹⁴⁶ and *Bear Stearns Bank plc v Forum Global Equity Ltd*,¹⁴⁷ in support of this. Both cases are drawn from the commercial rather than the employment sphere, but both demonstrate an unwillingness to allow parties to use either intention to create legal relations, or uncertainty, as a means to wriggle out of economically disadvantageous agreements. *Mapleleaf* was concerned with whether a negotiated term sheet was binding in relation to an agreement to borrow money from a

¹⁴³ *New Testament Church of God v Stewart* [2008] IRLR 134.

¹⁴⁴ *Percy v Church of Scotland Board of National Mission* [2006] IRLR 195.

¹⁴⁵ T Hibbert, 'To contract or not contract' JIBFL 6 (2009) 314.

¹⁴⁶ (1) *Maple Leaf Macro Volatility Master Fund (2) Astin Capital Management Ltd v Rouvroy and another* [2009] EWHC 257 Comm.

¹⁴⁷ *Bear Stearns Bank Plc v Forum Global Equity Ltd* [2007] EWHC 1576 (Comm).

hedge fund, and *Bear Stearns* involved a telephone agreement to sell loan notes for a certain price. In both instances the parties were found to be contractually liable.

In both cases the relevant test was held to be how would a reasonable man, versed in the relevant business, view the agreement? Asking at what stage a commercial party may draw back from a bad bargain is very different to asking whether a relationship between two parties constitutes employment. Nevertheless, the cases illustrate that the courts do not ordinarily apply a high threshold in establishing an intention to create legal relations.

Also agreements which would appear to an objective and informed outsider to be contractually binding will be taken to be so. Many of the clergy employment cases involved an exchange of documents which a reasonable person versed in human resources and employment practice, might well have deemed to be a contract of employment. For example in *Guru Nanak v Sharry* a document was exchanged which was expressly labelled 'contract'.¹⁴⁸

The general principles of contract law are as relevant to employment contracts as they are to commercial ones. If a special standard of intent to create legal relations was required in the context of clergy employment contracts, there would have to be a demonstrable legal justification for this.

¹⁴⁸ *Guru Nanak v Sharry* EAT 21/12/90 (145/90).

One possible justification for caution, if not for a legal presumption, was raised by the House of Lords in *Percy v Church of Scotland Board of National Mission*.¹⁴⁹ The court noted that Article 9 of the ECHR does require the fact finding tribunal to adopt a different approach to evidence where religious practices and beliefs are involved:

'Article 9 – Freedom of thought, conscience and religion

- 1. Everyone has the right to freedom of thought, conscience and religion; this right includes freedom to change his religion or belief and freedom, either alone or in community with others and in public or private, and to manifest his religion or belief, in worship, teaching, practice and observance.*
- 2. Freedom to manifest one's religion or beliefs shall be subject only to such limitations as are prescribed by law and are necessary in a democratic society in the interests of public safety, for the protection of public order, health or morals, or for the protection of the rights and freedoms of others.*¹⁵⁰

The requirement to respect faith and doctrine imposed by this article means that a court should not readily impose a legal relationship on members of a faith community where this would be contrary to their religious beliefs.

It is submitted that whilst this interpretation of Article 9 has some merit, there are several reasons to think that accepting an intention to create legal relations in cases involving ministers is unlikely to lead to many successful challenges on human rights grounds.

¹⁴⁹ *Percy v Church of Scotland Board of National Mission* [2006] IRLR 195.

¹⁵⁰ ECHR Article 9.

First, the case law in this area suggests that the risk of courts *imposing* a legal obligation on religious communities, without there being sufficient evidence to demonstrate an intention to create legal relations, is slight. The decisions in *Santokh Singh v Guru Nanak Gurwara*,¹⁵¹ *Guru Nanak v Sharry*,¹⁵² and *Birmingham Mosque v Alavi*,¹⁵³ seem to indicate reluctance on the part of some tribunals to acknowledge and enforce the legal obligations which members of such communities voluntarily undertake. In light of this generally cautious approach, it seems unlikely that courts will begin imposing legal obligations where evidence is not found to support them.

The Court of Appeal in *New Testament Church of God v Stewart*¹⁵⁴ made it clear that the matter of intent to create legal relations is set to remain a live issue in cases concerning employment of ministers; the question will not be taken for granted without proper consideration. Because some faith groups have doctrinal objections to contracts with ministers being subject to the jurisdiction of the secular courts, it will not be automatically assumed that any particular religious organisation intended to create legal relations. Arden LJ¹⁵⁵ even went so far as to be critical of Baroness Hale's judgement in *Percy v Church of Scotland Board of National Mission*.¹⁵⁶ She recognised Baroness Hale's judgement as having sought to reverse the trend in case law to find a lack of intention to create legal relations;

¹⁵¹ *Santokh Singh v Guru Nanak Gurwara* (1990) ICR 309.

¹⁵² *Guru Nanak v Sharry* EAT 21/12/90 (145/90).

¹⁵³ *Birmingham Mosque v Alavi* (1992) ICR 435.

¹⁵⁴ *New Testament Church of God v Stewart* [2008] IRLR 134.

¹⁵⁵ *Ibid*, para 63.

¹⁵⁶ *Percy v Church of Scotland Board of National Mission* [2006] IRLR 195.

and cited *Koeller v Coleg Elidyr (Camphill Communities Wales) Ltd*¹⁵⁷ as evidence of the need to keep this matter in the judicial consciousness.

Koeller was another Court of Appeal decision, also with Arden LJ sitting. It concerned a cooperative community which undertook the care and training of handicapped persons in the care and training of a communal environment. Decisions were made collectively by consensus, and the community operated on a non-hierarchical basis. It was accepted that members of the community were free to leave at any time without obligation, and also that members could be asked to leave if it was decided to be in the best interests of the community. In that context, Arden LJ regarded an intention to create legally enforceable obligations as running counter to the basis on which the organisation was formed.

Although the circumstances did not involve a conflict between religious doctrine and the possibility of recourse to secular law; the situation was comparable because there was a clear conflict between the shared vision and ideology of the group and the prospect of litigation. Creating legally enforceable obligations was fundamentally incompatible with the group's ethos and objectives.

However, it is not the case that the organisations like the community in *Koeller* can only be protected with special emphasis on the question of intention to create legal relations. It is well established law that such an intention is a requirement in the formation of any contract.¹⁵⁸ If, as in *Koeller*, there are grounds to argue that the intention was absent, then

¹⁵⁷ *Koeller v Coleg Elidyr (Camphill Communities Wales) Ltd* [2005] 2 BCLC 379.

¹⁵⁸ *Shah v Shah* [2001] 4 All ER 138.

the parties concerned may do so. Nothing in *Percy* implied that this element of contract law should be dispensed with altogether; it was its application rather than its existence which the court appeared to modify. None of the dicta in *Percy* suggest that parties who genuinely do not wish their arrangements to be legally enforceable will have their intentions overridden by the courts.

The EAT endorsed this view in *Macdonald v Free Presbyterian Church of Scotland*.¹⁵⁹

Macdonald was a minister, and was found on examination of the facts to be an office holder but not an employee. In reaching this conclusion Smith LJ was influenced by the fact that there was no documentary or even oral stipulation about hours or work, leave or sick pay¹⁶⁰; and by the fact that he was not monitored or supervised by the respondents or their local presbytery.¹⁶¹ Citing *Percy v Church of Scotland*,¹⁶² she found that there was no presumption for or against the existence of an intention to create legal relations in cases involving ministers; the starting point should be a neutral one.¹⁶³

*'Before leaving this matter I should add that Percy determined that when considering the issue of whether parties intended to create legal relations in the context of church and clergy, a tribunal ought not to begin with a presumption that there was no intention to create such a relationship. The correct starting point is, rather, a neutral one.'*¹⁶⁴

¹⁵⁹ *Macdonald v Free Presbyterian Church of Scotland* [2010] All ER (D) 265 (Mar).

¹⁶⁰ *Macdonald v Free Presbyterian Church of Scotland* EAT 10 February 2010 Judgements para 15.

¹⁶¹ *Ibid*, para 16.

¹⁶² *Ibid* paras 54-60.

¹⁶³ Citing: *Young and Woods Ltd v West* [1980] IRLR 201; *Consistent Group Ltd v Kalwak and others* [2008] EWCA Civ 430, [2008] IRLR 505; *Snook v London and West Riding Investment Ltd* [1967] 2 QB 786, [1967] 1 All ER 518, [1967] 2 WLR 1020 and *Protectacoat Firthglow Ltd v Szilagyi* [2009] EWCA Civ 98, [2009] IRLR 365, [2009] ICR 835.

¹⁶⁴ *Ibid* para 60.

Smith LJ also sought to distinguish this situation from the 'labelling' or sham contract cases;¹⁶⁵ on the basis that in those instances there was no doubt that the parties intended to enter into some sort of contractual relationship which was legally enforceable. The question about intent to create legal relations went to the existence of the contract, rather than the label which should be attached to it.

The understanding of the current position of ministers put forward by Smith LJ can be summed up as follows:

- i) There is no fixed rule as to whether ministers are or are not employees. The question of employment status is for the fact finding tribunal, and will usually be a mixed question of fact and law (although it may be exclusively a question of law if it rests entirely on the construction of documents.)
- ii) There is no hard and fast rule as to whether a working agreement amounts to a contract of employment. However there will usually be a significant degree of control, the worker will be expected to provide personal service in return for remuneration and will not appear to be in business of his own account.

On the facts of the case it was found that the minister was not an employee.

If these principles are applied in future cases, no contractual obligations will arise in the absence of a genuine intention to create legal relations. A court or tribunal will only find an employment relationship, if the agreement which the parties have reached supports this. If religious organisations are not treating their ministers as employees, then they will not be held accountable as employers. If they are treating their ministers as employees, then

¹⁶⁵ Ibid, para 59.

judicial recognition of this fact is not an infringement of their Article 9 rights. It is not possible to assert a doctrinal position which is utterly incompatible with demonstrable behaviour. Furthermore courts would not be imposing any spiritually alien framework on such bodies; they would simply be recognising the framework which they had chosen to adopt.

Although Smith LJ distinguished the labelling cases from the *Macdonald* case, the labelling cases would be relevant wherever it was accepted that there was an intent to create some sort of contractual relationship. The Court of Appeal reiterated in *Protectacoat Firthglow Ltd v Szilagyi*,¹⁶⁶ that the label which the parties choose to attach will not conclusively determine employment status; the court is concerned to ascertain the true nature of the legal relationship. If the arrangements made by faith groups dealing with ministers truly amounts to employment, then the court is *recognising* rather than imposing this status. Whilst dictating the way in manner faith communities dealt with ministers would clearly be a potential infringement of Article 9, recognising the legal consequences of their chosen course of conduct need not be.

In the first place, the specific situation rule, as it emerged from *Sahin v Turkey*,¹⁶⁷ is of relevance in context. The case concerned the dress code of a Turkish university, which refused to allow students admission to lectures or enrolment on courses whilst wearing Islamic headscarves or beards. It was held that in exercising his or her freedom to manifest religious beliefs, an individual may need to take into account a specific situation to which they have voluntarily submitted.

¹⁶⁶ *Protectacoat Firthglow Ltd v Szilagyi* [2009] All ER D 208.

¹⁶⁷ *Sahin v Turkey* (2007) 44 EHRR 5.

In the UK the courts have applied this principle in both educational¹⁶⁸ and employment¹⁶⁹ contexts. As Tyme¹⁷⁰ argues when considering Article 9 rights, there is a key distinction between the freedom to hold a religious belief, and the freedom to manifest that belief or to act upon it. *R (SB) v Governors of Denbigh High School (the Begum case)*¹⁷¹ concerned the refusal of a school to allow a female pupil to attend school wearing a jilbab, as this was contrary to the uniform policy. The House of Lords found that the decision by the school did not contravene Article 9; as per Lord Bingham, Lord Hoffman and Lord Scott, the article did not permit individuals to manifest their religious beliefs at any time and place of their choosing. Consequently there was no infringement of the pupil's Article 9.1 rights, and no need to consider whether any limitation of rights was justified under Article 9.2.

In *Ladele v London Borough of Islington*,¹⁷² the UK courts found that the employing local authority was justified in not permitting a registrar to manifest her religious beliefs by refusing to perform civil partnership ceremonies for same sex couples. In *Eweida v BA*,¹⁷³ the defendant airline's prohibition on wearing a cross at work was not found to be indirect discrimination when examined by the domestic courts. The cases were joined for consideration by the Strasbourg court,¹⁷⁴ along with two others: *Chaplin* and *McFarlane*.

¹⁶⁸ *R (SB) v Governors of Denbigh High School* [2007] 1 AC 100.

¹⁶⁹ *Ladele v London Borough of Islington* [2009] EWCA CIP 1357, [2009] All ER (D) 148 (Dec).

¹⁷⁰ David Tyme, 'Employment/Discrimination: Divided we fall' 160 NLJ 297.

¹⁷¹ *R (SB) v Governors of Denbigh High School* [2007] 1 AC 100.

¹⁷² *Ladele v London Borough of Islington* [2009] EWCA CIP 1357, [2009] All ER (D) 148 (Dec).

¹⁷³ *Eweida v BA* [2010] EWCA Civ 80, [2010] All ER (D) 144 (Feb).

¹⁷⁴ *Eweida and others v United Kingdom* [2013] ECHR 48420/10.

The *Chaplin* case concerned a Christian nurse who was not permitted to wear a cross and chain around her neck whilst carrying out clinical duties for health and safety reasons; the employer imposing the prohibition was an NHS body and uncontroversially a public authority. The *McFarlane* litigation was brought by a relationship counsellor disciplined and ultimately dismissed because he could not reconcile his interpretation of Christian scripture with counselling same sex couples, and his private sector employer could not accommodate a counsellor with these issues.

In giving judgement the ECHR did appear to partially retreat from the specific situation rule:

'It is true, as the Government pointed out and as Lord Bingham observed in R (Begum) v Governors of Denbigh High School case, that there is case-law of the Court and Commission which indicates that, if a person is able to take steps to circumvent a limitation placed on his or her freedom to manifest religion or belief, there is no interference with the right under Article 9.1 and the limitation does not therefore require to be justified under Article 9.2. For example, in the above-cited Cha'are Shalom Ve Tsedek case, the Court held that "there would be interference with the freedom to manifest one's religion only if the illegality of performing ritual slaughter made it impossible for ultra-orthodox Jews to eat meat from animals slaughtered in accordance with the religious prescriptions they considered applicable'.¹⁷⁵

However, it is important to note that the context of these cases was that of employment, and that the livelihood and career of the applicants was at stake:

¹⁷⁵ Ibid per Bjorgvinsson P para 83.

*'Given the importance in a democratic society of freedom of religion, the Court considers that, where an **individual complains of a restriction on freedom of religion in the workplace** [emphasis added], rather than holding that the possibility of changing job would negate any interference with the right, the better approach would be to weigh the overall balance when considering whether or not the restriction was proportionate'.¹⁷⁶*

A religious organisation acting as an employer is something very different from an individual employee confronted with a restriction on religious freedom in the workplace. Here the specific situation rule would be being applied to employer rather than employee. In voluntarily entering the specific situation of employing people, religious organisations would be effectively consenting to limit their freedom to manifest their beliefs, in so far as such manifestation was in conflict with employment law.

This argument might be accused of circularity, were it not for its factual context. This application of the specific situation rule does hinge upon the notion that religious organisations *choose* to act as employers, which in turn depends upon accepting their intent to enter into legal relations. However provided that the religious organisations in question are *behaving* as employers, then their intent to enter into legal relations is real rather than implied or imposed.

Religious organisations cannot logically have it both ways; it is not possible for them to claim that it would be against their doctrines and beliefs to have employed clergy, and at the same time to treat their clergy as employees. If religious organisations want to offer

¹⁷⁶ Ibid.

applicants to clerical posts the promise of rights and protection akin to that of other professions, and also to implement mechanisms of control and accountability which mirror those of the secular employment world, then they must accept the consequences of doing so.

Even if this argument were to fail, and a court concluded that being subject to employment law was indeed a limitation of the religious organisation's Article 9 rights, following *Eweida* it is highly likely that this limitation would be found to be proportionate. The United Kingdom would be limiting the Article 9 rights of the employing religious organisation in order to protect the rights of religious minister employees, including Convention rights: for example under Article 6 (Right to a fair trial), Article 8 (Privacy), Article 9 (Freedom of religion, conscience and belief), Article 10 (Freedom of expression) and Article 14 (Discrimination in relation to Convention rights). In *Eweida* the ECHR stated that:

'The Court generally allows the national authorities a wide margin of appreciation when it comes to striking a balance between competing Convention rights'.¹⁷⁷

In addition to these human rights considerations, the legal specific context of the Church in Wales (and most other churches which are not fully established in the manner of the Church of England or the Church of Scotland) means that the concerns raised by Arden LJ in *New Testament Church of God v Stewart*¹⁷⁸ cannot logically apply in relation to contract.

¹⁷⁷ Ibid, para 106.

¹⁷⁸ *New Testament Church of God v Stewart* [2008] IRLR 134.

As Doe argues,¹⁷⁹ it is difficult to assert that members have no intention to form contractual relations when dealing with their church, given that non-established churches are ordinarily voluntary associations, and as such, exist by virtue a multilateral contract between their members. As the legal framework of the church is based upon these contractual agreements, it is difficult to see how the church could claim that contractual agreements between members (including ministers) and the church are repugnant to its doctrines. On the facts the church may or may not have entered into a contractual relationship with a given minister, but if it did not, the reasons must have been pragmatic rather than doctrinal. If the church had a doctrinal objection to contractual relations between its members, it would not be able to exist in civil law by means of a multilateral contract.

Although cogent this argument had not been tested in any of the reported cases however. Following the findings of the Court of Appeal in *Stewart*, the question of intention to create legal relations is likely to continue to receive particular scrutiny in cases concerning clergy of any faith. In light of *Macdonald*, it appears that although this issue may be given more consideration than it would in most secular cases, such consideration will at least be from a neutral starting point. *Macdonald* also confirms that in general terms, ministers are in the same position as other workers; they may or may not be employees, and their employment status can only be determined by considering their circumstances as a whole.

This leaves ministers, churches and other religious organisations subject to the complexities and uncertainties relating to all questions of employment status. It is certainly possible for

¹⁷⁹ N Doe, *The Law of the Church in Wales* (Cardiff University Press, Cardiff 2002), Ch. 1.

ministers, including those within the Church in Wales, to be employees. However, as will be explored further below, different ministers enter into different kinds of working agreement with the church. This is one reason why the question of whether Church in Wales clergy are employees requires qualification and explanation before it can be adequately addressed.

But a further consideration is the complexity of contemporary employment law, and the shifting definition of employment. Some commentators in the ecclesiastical context have been slow to engage with the wider secular picture. Cranmer comments,¹⁸⁰ in relation to the *Macdonald* case, as follows:

*'It should be noted, however, that the Employment Judge's declaration [i.e. Judge MacKenzie in the Employment Tribunal phase of the Macdonald case] in paragraph 104 of his determination that 'it is accepted that Church of England recognises Ministers are employees' (quoted by Lady Smith at paragraph 41 of her judgement without further comment) was simply wrong. That inelegant statement will come as a considerable surprise to the Church of England, whose Review of Clergy Terms of Service concluded unequivocally that parish clergy should continue to be office-holders rather than employees'.*¹⁸¹

This analysis takes no account of the chameleon character of employment in the present context. As the *Percy* case illustrates, it is entirely possible for a worker to be an employee

¹⁸⁰ Frank Cranmer, 'Clergy Employment, Judicial Review and the Free Presbyterian Church of Scotland' *Ecc LJ* 12 (2010) 355, p359-360.

¹⁸¹ In 2002, the Archbishops' Council set up a group under Professor David McClean to review the terms under which the clergy hold office, following the Council's response to the DTI's discussion document 'Employment Status in relation to Statutory Employment Rights.' The first phase of the group's work was completed in Feb 2004 and the second in 2005. See further Church of England, *Review of Clergy Terms of Service: Part two - Report on the second phase of the work - GS 1564* (Church House Publishing: England) 2005.

for some purposes and not for others. In *Maga v Trustees of Birmingham Archdiocese of the Roman Catholic Church*,¹⁸² a Roman Catholic priest was treated as an employee for the purposes of vicarious liability, although this was on the basis of a concession by the defendants. In contrast in *JGE v Trustees of the Portsmouth Roman Catholic Diocese* it was common ground between the parties that Roman Catholic priests were *not* employees.¹⁸³ (Neither party explored the idea that an individual might be an employee for some legal purposes and not others, or attempted to list the purposes for which such priests were not deemed to be employed.) Nevertheless, the Court of Appeal concluded that the relationship was *akin* to employment for the purpose of vicarious liability.

It is no longer helpful to speak in absolutes. An individual's employment status will vary depending upon the purpose for which it is being ascertained. This is true for Church in Wales clergy as for other workers.

Although the employment status of the priest at the centre of the *JGE* case was not an issue between the parties, Ward LJ nevertheless chose to examine the case law on ministers of religion, and drew out the following principles:

- 1) *each case must be judged on its own particular facts;*
- 2) *there is no general 'presumption' of lack of intent to create legal relations between clergy and their church;*

¹⁸² *Maga (by his Litigation Friend, the Official Solicitor to the Senior Courts) v Trustees of the Birmingham Archdiocese of the Roman Catholic Church CA Civil Division 16 March 2010 Judgements, para 44.*

¹⁸³ *JGE v Trustees of the Portsmouth Roman Catholic Diocese* [2012] EWCA Civ 938 per Ward LJ para 22.

- 3) *a factor in determining whether the parties must be taken to have intended to enter into a legally binding contract will be whether there is a religious belief held by the church that there is no enforceable contractual relationship; and*
- 4) *it does not follow that the holder of an ecclesiastical office cannot be employed under a contract of service.*¹⁸⁴

These principles are consistent with the foregoing analysis of the law, and form a useful basis to examine the position of Church in Wales clergy in the discussion which follows.

1.4 Church in Wales clergy and secular employment law

1.4 (a) Intention to create legal relations-the general policy and doctrine of the Church in Wales on secular contracts and recourse to secular law

Do the professed beliefs of the Church in Wales allow for its members to enter into legally binding contracts with one another, enforceable in secular law? Are there any doctrinal prohibitions against suing fellow Christians? (The separate issue of whether Christians may sue non-Christians is not directly relevant to the point at issue, given that litigation between clergy and the church would by its very nature involve exclusively Christians).

There are passages in the Bible which cause some Christians to question whether litigation with their co-religionists is compatible with their professed faith.¹⁸⁵ The most relevant verses are from Paul's first letter to the Corinthians, 1 Corinthians 6:1-8:

¹⁸⁴ Ibid para 29.

¹⁸⁵ See for example arguments offered by individuals marketing themselves to perspective clients as legal advisers with a Christian ethos and focus: M Tozer 'Christians and Lawsuits: Two Wrongs Don't Make A Right' http://www.christian-attorney.net/christians_lawsuits.html (accessed 24/10/2012).

When any of you has a grievance against another, do you dare to take it to court before the unrighteous, instead of taking it before the saints? Do you not know that the saints will judge the world? And if the world is to be judged by you, are you incompetent to try trivial cases? Do you not know that we are to judge angels—to say nothing of ordinary matters? If you have ordinary cases, then, do you appoint as judges those who have no standing in the church? I say this to your shame. Can it be that there is no one among you wise enough to decide between one believer and another, but a believer goes to court against a believer—and before unbelievers at that?

In fact, to have lawsuits at all with one another is already a defeat for you. Why not rather be wronged? Why not rather be defrauded? But you yourselves wrong and defraud—and believers at that.¹⁸⁶

It is abundantly clear that these verses have not prevented Christians suing one another in secular as well as religious law courts for the past two millennia.¹⁸⁷ There are good reasons to argue that these verses should be read as addressing a particular pastoral problem in a specific circumstance, and not an attempt to promulgate rules which Christians should follow for all time regardless of context.

The available evidence suggests that the Christian community in first century Corinth was an intense and volatile environment, prone to internal conflict as well as dispute with its founder Paul.¹⁸⁸ Hays argues that Paul's condemnation of litigation related to a wider

¹⁸⁶ NRSV.

¹⁸⁷ R B Hays, *First Corinthians*, (John Knox Press: Louisville 1997), 92 See also N. Doe, *Christian Law: Contemporary Principles* (CUP: Cambridge) 2013, Ch. 5.

¹⁸⁸ P Barnett, *Paul: Missionary of Jesus-After Jesus Volume 2*, (Eerdmans: Cambridge 2008), 159: 'It is evident from his letters that Paul was sometimes under criticism from within the churches he founded and that his reason for writing to them (in part, at least) was to defend himself from those criticisms. Nowhere was this

concern, that the Corinthians were not a cohesive, mutually supportive family as befitted part of the Body of Christ.¹⁸⁹ Furthermore, the pagan, secular courts may have been inclined to favour the privileged classes of society, and litigation may have been one mechanism for richer members of the Corinthian church to further exploit and oppress their impoverished brethren.¹⁹⁰

These very particular circumstances did not apply in other contexts, so it can be argued that Paul's apparent prohibition should not be generally applied. Furthermore, Paul condemns the Corinthians for taking disputes '*before unbelievers*' this was not a relevant consideration once Christianity became the normative religious position in Western Europe; judges and lawyers were assumed to be Christian and even the secular law which they applied was deemed to have a Divine origin.¹⁹¹

Therefore, it is not surprising that the concerns about litigation referenced above have never found a mainstream place within Anglicanism, given that Christians suing Christians was an accepted and everyday reality for the culture in which the church and its doctrines evolved.

Recourse to secular law nowhere forbidden within the Principles of the Canon Law, and there are some principles which in practice can only be carried out fully in collaboration with

more evident than in Paul's relationship with the troublesome Corinthian church that he visited twice after its initial foundation and to which he wrote no fewer than four letters (two of them lost to us).

¹⁸⁹ Richard B Hays, *First Corinthians*, (Louisville: John Knox Press) 1997, 92-93: '*Paul is upset with the Corinthians because they are failing to act as a community, failing to take responsibility for one another. Just as they have failed to discipline the incestuous man, so they are failing to take responsibility for settling their own disputes; consequently they are taking legal cases before unbelievers.*'

¹⁹⁰ Ibid 93.

¹⁹¹ J H Baker, *An Introduction to Legal History* (Oxford: Oxford University Press) 2002, 4th edition, 1: '*When, in 1470, an English serjeant-at-law maintained that the Common Law had been in existence since the Creation of the world it is not improbable that he believed it literally*'. See further *Wallyng v Meger* (1470) 47 SS 38, per Catesby sjt. See further N Doe, *Fundamental Authority in Late Medieval English Law* (Cambridge: Cambridge University Press) 1990.

the secular law and its courts.¹⁹² For instance, churches are required to satisfy the requirements of civil law in relation to the holding of property, and permitted to hold property in trust.¹⁹³ The fiduciary obligations of trustees in civil law may require them to take legal action in some circumstances, for example if this is necessary to protect or reclaim property held in trust.¹⁹⁴

Therefore, there is entering into legally enforceable contracts with Christians, and suing on them if necessary, is not incompatible with either Anglican doctrine or practice. In fact, as Doe argues, non-established churches in Common Law jurisdictions owe their very legal existence to a multilateral contract between the members, so where Anglican churches are in this position, it would be impossible to argue that they were doctrinally incapable of entering into contracts in secular law.¹⁹⁵

With regard to the specific context of the Church in Wales, there are numerous examples of the church as an organisation electing to enter into contracts which are enforceable through the secular courts in order to carry out its mission and manage its day to day affairs. These include for instance: contracts outlining the terms of loans to clergy to purchase cars, contracts governing the hire of churches and church halls to third party organisations,

¹⁹² See for example, *The Principles of Canon Law Common to the Churches of the Anglican Communion*, (Anglican Communion Office: London) 2008, ('PCL') Principle 80.

¹⁹³ *Ibid*, Principle 80:1: '*Churches should satisfy those requirements of civil law which apply to the acquisition, ownership, administration and alienation of church property, both real and personal*'; Principle 80: 2 '*Property is held by those authorities within a church which enjoy legal personality as trustees or other entities of a fiduciary nature under civil law and competence under church law*'; and Principle 80:6 '*Ecclesiastical trustees may sell, purchase and exchange property in the manner and to the extent authorised by law*'.

¹⁹⁴ For a discussion of the general law on trustees and their fiduciary duties, see Halsbury's Laws, *Equity* Vol 16 (2) (Reissue)) 6 (1) Trustees and Other Persons in Fiduciary Positions.

¹⁹⁵ N Doe, *The Law of the Church in Wales* (Cardiff University Press: Cardiff, 2002), Ch.1.

contracts to purchase data projectors and contracts for filming in churches or churchyards.¹⁹⁶

In light of all of the foregoing, it is not viable to argue that the Church in Wales has any doctrinal difficulty with creating legal relations which are enforceable in the secular courts. However, whether there is an intention to create legal relations in the specific case of clergy employment is a different question.

1.4 (b) Intention to create legal relations - the doctrine of the Church in Wales and the specific case of clergy employment contracts

Nothing within the Principles of Canon Law Common to the Churches of the Anglican Communion ('PCL') in relation to ministry either precludes or requires agreements between clergy and the church which are enforceable in the secular courts.¹⁹⁷ The Preface to Part IV of the Principles of Canon Law, which deals with ministry, acknowledges the diversity in culture and language across the Anglican Communion, but nevertheless identifies some core, unifying beliefs about the nature of ministry.¹⁹⁸ Given the very different political, social and cultural contexts within which the provinces operate, it is perhaps unsurprising that no universal principle can be identified in relation to engagement with secular contract

¹⁹⁶ Church in Wales: Churches and Church halls community use of; Clergy Car Loan Scheme; Data Projectors: Guidance to those purchasing a data projector; and Filming in Churches or Churchyards <http://www.churchinwales.org.uk/resources/> accessed 24/10/2012.

¹⁹⁷ PCL, see in particular Part IV, Ministry, Principles 25-47.

¹⁹⁸ Ibid, Part IV, Ministry, Preface: *'there are well defined structures of governance, authority and responsibilities for the different roles and functions of its members, lay and ordained. These are contained in the constitutions, canons and other legal instruments in the different provinces and diocese of the Communion, but all exist for the purpose of furthering God's Mission in the world.'*

In spite of the diversity in culture and language in different parts of the Communion, there is a shared commitment of clergy and laity alike, to support public and individual ministry, through ordained officials and lay members, the three-fold ministry of bishops priests and deacons, and archiepiscopal and metropolitanical authority'

and employment law.¹⁹⁹ For example, the Nippon Sei Ko Kai/Anglican Episcopal Church in Japan²⁰⁰ functions within a very different secular legal and social context than the Iglesia Anglicana del Cono Sur de América/Anglican Church of the Southern Cone of America. Normative social and legal assumptions about work, dispute resolution and agreements may be very different in Tokyo and Santiago de Chile.

However, if Anglican theology and doctrine was incompatible with clergy contracts which were enforceable in secular courts in *any* circumstances, then this norm would be found embedded in the individual legal systems of the member provinces and therefore reflected in the Principles of Canon Law. As it is not, there is evidently nothing fundamentally un-Anglican about such arrangements. So is there anything in the specific context and legal structures of the Church in Wales which would render civil law employment contracts problematic in this particular case?

The factual context of the Roman Catholic diocese of Portsmouth as discussed in the JGE case provides a useful counterpoint for the Church in Wales. It was common ground between the parties that the priest at the centre of the litigation was not an employee and that there was no intention to create legal relations between said the priest and his bishop.²⁰¹ However, the Court of Appeal considered at length the facts and background upon which this common understanding was based.²⁰²

¹⁹⁹ Although provisions do exist in relation to clergy engaging in secular employment outside of the church, see PCL 41.4: '*Clergy must not engage in any secular employment or other occupation outside their ministry without consultation with, or as the case may be permission from, the diocesan bishop or other relevant church authority.*'

²⁰⁰ See, Nippon Sei Ko Kai/Anglican Episcopal Church in Japan <http://www.nskk.org/> accessed 24/12/2012.

²⁰¹ *JGE v Trustees of the Portsmouth Roman Catholic Diocese* [2012] EWCA Civ 938 per Ward LJ para 22 and para 30.

²⁰² *Ibid* paras 1-30.

The defendants contended that although the parish church from and within which the tortfeasor priest operated was part of the Diocese of Portsmouth, responsibility for operating and managing it rested with the parish priest and not with the diocese.²⁰³ Furthermore, neither they nor the bishop could removed the priest from his post in the parish or from the priesthood itself, except in accordance with the processes of Canon Law which require proof of grave cause.²⁰⁴ Directions as to the manner of carrying out the office in question were universal and set out in canon law rather than being given by the bishop to individual parish priests.²⁰⁵ The diocese and bishop could only issue guidelines for the whole diocese through Episcopal decrees, generally promulgated via letters to clergy. The only oversight or vigilance as to how the universal canon laws were being carried out in each parish and how the priest was fulfilling his duties took place through a periodic visitation, which had to be at least quinquennial.

Priestly appointments were managed by advertisement and application, when the bishop wanted priests to move he invited them to a meeting and informed them of their new appointment.²⁰⁶ Priests were free to decline. If they accepted, the clergy would be informed but no formal letter of appointment would be sent, the diocese would be informed of the change via a letter *Ad Clerum*. No terms and conditions would be imposed

²⁰³ Ibid para 4: '*Although it is admitted that the parish church was part of the Roman Catholic Diocese of Portsmouth, the second defendants deny that they ever managed, operated or were responsible for the church, the responsibility resting at all times with the parish priest*'.

²⁰⁴ Ibid.

²⁰⁵ Ibid: '*nor any power to give directions as to how that office was to be carried out as the requirements appertaining to any particular office are set out in the universal and particular canon law applying to the office concerned*'.

²⁰⁶ Ibid para 7.

on the parish appointment above and beyond those set out in canon law. Financial support for the priest came not from central funds, but from directly from the parish.²⁰⁷

Both sides took expert advice on the canon law applicable at the time (the Code of Canon Law promulgated in 1917,²⁰⁸ and all of the evidence given related to this code rather than the current version promulgated in 1983²⁰⁹), although there was little material disagreement between the two experts.²¹⁰ The following pertinent points were agreed:

- i) Bishops were appointed the Pope, who as Bishop of Rome shares their Episcopal orders. Bishops are not delegates of the Pope but have full independent authority over their own diocese; nevertheless they are ultimately answerable to him.
- ii) Secular law in England and Wales does not recognise the Roman Catholic Church as an entity with legal personality, but regards it as an unincorporated association. Consequently each diocese ordinarily sets up a charitable trust to hold property and manage its affairs.

²⁰⁷ Ibid: 'Priests did not receive a stipend or indeed any financial support from the diocese. Parishes were responsible for generating their own income to support their parish priest. A parish's income comprised almost always exclusively the charitable donations collected at Mass.' This position does not reflect that of current code, see CIC 1983 'Can. 1274 §1 In every diocese there is to be a special fund which collects offerings and temporal goods for the purpose of providing, in accordance with Can. 281, for the support of the clergy who serve the diocese, unless they are otherwise catered for. §2 Where there is as yet no properly organised system of social provision for the clergy, the Episcopal Conference is to see that a fund is established which will furnish adequate social security for them.'

For the position in the 1917 Code, see CIC 1917 Can.1499-Can. 1517, and in particular Can. 1499: 'par. 1. *Ecclesia acquirere bona temporalia potest omnibus iustis modis iuris sive naturalis sive positivi, quibus id aliis licet. par. 2. Dominium bonorum, sub suprema auctoritate Sedis Apostolicae, ad eam pertinet moralem personam, quae eadem bona legitime acquisiverit.*' (Can.1499§1 *The Church may acquire temporal goods by every just means permitted to other legal persons pursuant to either natural or positive law; §2 The ownership of goods, under the supreme authority of the Apostolic See vests in the moral person who lawfully acquired them*).

²⁰⁸ CIC 1917.

²⁰⁹ CIC 1983.

²¹⁰ *JGE v Trustees of the Portsmouth Roman Catholic Diocese* [2012] EWCA Civ 938 para 8.

- iii) In Canon law each parish is a separate legal entity; any property belongs to the parish rather than the diocese. In canon law the position of the priest is a perpetual ecclesiastical office to which successive individuals are appointed. Subject to the oversight of the bishop and applicable diocesan laws and regulations, the responsibility for running the parish lies with the parish priest. The parish priest is not a delegate of the bishop and does not receive instructions on *how* to run the parish.
- iv) The parish priest may be removed or transferred by the bishop against his will, but only in accordance with the processes set out in the Code of Canon Law. An aggrieved priest subject to such involuntary removal has recourse to the Congregation for Clergy in Rome.
- v) The priest has a duty of reverence and obedience to the bishop, but exercises his ministry as collaborator rather than someone subject to supervisory control of the sort found in secular employment. There are penalties prescribed by canon law which a bishop may invoke against a priest, but these did not mean that a priest was subject to managerial supervision in the secular sense. The experts agreed to leave to the court to determine how far the availability of such penalties rendered the relationship one of 'close supervision' or 'control'.²¹¹

A slightly more nuanced position was fleshed out when the experts were cross-examined. The claimant's expert Dr Costigane conceded that there was no direct control in the sense of the bishop monitoring a priest's daily activities; however if certain major departures from

²¹¹ Ibid para 8.

the Code of Canon law would generate an issue and result in Episcopal action.²¹² The expert for the defence, Monsignor Read repeated the point made in his written opinion that although parish appointments were not subject to advertisement and application, and also that a priest was not free to choose where to go but obliged to accept the direction which his bishop chose, once in post a priest nevertheless has great freedom in determining how he carries out his office.²¹³ Bishops do not give detailed instructions about running parishes to specific priests, but issue general norms of conduct to their clergy as a whole.²¹⁴

Examining this picture as a whole, both experts and the Court of Appeal accepted that the relationship between a Roman Catholic priest and his bishop was not one which could or should be characterised as secular employment. However, when the relationship between Church in Wales clergy and their bishops is examined in a similar level of detail, it becomes apparent that they have a very different overall working context. Many of the factors which pointed so firmly against an employment relationship in the *JGE* case are either not present or exist in a different form.

In *JGE* the corporate structure and governance of the Roman Catholic church (as it operated under CIC 1917) was of particular significance in two respects: i) bishops were appointed by the Pope in Rome and operated in accordance with a universal Code of Canon Law which

²¹² Ibid para 9: *'There is no control in the sense the bishop is checking on what a priest does every single day, but there is a level of control in the sense that if certain things don't happen action could be taken or, for example, if he starts reading out of the Koran rather than the Bible, there would be an issue there, I think. So in terms of levels of control I think it is a question of understanding what is meant by "control" in terms of direction. I would say, that that is the key; and also "vigilance" as well'.*

²¹³ Ibid para 10.

²¹⁴ Ibid para 11.

was applicable throughout the Roman Catholic world;²¹⁵ and ii) parishes were financially independent units responsible for supporting their own priests.

The corporate structure and governance of the Church in Wales is very different. Diocesan bishops are elected by an Electoral College.²¹⁶ The Electoral College is composed of members from within the Church in Wales.²¹⁷ Like other members of the Church in Wales, diocesan bishops are subject to the law and constitution of the Church in Wales.²¹⁸ There is no universal canon law applicable throughout the Anglican world.²¹⁹ Bishops are subject to the law and regulations of the province within which they operate. Therefore the link between the individual acting in a supervisory capacity, and the organisational structures which might be identified as employer, is demonstrably more immediate than in the Roman Catholic Church. Neither could an argument be made about the problems applying broad international norms in specific national contexts.

The Church in Wales may be described as a partially disestablished or quasi-established church.²²⁰ As Garcia Oliva persuasively argues, it is neither possible nor desirable to make a simple binary distinction between churches which are established and churches which are not; there are different models of establishment reflecting differing relationships between

²¹⁵ This point has remained unchanged, although as discussed above, financial arrangements are now different significantly pursuant to CIC 1983.

²¹⁶ Const. Ch V, Part III, 10.

²¹⁷ Ibid: ‘ (1) *The election of a Diocesan Bishop shall be by a Bishop’s Electoral College. (2) The Bishop’s Electoral College shall consist of: (a) the Archbishop and the Diocesan bishops; (b) the six clerical and six lay Episcopal Electors from the Diocese of which the see is vacant; and (c) the first three clerical and the first three lay Episcopal Electors on the list of the other dioceses.*’

²¹⁸ Const. Ch I, Part I, 2.

²¹⁹ PCL, Preface, 13.

²²⁰ Although the Church in Wales is sometimes classified as a disestablished church (e.g. see *Representative Body of the Church in Wales v Tithe Redemption Commission and Other* [1944] 1 All ER 710, 718 per Lord Porter) this description is not really satisfactory or accurate. For a discussion of the status of the Church in Wales in relation to establishment, see N Doe, *The Law of the Church in Wales* (University of Wales Press: Cardiff 2002), 10-11. The legal foundation of the contemporary institutional Church in Wales derives from the Welsh Church Act 1914, and is therefore a direct consequence of a legislative act of civil power. There are also significant legal vestiges of establishment in relation to marriage and burials in churchyards.

churches and the states which they operate.²²¹ Nevertheless, despite its quasi-established status, in relation to legal personality, secular law regards it as an unincorporated voluntary organisation whose members are organized and bound together by private contract.²²² It could be argued that the position of the Church in Wales in respect of legal personality is subtly but significantly different from that of the Roman Catholic Church in the UK.

Neither has a single, overarching legal personality at a national, institutional level.²²³ Both churches however operate in the secular world through entities which do have juridic personality. As discussed in *JGE* Roman Catholic diocese set up charitable trusts to hold property and manage their affairs.

In the case of the Church in Wales at a national level, the Representative Body is incorporated by Royal Charter and the Governing Body is recognised as an 'appropriate authority' for the purposes of the Sharing of Church Buildings Act 1969, Schedule 2.²²⁴ At a diocesan level each Diocesan Conference is required to appoint or cause to be appointed a Diocesan Board of Finance.²²⁵ The composition and functions of this board are not specified, but the Diocese of St Asaph has opted to incorporate it under the civil Companies Acts to hold property and funds for the diocese in accordance with its Memorandum and Articles of Association.²²⁶

²²¹ J Garcia Oliva, 'Church, State and Establishment in the United Kingdom in the 21st Century: Anachronism or Idiosyncrasy', *Public Law* (July 2010) 482-504

²²² N Doe, *The Law of the Church in Wales* (University of Wales Press: Cardiff 2002), 11.

²²³ In other words, there is no legal entity with the title 'The Roman Catholic Church in the United Kingdom' or 'The Church in Wales'. Both churches do however have legal institutions which operate at a national level e.g. The Catholic Bishops' Conference of England and Wales.

²²⁴ *Ibid* 12.

²²⁵ Const. Ch IV A, Part V, 24.

²²⁶ *Ibid* p 332, see also Companies House, Company Details, St Asaph Diocesan Board of Finance (The), Company No 00188626: <http://wck2.companieshouse.gov.uk/ee63fb8ce25443a4e293f21cb603dbdc/compdetails> (accessed 10/11/2012)

In contrast at parish level, parishes are governed by their own representative assemblies, Parochial Church Councils.²²⁷ These do not have legal personality, as the Welsh Church Act 1914 dissolved ecclesiastical corporations,²²⁸ and consequently their members may be personally liable for any contractual liabilities which they incur.²²⁹ There is nothing however to prevent members incorporating as limited companies to avoid such liability if they are inclined to do so, or setting up charitable trusts in relation to specific funds or projects.

Therefore, both the Church in Wales and the Roman Catholic Church exist without an umbrella juridic personality at a national level, but in practice function through created entities which are recognised by secular law. The contractual analysis which Doe applies to the Church in Wales and other non-established churches can properly apply to the Roman Catholic Church in the United Kingdom,²³⁰ was applied to the Roman Catholic Church in *Buckley v Cahal Daly*.²³¹ In this case a priest sought a declaration that he had been unlawfully removed. Campbell J held that since the Roman Catholic Church was a voluntary association, its canon law relating to the status of clergy existed as the terms of a contract.

As the *JGE* case highlights, intent to create legal relations is a genuine question in relation to contracts in the religious sphere. Given that a court found that a priest and bishop intended their relationship to be governed by canon law not secular law, a court might also find that all members of the faithful intend their relationship to be governed by canon law not

²²⁷ N Doe, *The Law of the Church in Wales* (University of Wales Press: Cardiff 2002), 78.

²²⁸ Welsh Church Act 1914, s. 2 (1).

²²⁹ For a discussion of this see P. Jones *The Governance of the Church in Wales* (Cardiff, 2000) 408.

²³⁰ N Doe, *The Law of the Church in Wales* (Cardiff: University of Wales Press) 2002, 11.

²³¹ *Buckley v Cahal Daly* [1990] NIJB 8.

secular law.²³² Would a different conclusion perhaps imply that Roman Catholics intended their relationships with brother and sister Catholics outside of the UK and presumably not parties to such a multilateral contract, to be on a different legal basis from their relationship with fellow Catholics who were also British nationals? And if so, could this position be reconciled with the Catholic understanding of sacred bonds sets out in the Code?²³³ If not, then a secular court finding and imposing contractual ties would potential be an infringement of members' rights under Article 9.

The probable answer is to be found in a nineteenth century decision, *Forbes v Eden*,²³⁴ which remains the leading authority in this area. It concerned an action by a cleric in the Scottish Episcopal Church to set aside certain canons passed in 1863, which were intended to cement the union between that church and the Church of England and the Church of Ireland. Lord Cranworth held as follows:

'Save for the due disposal and administration of property, there is no authority in the Courts either of England or Scotland to take cognizance of the rules of a voluntary society entered into merely for the regulation of its own affairs.

If funds are settled to be disposed of amongst members of a voluntary association according to their rules and regulations, the Court must necessarily take cognizance of those rules and

²³² There are statements in the Roman Catholic Code of Canon Law which could be used to support this contention, for example see CIC Canon 207: '*§1. By divine institution, there are among the Christian faithful in the Church sacred ministers who in law are also called clerics; the other members of the Christian faithful are called lay persons. §2. There are members of the Christian faithful from both these groups who, through the profession of the evangelical counsels by means of vows or other sacred bonds recognized and sanctioned by the Church, are consecrated to God in their own special way and contribute to the salvific mission of the Church; although their state does not belong to the hierarchical structure of the Church, it nevertheless belongs to its life and holiness.*' It could be argued that this implies that the members of the Church intend their relationship to be governed by these sacred bonds, as opposed to bonds at secular law.

²³³ CIC Canons 204-207.

²³⁴ *Forbes v Eden* (1867) L. R. 1 Sc. & Div. 568.

*regulations for the purpose of satisfying itself as to who is entitled to the funds. So, likewise, if the rules of a religious association prescribe who shall be entitled to occupy a house, or to have the use of a chapel or other building’.*²³⁵

So a court will take cognizance of the mutually agreed rules of a church or other voluntary association if required to settle a dispute about funds or property, but has no authority to interfere with a dispute about purely internal affairs. This position is essentially in harmony with Canon 22 of the 1983 Code of Canon Law which states that:

*‘Civil laws to which the law of the Church yields are to be observed in canon law with the same effects, insofar as they are not contrary to divine law and unless canon law provides otherwise.’*²³⁶

The complicating factor of course may be determining what are purely internal affairs. However interesting though these questions are, it is submitted that they may be something of a red herring for the purposes of the current discussion. It is uncontroversial that both the Roman Catholic Church and the Church in Wales function through legal entities designed to overcome their lack of juridical personality at a national level. This being the case, it is submitted that their lack of juridical personality would not be a fatal objection to their entering into employment relations with their clergy. Although a relevant factor in *JGE*, it was certainly not treated as an absolutely decisive one, either in that case or any other decision concerning clergy status. If other highly persuasive factors pointing towards employment were found to be present, a court or tribunal would be in a position to identify

²³⁵ Ibid, 581.

²³⁶ CIC, Can. 22.

a suitable juridic person to fasten with status as employer.²³⁷ The House of Lords specifically made this point in the *Percy* case, noting that the particular structural challenges presented by many churches should not in themselves be allowed to defeat clergy employment claims.²³⁸

It was significant in *JGE* that the parish paid the priest and that his income did not come from central church or diocesan funds. In contrast in the Church in Wales, stipendiary clergy have their stipend provided at a provincial level by the Representative Body.²³⁹ The system for appointing parish priests was also highlighted as significant; such posts were not subject to advertisement and application but within the discretion of the bishop.

Within the Church in Wales the arrangements for appointing parish clergy are complicated, and the persons involved in the appointment process will depend upon the particular circumstances of the parish and appointment involved.²⁴⁰ However, as part of this process

²³⁷ In the case of the Church in Wales, either the Representative Body (created at disestablishment to hold most of the church's property, see further. Ch. III s. 20); or a Diocesan Board of Finance (see further Const. Ch. IV. S. 24) would be possible legal employers for clergy.

²³⁸ *Percy v Church of Scotland National Board of Mission* [2006] IRLR 195 per Lord Nicholls: '*These different bodies are, in a broad but real sense, all part of 'the church' in question. But the 'church' may not be an entity capable of making a contract or of suing or being sued. This is so with the Church of England. It is equally so with a diocese of the Anglican church, for the reason given in Diocese of Southwark v Coker [1998] ICR 140, 148. This is also true of the Church of Scotland. Then the fragmentation of functions within such an 'umbrella' organisation may make it difficult to pin the role of employer on any particular board or committee. But this internal fragmentation ought not to stand in the way of otherwise well-founded claims.*'

²³⁹ MMS, s. 10. It is the case, however, that a large percentage of the money for stipends comes from the parish share, a kind of internal tax paid by parishes towards central running costs. See further for example, The Diocese of Monmouth, *The Parish Share: What it is and what it doe*: <http://www.churchinwales.org.uk/monmouth/admin/financial/Parish%20Share%20booklet.pdf> (accessed 14/3/2013). So parishes contribute substantially but indirectly to the payment of clergy in general, although parish share for a particular parish is calculated without reference to the number of stipendiary clergy serving in that location.

²⁴⁰ Where incumbents are concerned, the law of patronage governs their appointments, in accordance with the Welsh Church Act 1914, s38. The right to collate or nominate a priest to a vacant benefice is exercised in turns between the diocesan bishop, Diocesan Patronage Board and the Provincial Patronage Board in accordance with Const Ch VI, 7. Appointment of vicars in a rectorial benefice are appointed by the bishop after consultation with the rector, see Const VI, 8 (4). Priests in charge are appointed by the bishop, see Const Ch VI, 26 (1) and where circumstances require it and in the judgement of the bishop sufficient maintenance can be guaranteed the incumbent of a benefice is entitled to nominate to the bishop for his approval an Assistant Curate or deaconess, see Const VI, 23 (1).

it is common for appointments to be advertised in the *Church Times* and on diocesan websites, and for applications to be invited in a manner similar to that in many secular contexts.²⁴¹ This presents a relationship which looks far more like one of employment than the exercise of episcopal discretion without any application process within the Roman Catholic context. A situation in which both parties ordinarily make and accept an offer (i.e. to give and to perform duties) is more naturally categorised as contractual than one in which one party gives a direction which the other is morally and spiritually expected to accept.

The point that a Roman Catholic parish may be removed or transferred against his will, but only in accordance with due process of canon law, is not necessarily inconsistent with secular employment law or radically different from the position of Church in Wales clergy (the latter is discussed further below). An employment contract may contain provisions requiring an employee to work in a different location if the employer requires this; and dismissal would usually only be in accordance with a set process (not least because this is necessary to avoid falling foul of the Employment Rights Act and facing claims for unfair dismissal).²⁴²

However, the fact that the procedure for dissatisfied Roman Catholic clergy is an appeal to Rome arguably suggests that the parties do not intend the cleric to have recourse to a secular employment tribunal. Although again it is submitted that this point is not conclusive; it is possible to imagine a secular employer with an appeals or grievance procedure which ultimately escalated to a head office outside of the jurisdiction. This would

²⁴¹ See for instance *The Church Times*, www.jobs.churchtimes.co.uk which frequently features positions within the Church in Wales as well as the Church of England.

²⁴² Employment Rights Act 1996, Part X.

not automatically preclude an employee suing for unfair dismissal (including constructive dismissal) if he or she was not satisfied with the outcome of the internal procedure.

Similarly, the lengthy discussion in *JGE* on the ability of a bishop to direct the manner in which a priest carried out his duties could not be said to be conclusive in relation to employment, rather it was a further addition to the already vexed body of case law on the 'control' issue in the context of highly skilled employees. Nothing in the judgement indicated that the bishop was in a radically different position from, for example, an NHS trust in relation to a consultant surgeon.

In *JGE* the court was clear that contracting with priests as employees for the purposes of secular labour law was incompatible with Roman Catholic doctrine. But contrasting the respective positions of the two churches, it can be seen that most of the factors which led the court to conclude that employment was inconsistent with Roman doctrine in *JGE*, either would not apply, or would operate in a very different way in an Anglican context. There is nothing in that case which suggests convincingly that by analogy with the Roman Catholic Church, Church in Wales' doctrine is inconsistent with secular employment relations between church and clergy.

1.5 Intention to create legal relations - In which contexts, if any, does the current practice of the Church in Wales demonstrate an intention to create legal relations with its clergy?

Stating that a religious community *may* do something is distinct from stating that it actually does it. Having established that there is no doctrinal reason why the Church in Wales should not enter into employment arrangements with its clergy, it is still necessary to ask whether it in fact does so.

At present the Church in Wales is effectively operating a two-tier system in relation to clergy service: i) Common Tenure, which applies to all new appointments, and to all clergy already in post who voluntarily opted into the Common Tenure arrangement after its introduction; and ii) clergy who have chosen to remain working under the pre-Common Tenure regime.²⁴³ The differences between these two regimes make it appropriate to examine them separately.

1.5 (a) Common Tenure

It was the expressly stated intention of the Church in Wales to introduce this regime in response to an ultimatum from secular government, to provide clergy with employment rights reflecting those given to secular employees or to have such provision imposed by statute.²⁴⁴ Clergy were expressly stated to be remaining office holders.²⁴⁵ However, it is now clear from *JGE* and other case law that office holder and employee are not mutually exclusive states. It is complicated that the Church in Wales both presents the new rights as existing within a voluntary framework *and* being parallel with the rights available to individuals working in the secular sphere. However, it is submitted that both logic and human rights law require this 'voluntary' arrangement to be enforceable in the secular

²⁴³ The Church in Wales, *Highlights of the Church in Wales Governing Body, April 2011*, 3: 'The motion to approve the Statement of Clergy Terms of Service was passed *nem. con.* The Bishops will now bring into effect the Canon passed last September. Clergy moving into new posts or entering ministry for the first time will automatically be appointed on the basis of Common Tenure. Clergy already in post will be invited to opt into Common Tenure. Letters will be shortly sent out to all serving clergy. To help the process of implementation, seminars and workshops are being arranged in every archdeaconry over the course of the next few months, and these will provide further opportunity to learn more about the provisions and what Common Tenure means in practice'.

²⁴⁴ *Ibid* per the Right Rev'd Dominic Walker Bishop of Monmouth: 'The detailed provisions have been a long time in development, have been subject to very wide consultation, and we have taken on board and made various amendments as a result of those consultations. They represent a fair and transparent means of achieving the objectives set us by the Government to extend Section 33 employment rights to the clergy within a voluntary framework of rights and responsibilities.'

²⁴⁵ *Ibid*: 'The changes which are proposed will give clergy similar protection to employees in secular employment, notwithstanding the status of clergy as office holders.'

courts if necessary. If this is not the case, then Church in Wales clergy in no sense enjoy parallel rights to secular employees.

Consider the hypothetical case of a Church in Wales Representative Body or a given diocese arbitrarily refusing to honour its obligation to grant paid maternity leave to a female cleric.²⁴⁶ There would be no possible religious or doctrinal argument for such a denial. Aside from other considerations, a church can hardly expressly and deliberately provide for something in writing and then subsequently claim a faith based problem with it. There be potential legal arguments about estoppel and legitimate expectation, but more fundamentally, there would be a factual problem of inconsistency for the church to overcome. Having made express and detailed written provision at an institutional level, it could not hope to put forward a credible argument about a genuine doctrinal objection to its own deliberately adopted provisions.

A secular tribunal or court refusing to hear a claim from such a cleric purely on the basis of the religious context of her work would present difficulties in relation to Article 9 and Article 14.²⁴⁷ The state would be denying her access to justice on the basis of her faith based work and lifestyle, and failing to recognise her right to freedom from discrimination on grounds of sex.

Furthermore, it is hard to plausibly argue that clergy or the Church in Wales truly perceive their obligations to be purely voluntary. The relationship between stipendiary clergy and the church would cease to be tenable if the church decided to withhold payment for clergy services; the majority of stipendiary clergy are dependent upon this income. In the *Percy*

²⁴⁶ CTS-Clergy Appointments, Special Leave Provisions: *'The Church in Wales through the Maintenance of Ministry Scheme makes provision for special leave including-Maternity Leave'*.

²⁴⁷ ECHR Articles 9 and 14: these provide respectively for the right of freedom of conscience, thought and religion and the right of freedom from discrimination.

case, as discussed above, the court accepted that if her monetary payment had been withheld the minister would have had a claim in respect of this debt.²⁴⁸

Similarly, what meaningful protection would the disciplinary rules and procedures, proficiency requirement or the grievance procedure afford to clergy if they could be dispensed with at the whim of the church?²⁴⁹ Although these all effectively provide for due process and a right to a hearing in an internal forum, there are of little use if the institution is not contractually bound to honour them. What purpose do they serve if the church can decide to dismiss clergy without reference to them and face no consequences in civil law? If the Church in Wales cannot ultimately be made to honour its obligations by a secular court, then the terms of the CTS are really statements of vague intent or aspiration rather than *rights*. This position is difficult to reconcile with the stated intent of both secular government and the Church in Wales to provide clergy with employment rights and protection.²⁵⁰

Furthermore, the other side of the coin is that if the terms of the CTS were non-contractual, then the obligations imposed upon clerics within them would not have contractual force either. This again seems to contradict the church's expressed desire to impose professional standards of service and conduct upon its clergy.²⁵¹

²⁴⁸ *Percy v Church of Scotland National Board of Mission* [2006] IRLR 195 para 137 per Lord Scott: '*If the board had withheld or reduced her salary the civil courts would surely have had jurisdiction to entertain an action for payment.*'

²⁴⁹ CTS-Clergy Appointments, Disciplinary Rules and Procedures, Grievance Procedure and Proficiency Requirement.

²⁵⁰ The Church in Wales, *Highlights of the Church in Wales Governing Body, April 2011*, 3.

²⁵¹ *Ibid* per the Right Rev'd Dominic Walker Bishop of Monmouth: '*The changes which are proposed will give clergy similar protection to employees in secular employment, notwithstanding the status of clergy as office holders. By the same token, the Church has the right to expect from its clergy the same professional standard that a secular employer would expect from its employees.*'

The CTS set out terms which suggest something more closely akin to a standard employment arrangement in the secular world than the model described in the *JGE* case, in which Roman Catholic clergy were presented as operating independently in parishes and receiving minimal direction. In addition to statements on, inter alia: Work/Life Balance and Hours of Work; Holiday entitlement; Training and Retreats; Special Leave Provisions; Expenses; Clergy Sickness; Discipline and Ministerial Development, the CTS are accompanied by Guidelines which set out in detail how clergy are to carry out their ministry.²⁵²

The Guidelines include statements making it clear that clergy are required to work collaboratively with colleagues, and to accept direction in their ministry from the wider Church, including their bishop.²⁵³ Overall the picture which emerges from the CTS is one of a priest as a worker within a wider organisation, subject to direction, obliged to cooperate with others and to meet specified professional standards. In return he or she receives remuneration and employment rights, and there is a strong case that there is intent by both parties to enter into legal relations enforceable in a secular court.²⁵⁴ For many purposes this arrangement will amount to employment in secular law.

1.5 (b) Ministry Outside of Common Tenure

Clergy who have not taken up a new post since the introduction of Common Tenure, and who had not chosen to opt into the scheme remain subject to the pre-existing arrangements. Like other clergy they are of course subject to an oath of Canonical

²⁵² CTS and CTS Guidelines.

²⁵³ See for example CTS 8.1: '*Clergy swear an oath of canonical obedience to the bishop and agree to be bound by the Constitution of the Church in Wales*'; CTS 8.2: '*Clergy should participate fully in the life and work of the deanery, archdeaconry, diocese and province, giving support and respect to those given responsibility of leadership and oversight*'; CTS 8.4: '*Clergy should acknowledge and respect the ministry of other clergy*'; and CTS 9.3: '*Clergy should participate fully in continuing ministerial education and in Bishop's Review, knowing that accountability involves regular review personally and with others*'.

²⁵⁴ The position of non-stipendiary clergy in the Church in Wales, who do not receive financial remuneration from the Representative Body is dealt with further below.

obedience and bound by the Constitution of the Church in Wales and judgements of its courts and tribunals.²⁵⁵ This means that they are also subject to its considerable body of quasi or soft legislation, including for example policies on Child Protection and Ministry with Vulnerable Adults, as well as the provincial statement on ministry 'Cure of Souls'.²⁵⁶

The document Cure of Souls deals with leadership, liturgical responsibility, pastoral ministry, confidentiality and administrative responsibility. It does not conflict in any way with the CTS, and much of its contents are re-presentations of duties deriving from the pre-existing law of the Church in Wales.²⁵⁷

In pragmatic terms clergy working outside of the Common Tenure arrangement are performing the same practical functions and subject to the same body of canon law as those working within it. For instance the duty to celebrate the Holy Eucharist applies equally to *all* priests, ultimately deriving as it does from the liturgical rubrics of the Church in Wales.²⁵⁸ Just because certain priests have not signed up to Common Tenure (and therefore CTS 6, which opens with the statement: *'You are to preside at the Holy Eucharist'*²⁵⁹) it does not follow that they are somehow exempt from the general duty imposed by the rubrics.

However, the pertinent question in this context is not whether canon law applies to clergy outside of Common Tenure (it clearly does and that point is uncontroversial) but whether opting not to enter into the arrangement alters their position in secular law. Does it indicate that such clergy do not have an intention to enter into a contractual relationship

²⁵⁵ Const. Ch VI, Part III, 10.

²⁵⁶ *Cure of Souls* (1996) (Although both the debate about clergy working arrangements and the practical implementation of the new regime has moved on considerably since this document was published, it is still of relevance, as it is referenced at length within the current CTS, see for example Annex 1).

²⁵⁷ N Doe, *The Law of the Church in Wales* (Cardiff: University of Wales Press) 2002, 150 footnote 43.

²⁵⁸ BCP (1984), 3, 1; see also Canons Ecclesiastical 1603, Can 21: *'parishioners may communicate at least thrice in the year (whereof the feast of Easter to be one);* see also Can 22: *'every lay person is bound to receive the Holy Communion thrice every year'*.

²⁵⁹ CTS 6.

with their church? Did they perhaps reject Common Tenure precisely because they did not wish to be treated more like a secular employee?

The answer to that question must surely be, it depends, and the analysis has come full circle. Many of the same arguments which applied to clerics within Common Tenure about payment of stipend would be equally relevant to their stipendiary brothers and sisters outside of the scheme; is it really probable that such individuals believe their stipend to be a purely voluntary payment, which the church may at anytime decide to withhold for no reason?

Whether there is an intent to create legal relations may well depend upon the matter in question; a court for example might make a different finding about payment of stipend and an obligation to attend a training course. The intention of the parties is a question of fact, and will depend on the circumstances of the case. It is submitted however that it is not possible to assert that the mere fact that a clergy chooses not to opt in to Common Tenure does not prove that he or she has lack intention to create legal relations in respect of any aspect of his or her working life.

This conclusion raises the related point that whether or not an employment relationship is found to exist, will always depend upon what is meant by 'employment' in the given context. As argued at length above, it is no longer possible to adopt a universal and inflexible understanding of 'employment' within the United Kingdom, or indeed the European Union.

A final point should be made in relation to clergy operating outside of Common Tenure, and that is that this is necessarily a transitional position. All new appointments are subject to

Common Tenure. Therefore the previous arrangements, like unregistered land, will gradually be replaced and brought within the new regime through an organic process of change.

1.5 (c) Non-stipendiary clergy

As discussed above, what is meant by employment will be dependent upon the context.

The Common Tenure arrangements are open to all clergy, stipendiary or otherwise.

Furthermore recent case law suggests that courts are increasingly prepared to accept that consideration in an employment contract need not always be wages in the conventional sense. An opportunity to earn money and even to gain or maintain professional skills, experience and contacts or the provision of accommodation may all be sufficient.²⁶⁰

On this basis many clergy not in receipt of a stipend could claim to be employees, at least for some purposes. A retired non-stipendiary priest regularly receiving fees for occasional offices, a house for duty priest being provided with accommodation in return for services; and a priest taking a career break to care for young children but nevertheless keen to remain active in ministry to some degree and keep up professional contacts and knowledge in the diocese.

1.6 Conclusions

²⁶⁰ *Quashie v Stringfellows Restaurants Ltd*, UKEAT/0289/11/RN, (Transcript) per Judge McCullen QC para 51: 'In my judgement, the Judge was wrong to focus narrowly on the wage/work bargain. The problem with it is that it does not encompass all forms of bargains within employment relationships. Arguably, it answers itself: only employees get wages. More systematically, though, the signpost to this is the citation of *Buckley J* by *Langstaff J* in para 47 of *Cotswold* (above). These days, it is not uncommon to find a person agreeing to work for no pay (to gain work experience), or to attend for the mere opportunity of being given work for which remuneration would be available. The wage/work bargain would be satisfied if Ms Quashie agreed to dance in exchange for accommodation, for free meals, for fees paid directly to her university, or even for payment of 1p a night. She could make the bargain to dance to the Respondent's tune if the Respondent agreed to let her be seen at the club so as to enhance her reputation, or to keep her hand in, or even just to maintain networking in a congenial workplace.'

What is meant by employment will depend upon the context of the question; different types of working arrangements are covered by different provisions of labour and anti-discrimination legislation.

Ministers of religion in general may be both employees and office holders as far as secular law is concerned. Whether there is intent to create legal relations between a minister and the faith community for which he or she works will be a question of fact, no judicial presumption is now applied in respect of this matter.

There are no doctrinal objections which would negate any intention to create legal relations between Church in Wales clergy and their church. The working arrangements currently in place suggest that in at least some circumstances, a secular court would be prepared to hear a claim from a Church in Wales cleric and construe him or her to be an employee.

The chameleon nature of the concept of employment in secular law, and the wide variety of working arrangements in the contemporary Church in Wales mean that every case will turn on its facts.

The legal consequences of any given working arrangement in an employment or quasi-employment situation will depend upon the subject in dispute. Different factors may be relevant in a sex discrimination claim and a claim for unfair dismissal. The following chapter goes on to look at Church in Wales working arrangements within the specific context of vicarious liability.

CHAPTER 2

VICARIOUS LIABILITY AND CHURCH IN WALES CLERGY

2.1 Overview

Having established in the previous chapter that the courts construe employment and quasi-employment relationships differently in different contexts, it is necessary to ask how the working arrangements of Church in Wales clergy would be regarded for the specific purpose of vicarious liability.

The basic principle of vicarious liability can be stated quite succinctly:

'When it applies it exists independent of fault. It is a rule under which D2 is liable for the tort of D1, on grounds of his relationship to D1 and his connection to D1's tort'.²⁶¹

However, the question of when this principle should be applied is a complex one, and continues to exercise both academic commentators,²⁶² and the judges, throughout the Common Law world.²⁶³ Under what circumstances is it appropriate to make a defendant who is not at fault liable for the conduct of a tortfeasor? In answering this question, courts apply a two-stage test:

'The first stage involves an inquiry into the relationship between A and B; whether it is a relationship (classically employment) to which the principles of vicarious liability may attach. The second involves an inquiry into the act of omission of B which is in question; whether the act was within the scope of employment or other relationship'.²⁶⁴

²⁶¹ *Various Claimants v Catholic Welfare Society and others* [2010] EWCA Civ 1106 per Hughes LJ para 35.

²⁶² J W Nevers, 'A Theory of Vicarious Liability' (2005) Alberta L.R. 2.

²⁶³ *Lister and others v Hesley Hall Ltd* [2001] UKHL 22 per Lord Steyn para 27.

²⁶⁴ *JGE v English Province of Our Lady of Charity and another* [2011] EWHC 2871 (QB) per Macduff J para 7.

In relation to Church in Wales clergy this two-stage inquiry will raise the following questions:

- 1) Is the relationship between an individual cleric and his or her bishop one to which vicarious liability may attach?
- 2) If question 1) can be answered in the affirmative, what category of acts and omissions will come within the scope of that relationship or relationships?

In order to answer these questions, it is necessary to consider who the law on vicarious liability has developed.

2.2 Development of the law on vicarious liability

Prior to the late seventeenth century there was no concept of vicarious liability in English and Welsh law.²⁶⁵ A master was however liable for the acts of his servants if he had commanded them, on the basis that these were then effectively the master's own actions carried out by the servant. From this position, there was a gradual movement to one in which a master could be made liable for actions which he did not command, provided that they were for his benefit and in the course of the servant's employment.²⁶⁶

The doctrine as it developed was not confined to negligence by an employee but came to encompass deliberate wrong doing on their part.²⁶⁷ However, in the case of dishonest or criminal behaviour, the question of scope of employment was always particularly problematic; so much so that Lord Denning MR once described the case law on this subject

²⁶⁵ J H Baker, *An Introduction to English Legal History* (Oxford: Oxford University Press 2002) 4th edition, 410.

²⁶⁶ See for example *Mitchell v Allestry* (1676) B & M 572. Although there was dispute as to whether he had actually authorised the ill advised actions of his servants, a master was held to be liable for injuries caused to a third party when his employees attempted to break in some rather spirited horses in the crowded public space of Little Lincoln's Inn Fields.

²⁶⁷ *Lloyd v Grace Smith & Co* [1912] AC 716.

as 'baffling'.²⁶⁸ Furthermore although employment was the usual relationship giving rise to vicarious liability, the principle was never confined to master and servant relations.²⁶⁹

Recent case law in the UK and Canada has considered vicarious liability in relation to clergy, and has devoted much attention to the issue of liability for deliberate wrong-doing and also the issue of liability in the context of non-standard employment relationships.

2.2 (a) Vicarious liability for deliberate wrong-doing-the current issues

In *Lister and others v Hesley Hall Ltd*,²⁷⁰ Lord Steyn²⁷¹ referred to the two Canadian cases of *Bazley v Curry*²⁷² and *Jacobi v Griffiths*²⁷³ describing them as 'luminous and illuminating',²⁷⁴ and stating that wherever problems of vicarious liability and sexual abuse 'are considered in future in the common law world these judgements will be the starting point'.²⁷⁵

These decisions were duly considered in the subsequent cases of *Maga v Trustees of the Birmingham Archdiocese of the Roman Catholic Church*,²⁷⁶ *JGE v English Province of Our Lady of Charity and another*,²⁷⁷ and *Various Claimants v The Catholic Welfare Society and*

²⁶⁸ *Morris v C W Martin and Sons Ltd* [1966] 1 QB 716, 724.

²⁶⁹ See *Ormrod v Crosville Motor Services* [1953] 2 All ER 753 in which the defendant asked a friend to drive a car to Monte Carlo for him and was held to be liable for the friend's negligent driving; see also *Brooke v Bool* [1928] 2 K B 578 in which the defendant and his lodger were investigating a gas-leak in a shop rented by the plaintiff. The elderly defendant encouraged his young lodger to climb up and examine a gas-pipe with a match. The former was held to be liable for the damage to the plaintiff's property in the ensuing explosion on the basis that he had been engaged in a joint enterprise with the lodger, and also that he had been in control of the proceedings.

²⁷⁰ *Lister and others v Hesley Hall Ltd* [2001] UKHL 22.

²⁷¹ *Ibid*, per Lord Steyn para 27.

²⁷² *Bazley v Curry* 174 DLR (4th) 45.

²⁷³ *Jacobi v Griffiths* 174 DLR (4th) 71.

²⁷⁴ *Ibid*, per Lord Steyn para 27.

²⁷⁵ *Ibid*.

²⁷⁶ *Maga v Trustees of the Birmingham Diocese of the Roman Catholic Church* [2010] EWCA Civ 256.

²⁷⁷ *JGE v English Province of Our Lady of Charity and another* [2011] EWHC 2871 QB; *JGE v English Province of Our Lady of Charity and another* [2012] EWCA Civ 938.

Others.²⁷⁸ Furthermore, although the Canadian decisions were not dealt within the judgements given in or *EL v Children's Society*,²⁷⁹ both the *Lister* and *JGE* cases were analysed. Therefore, *Bazley* and *Jacobi* indirectly influenced these decisions as well, by virtue of having shaped the UK case law which was applied.

A key factor in the ratio of both *Bazley* and *Jacobi* was the concept of 'enterprise risk'.²⁸⁰ However, this factor was not understood and adopted in a consistent manner in the UK decisions which followed. It is submitted that this had two undesirable consequences: 1) judicial and academic confusion about the distinction between vicarious liability and direct liability in negligence; and 2) continuing uncertainty about when vicarious liability will be successfully established, particularly in the context of religious organisations.

It is true that in the most recent decision, the Supreme Court did emphasise the importance of the 'creation of risk' in the establishment of vicarious liability in cases of sexual abuse.²⁸¹ However, as will be discussed further below, there was still little or no guidance as to what factual elements would be required to demonstrate 'creation of risk'.

It is likely that more is required than mere opportunity for the wrong-doing (otherwise presumably employers would be liable for sexual assault committed by one adult against another working in an office or a factory); but how much more²⁸²? And does the term 'creation of risk' differ materially from the phrase 'enterprise risk' favoured in the Canadian cases? If not, why was different terminology adopted? If so, how does it differ?

²⁷⁸ Although not considered by the Court of Appeal in *Various Claimants v The Catholic Society Welfare and Others* [2010] EWCA Civ 1106, the Supreme Court did analyse the Canadian authorities in detail, see [2012] UKSC 56.

²⁷⁹ *EL v Children's Society* [2012] EWHC 365 (QB).

²⁸⁰ *Bazley v Curry* 174 DLR (4th) 45 per McLachlin J paras 22, 30, 41-46 and *Jacobi v Griffiths* 174 DLR (4th) 71 per Binnie J paras 42-64 and 79-85.

²⁸¹ *Various Claimants v The Catholic Society Welfare and Others* [2012] UKSC 56 per Lord Phillips para 87.

²⁸² For a UK judicial discussion of the insufficiency of mere opportunity in this context, see *Lister and others v Hesley Hall Ltd* [2001] UKHL 22 per Lord Millet para 82.

For as long as these questions remain unanswered, it is likely that the current confusion and uncertainty will remain.

2.2 (b) The Decisions in *Bazley, Jacobi and Lister*

The claimant in the *Bazley* case had been sexually abused as a child in a residential care facility.²⁸³ The abuser was an employee of the Children's Foundation, a non-profit organisation which ran the home. The question arose as to whether the Foundation could be held vicariously liable for his deliberate and gross wrong-doing. Although the non-profit status of the organisation was considered at length in the judgement,²⁸⁴ there was no suggestion that it had any religious ethos or spiritual mission. The Foundation required its employees to act as parent figures for the children in its care, in both physical and emotional terms.²⁸⁵ They were not only permitted but expected to relate to the children in an intimate way, assisting with personal hygiene and tucking them into bed.²⁸⁶

Although not discussed in the judgements, the case was inevitably decided in the shadow of what Ogilvie describes as the 'infamous' litigation over widespread civil and criminal wrongs perpetrated in residential schools for Native American children.²⁸⁷ In one case over 11,000 claimants sued a Roman Catholic lay order.²⁸⁸ In Canada there has been a public scandal and national tragedy over the abuse of vulnerable children in institutions, on a scale unmatched by anything in the United Kingdom.

²⁸³ *Bazley v Curry* 174 DLR (4th) 45.

²⁸⁴ *Ibid* per McLachlin J paras 47-56.

²⁸⁵ *Ibid* per McLachlin J, para 2.

²⁸⁶ *Ibid*: 'As substitute parent, it (the Foundation) practised "total intervention" in all aspects of the lives of the children it cared for. The Foundation authorised its employees to act as parent figures for the children. It charged them to care for the children physically, mentally and emotionally. The employees were to do everything a parent would do, from general supervision to intimate duties like bathing and tucking in at bedtime.'

²⁸⁷ M H Ogilvie, *Religious Institutions and the Law in Canada* (Irwin Law: Canada 2003), 317.

²⁸⁸ *Ibid*.

In the leading judgement, McLachlin J expressed the view that policy considerations had played a crucial role in the development of the law on vicarious liability.²⁸⁹ However, she did not accept that the pragmatic policy considerations could be permitted to shape the outcome of cases at the expense of legal rules, and examining the previous case law she identified a *'unifying principle'*.²⁹⁰

In each instance where an employer was liable for the unauthorised tort of an employee, it could be said that *'the employer's enterprise had created the risk that produced the tortious act'*.²⁹¹ Or, in other words, *'the employee's conduct is closely tied to a risk which the employer's enterprise has placed in the community'*.²⁹²

Having considered both the existing precedent and examined the policy reasons for vicarious liability, McLachlin J went on to lay down some principles to guide future courts determining liability for intentional and unauthorised wrong-doing. She held that courts should *'openly confront the question of whether liability should lie against an employer rather than obscuring the decision beneath the semantic discussions of "scope of employment" and "mode of conduct",'*²⁹³ and found that liability was generally appropriate where *'there is a significant connection between the creation or enhancement of a risk and the wrong that accrues therefrom, even if it is unrelated to the employer's desires'*.²⁹⁴

²⁸⁹ Ibid paras 26-36, The major policy considerations identified were: the goal of effective compensation, deterrence of future harm, and fair allocation of loss.

²⁹⁰ Ibid, para 22.

²⁹¹ Ibid.

²⁹² Ibid.

²⁹³ Ibid, para 41.

²⁹⁴ Ibid.

McLachlin J set out a non-exclusive list of factors to be considered in assessing whether there was sufficient connection between the tort and the risk which the employer's enterprise had created or enhanced.²⁹⁵ These were:

- a) The opportunity which the enterprise afforded the employee to abuse his or her power;
- b) the extent to which the tort may have furthered the employer's aims;
- c) the extent to which the tort related to friction, confrontation or intimacy inherent in the enterprise;
- d) the extent of the power conferred on the employee in relation to the victim;
- e) the vulnerability of victims to the wrongful exercise of the employee's power.

In this case, it was highly significant that the role of substitute parent put the employee in a position of both power and intimacy over the victim, and made it difficult for the child to make an effective complaint.²⁹⁶ The abuser had legitimate reason, indeed, even a duty, to engage in close and private physical contact with the child at bedtime and bath-time, and was a role model whom the child was encouraged to emulate and obey.

There was no suggestion by McLachlin J that the employer was doing anything wrong in giving its employees this kind of intimacy and power. Its enterprise in caring for children was legitimate, even laudable; and providing substitute parent-figures was an appropriate way of pursuing that enterprise. Nevertheless, it set up a situation in which there was an inherent risk of a paedophile employee abusing the trust and authority accorded to them by their role. Properly understood the concept of 'enterprise risk' as outlined did not introduce issues of fault into vicarious liability. Whether the employer's enterprise

²⁹⁵ Ibid.

²⁹⁶ Ibid, para 44.

introduces or enhances a risk to the community is a question of fact independent of culpability.

In the second Canadian case of *Jacobi*²⁹⁷ the ratio and principles of *Bazley* were applied, but the majority judgement was given by Binnie J and McLachlin J put forward a dissenting view. This case concerned a club for children and teenagers which sought to provide behaviour guidance and to promote positive health, social, educational, vocational and character development.²⁹⁸ There was no suggestion in the judgements that the club's attempts to promote and foster the well-being of its members, was done within a religious environment or with any proselytising intention.

The tortfeasor was employed by the club as a program director, and was held out as a role-model and trusted confidant. He befriended the claimants, developed a friendship with them outside of club hours and invited them to his home. He then took advantage of this trust to sexually abuse them, for the most part away from club property and not during working time.

In the opinion of McLachlin J. the test laid out in *Bazley* was satisfied. The club expected its employee to develop friendly, trusted relations with the young people attending, and to act as a role-model and mentor. There was a risk associated with this intimacy, exacerbated by the vulnerability of many of the young people who came from disadvantaged or troubled backgrounds.²⁹⁹ The predatory employee was found by the trial judge to exercise a 'god-like' authority over his young charges.³⁰⁰ Overall the special situation of trust and respect

²⁹⁷ *Jacobi v Griffiths* 174 DLR (4th) 71.

²⁹⁸ *Ibid*, para 3 per McLachlin J.

²⁹⁹ *Ibid*, para 17.

³⁰⁰ *Ibid*, para 18.

fostered by the abuser was part of the club's enterprise, and therefore vicarious liability should apply even though the goals of the club were praise-worthy.³⁰¹

The majority of the court disagreed however: Binnie J emphasised that in contrast with the *Bazley* case, the employee had no parenting role.³⁰² The employer's enterprise was providing group recreational activities for young people; the abusive employee was only able to commit the wrongful acts when he managed to subvert this and gain private access to the victims.³⁰³ His legitimate access to the victims in pursuance of his employer's enterprise was always in public.

Neither was he required to touch the victims in any intimate way comparable to that expected of the employee in *Bazley*.³⁰⁴ Steadying a child on gym equipment is very different from helping to bathe a child and tuck him or her into bed. Furthermore, in contrast with the situation in *Bazley*, the victims returned home to parents who should have had regard to their interests, and been aware that the activities in the employee's home were not part of the club's program. The mentoring role did not generate a relationship of intimacy and power which could be equated to that of adults in a parental role. The employer's enterprise provided an opportunity for the abuser to meet and groom his victims, but it did not introduce or enhance the risk of their being abused. It was common ground from *Bazley* that mere opportunity was not enough to establish liability.³⁰⁵ Therefore, the majority of the court found that on the facts of *Jacobi*, vicarious liability could not be established.

³⁰¹ Ibid, para 27.

³⁰² Ibid, per Binnie J para 32.

³⁰³ Ibid, para 80.

³⁰⁴ Ibid.

³⁰⁵ *Bazley v Curry* 174 DLR (4th) 45, per McLachlin, para 40.

The UK House of Lords had to consider similar issues in *Lister*.³⁰⁶ The case concerned abuse of boys resident in a boarding annex to a school for pupils with emotional and behavioural difficulties.³⁰⁷ The leading speech was given by Lord Steyn, and he cited the Canadian cases with strong approval.³⁰⁸ But he described the test outlined in those cases not in terms of enterprise risk, but of 'close connection'.

Lord Steyn formulated the test for liability as follows '*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*',³⁰⁹ and found on the facts that it would. In his opinion the perpetrator's abuse was '*inextricably interwoven*' with the carrying out of his duties as warden.

Lord Clyde adopted a similar approach in his speech, referring to cases in which an employer had been entrusted with the safekeeping of something, noting that in such circumstances it was usually not difficult to demonstrate a '*sufficient connection*' between the wrongful act of the employee and the employment, and thereby establish vicarious liability.³¹⁰ He also referred to the Canadian cases, analysing *Bazley* as follows: '*the essence of the decision seems to me to lie in the recognition of the existence of a sufficient connection between the acts of the employee and the employment*'.³¹¹ He noted that this was affirmed in *Jacobi* and that '*These two decisions seem to be consistent with the traditional approach recognised in this country*'.³¹²

³⁰⁶ *Lister and others v Hesley Hall Ltd* [2001] UKHL 22.

³⁰⁷ *Ibid* per Lord Steyn para 2.

³⁰⁸ *Ibid*, para 16.

³⁰⁹ *Ibid*, para 28.

³¹⁰ *Ibid*, per Lord Clyde para 46.

³¹¹ *Ibid*, para 48.

³¹² *Ibid*.

On the facts of *Lister* Lord Clyde held that whilst an opportunity for wrong-doing would not have been sufficient to establish sufficient connection between the tort and the employment for vicarious liability to arise, the warden had a general duty to look after and care for the victims. This function had been delegated to him by his employers, and he was performing this function at the time of the abuse.³¹³

Lord Hobhouse expressly stated that he was basing his judgement on English authority, and that he did not believe it appropriate to follow the lead given by the Canadian cases.³¹⁴ He explained vicarious liability in the following terms: '*their [the employers'] voluntary assumption of the relationship towards the plaintiff and the duties that arise from that relationship and their choosing to entrust the performance of those duties to their servant*'.³¹⁵ He agreed however that on the facts the employer was vicariously liable, as it had undertaken to care for the boys, and delegated this duty to the warden who abused them.

Like Lords Steyn and Clyde, Lord Millet stated that he had found the Canadian authority to be of much assistance.³¹⁶ He also stressed that the warden had a duty to care for the boys who suffered from his abuse, and that he committed the assaults by virtue of abusing the special position he occupied in order to perform this duty.³¹⁷ His employer was therefore liable for his conduct, whereas it would not have been liable for the actions of a

³¹³ Ibid, para 50.

³¹⁴ Ibid, per Lord Hobhouse para 60.

³¹⁵ Ibid, par 55.

³¹⁶ Ibid, per Lord Millet para 70.

³¹⁷ Ibid, para 82.

groundsman or gardener, who merely took advantage of the opportunity to abuse children with which his employment provided him.³¹⁸

Unlike the other members of the House of Lords, Lord Millet did use the word 'risk' once in his speech,³¹⁹ observing that in residential settings where vulnerable people are cared for '*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*'.³²⁰ However, he did not analyse the case in terms of enterprise risk, but of duty and proximity.

Therefore, the majority of the House of Lords purported to follow the two Canadian cases and encouraged future courts to do likewise, but adopted a markedly difference terminology and emphasis from that of the leading judgements in *Bazley* and *Jacobi*. The question 'is there a sufficient connection' is a more nebulous one than 'did the employer cause or enhance a risk'? It is not clear how strong a connection must be in order to qualify as 'sufficient'. Nothing comparable was offered to the list of principles for consideration laid out in *Bazley*.³²¹

The Maga case

The courts had occasion to apply the 'close connection' test outlined in *Lister in Maga v Trustees of the Birmingham Archdiocese*.³²² The difficulties generated by the imprecise nature of the test are apparent in the reasoning in *Maga*.

³¹⁸ Ibid.

³¹⁹ Ibid, para 83.

³²⁰ Ibid.

³²¹ *Bazley v Curry* 174 DLR (4th) 45 per McLachlin J, para 41.

³²² *Maga v Trustees of the Birmingham Diocese of the Roman Catholic Church* [2010] EWCA Civ 256.

The claimant was a boy from a non-Roman Catholic family who met Fr Clonan, a curate with a special brief for youth work, whilst admiring his sports car.³²³ The claimant was aged around twelve or thirteen at the time.³²⁴ Fr Clonan struck up a friendship with the claimant, inviting him to attend church discos and getting him to do various odd jobs in return for money. He never engaged with him on a '*religious level*' or sought to involve him in attending worship.³²⁵

Tragically, Fr Clonan was a paedophile and abused the claimant. When the boy attempted to complain about this to Fr McTernan, the priest who ran the parish in which Fr Clonan worked, he was dismissed and warned that his mother would be told he was 'playing up'.³²⁶ Fr McTernan shared a presbytery with Fr Clonan and was his immediate supervisor. Despite being on notice that Fr Clonan was a potential abuser, he made no attempt to monitor his behaviour, or to report any concerns to the ecclesiastical hierarchy or the police.

In analysing the case, Neuberger MR referred to the close connection test set out by Lord Steyn in *Lister*.³²⁷ He took account of the fact that Lord Hobhouse adopted a different approach in that same case, but concluded the majority of the court found the Canadian cases correct and helpful.³²⁸ He emphasised that the fact that Fr Clonan's work had given him the opportunity to abuse the claimant was not sufficient to fix his employer with liability³²⁹. However, taking a global view of the situation, there was evidence that the requisite close connection could be established.³³⁰

³²³ Ibid, per Neuberger MR para 11.

³²⁴ Ibid, para 1.

³²⁵ Ibid, para 12.

³²⁶ Ibid, para 13.

³²⁷ Ibid, para 38.

³²⁸ Ibid, para 40.

³²⁹ Ibid, para 42.

³³⁰ Ibid, para 44.

Fr Clonan normally wore clerical garb, and had a *'special role, which involves trust and responsibility in a more general way than a teacher, doctor or a nurse'*.³³¹ His priestly status enabled him to hold himself out as having such role and authority.³³² Furthermore he had a duty to evangelise which meant that he was supposed to befriend and gain the trust of non-Catholics like the claimant.³³³ He had a special responsibility for youth work,³³⁴ and he used church functions like the disco and church premises to cultivate and abuse the claimant.³³⁵ Evidence was also heard that *'spending time alone with people who were searching for truth'* was a *'normal'*³³⁶ and proper part of a priest's work.

In the Court of Appeal Neuberger MR did then go on to consider the two Canadian cases referring with approval to the requirement that there was a *'material risk of harm occurring in the sense that the employment significantly contributed to that harm'*.³³⁷ He then set out the five factors listed in the Canadian cases for assessing this (see the foregoing discussion). He found that all but b) (the extent to which the employee's action furthered the employer's enterprise) were applicable. He also noted that by its very nature, factor b) would hopefully never apply in the context of sexual abuse.

However, he did not consider each of the factors separately nor in detail; neither did he explicitly relate the factors to the different issues which he had identified on the facts. At the end of this section of his judgement, he returned to Lord Steyn's concept of 'close

³³¹ Ibid, para 45.

³³² Ibid.

³³³ Ibid, para 46.

³³⁴ Ibid, para 47.

³³⁵ Ibid, paras 48-51.

³³⁶ Ibid, para 51.

³³⁷ Ibid, para 53.

connection'.³³⁸ Therefore, although risk was referenced, ultimately his conclusion was presented in terms of close connection.

Longmore LJ analysed the case slightly differently, distinguishing *Lister* on the basis that the Roman Catholic diocese had not taken on a duty to care for the claimant in the way in which the school in *Lister* had done.³³⁹ Nevertheless he found that the diocese was part of the Roman Catholic Church, and consequently had an analogous obligation by virtue of its teachings and purported special care for the vulnerable and oppressed.³⁴⁰

He held that the church had invested Fr Clonan with clerical garb, bestowed the title 'Father' and concluded '*It is difficult to think of a role nearer to that of a parent than that of a priest. In this circumstance the absence of any formal legal responsibility is almost beside the point*'.³⁴¹ He emphasised that Fr Clonan's priestly status and authority gave him unquestioned private access to the claimant.³⁴²

He also referred with approval to the Canadian decisions, noting in *Bazley* how much significance was attached to the quasi-parental role of the employees, and the power dependency relationship which this engendered.³⁴³ Longmore LJ concluded '*this exposition of the law is highly relevant to the position of Father Clonan in respect of whom there undoubtedly existed a "power or dependency relationship" with the Claimant arising from his position as a priest*'.³⁴⁴ In all the circumstances there was a 'sufficiently strong'

³³⁸ Ibid, para 55.

³³⁹ Ibid, per Longmore LJ, para 79.

³⁴⁰ Ibid, para 82.

³⁴¹ Ibid, para 83.

³⁴² Ibid, para.

³⁴³ Ibid, para 86.

³⁴⁴ Ibid.

connection between what Fr Clonan was authorised to do and the abuse which he committed for vicarious liability to apply.³⁴⁵

He observed that he would not lay any emphasis on Fr Clonan's 'duty to evangelise' as it was too nebulous a concept to be analytically useful, but that in all matters he agreed with Lord Neuberger.³⁴⁶

Smith LJ gave a brief final judgement, expressing the view that the duty to evangelise was not a key factor; a priest or pastor without such a doctrinal duty who committed abuse by virtue of position and ostensible authority would be no different from Fr Clonan.³⁴⁷ Her reasoning was that a minister of a non-evangelical denomination might have other grounds to make pastoral contact with individuals, which he or she could then subvert for the purposes of abuse.³⁴⁸ Therefore, she found that there was no material distinction between the judgement of the Master of the Rolls and Longmore LJ, and agreed with both.³⁴⁹

Therefore, although the Court of appeal referred to the Canadian cases with approval, all of the judgements laid more emphasis on the 'close connection' test required by *Lister* than the more precise 'enterprise risk' inquiry set out in *Bazley and Jacobi*. The consequence of which, is that it is difficult either to draw out or to substantiate the reasons for the court finding a close connection in this instance. The issue that the facts of *Maga* were apparently much nearer to the circumstances of *Jacobi* than *Bazley* adds further complexity,

³⁴⁵ Ibid, para 88.

³⁴⁶ Ibid, para 91.

³⁴⁷ Ibid, para 94.

³⁴⁸ Ibid, para 95: 'It will be necessary to examine with what ostensible authority the church clothes its priests or pastors and for what legitimate purposes. The legitimate purposes might or might not include the duty of evangelisation. The duties might be purely pastoral. But if those legitimate purposes clothe the priest or pastor with ostensible authority to create situations which the priest or pastor can and does then subvert for abuse, I see no reason why that church should not be vicariously liable for the abuse'.

³⁴⁹ Ibid, para 96.

given that in the former case vicarious liability was held not to apply. In light of this, it is perhaps not surprising that cases subsequent to *Maga* have not followed a predictable pattern in terms of outcome or reasoning.

Deconstructing the two leading judgements in *Maga* it is clear that leaning towards 'close connection' rather than 'enterprise risk' shifted judicial consideration away from the facts of the case. By not considering in turn each of the five factors in the Canadian cases, the judges failed to ask in a methodical way what Fr Clonan was required to do, what real authority he had to do it and how his role and authority generated a risk for the claimant.

Lord Neuberger laid great stress on the trust and responsibility which Fr Clonan's priestly status conferred.³⁵⁰ However, he did not address how real or relevant this was for the claimant or his parents. Would a teenager brought up in a non-Roman Catholic household in 1970s Britain necessarily revere or trust a priest by virtue his office and attire? In reality, were there not grounds to suggest that Fr Clonan's sports car gave him more credibility in the claimant's eyes than his dog-collar? These questions were not even explored by Lord Neuberger, much less resolved.

This is in sharp contrast to the approach of both McLachin J and Binnie J to status and authority exercised by the abuser in *Jacobi*.³⁵¹ Although they reach different conclusions, they both considered the impact which the authority conferred by the employer would have had on the victim, and gave reasons for their findings which future courts could analyse.

³⁵⁰ Ibid, per Neuberger MR para 44.

³⁵¹ *Jacobi v Griffiths* 174 DLR (4th) 71.

Lord Neuberger also emphasised how Fr Clonan's role had given him an ostensible reason to spend time alone with the claimant.³⁵² Here the facts did diverge from *Jacobi*, as in that case it was a very material factor that the perpetrator had no work-related justification for being alone in private with his victims.

But again, it is not wholly clear that the sweeping judicial pronouncement can be supported by the facts. Fr Clonan had reason to spend time alone '*with people seeking the truth*'.³⁵³

There seems to have been little or no pretence that the claimant was seeking spiritual advice. It is not apparent from any evidence presented in the judgement that Fr Clonan really had legitimate grounds to be spending a lot of time alone with one particular boy who was not a member of the congregation, nor likely ever to become one, especially in places like his bedroom in the presbytery.

In fact as Lord Neuberger found, Fr Clonan's behaviour should have raised major concerns for his senior colleague Fr McTernan.³⁵⁴

This finding is not easily reconciled with the conclusion that his priestly role gave him unquestioned private access to his victim. If Fr Clonan really had only been engaging in behaviour which was to be expected for a priest doing his job, then Fr McTernan would surely have had no grounds for concern. Tragically this clearly was not the case. Fr Clonan was doing things which could not be explained away as part of his ordinary duties.

In a similar way Longmore LJ asserted that it was difficult to think of '*a role nearer to that of a parent than that of a priest*'³⁵⁵ before going on draw parallels with *Bazley* and the kind of

³⁵² *Maga v Trustees of the Birmingham Diocese of the Roman Catholic Church* [2010] EWCA Civ 256 per Neuberger MR, para 48.

³⁵³ *Ibid*, para 49.

³⁵⁴ *Ibid*, para 67.

power and dependency relationship which existed between the victim and abuser.³⁵⁶ Again it is far from clear that this assertion can be supported on the facts. In *Bazley* the abuser was in the role of primary-carer; he had complete power over the most aspects of the child's day to day life. The abusive employee had reason to be alone with the child and for intimate physical contact whilst assisting with tasks like washing and dressing. He also had the opportunity to use and manipulate the trust and attachment with a young child is likely to form with a parental figure.

The title 'Father' in no way gave Clonan that sort of power over his victim, or reflected that level of intimacy. That is not to say that there was not a relationship of 'power or dependency' of some sort, or to suggest that Fr Clonan did not abuse it in an appalling way. But to equate his relationship to the victim so directly with that of a young child and parental figure is deeply problematic.

There was a complicating factor the *Maga* case, which may perhaps explain the judges' readiness to find vicarious liability without entering into a careful analysis of the factual matrix in relation to legal principle. In most cases vicarious liability is pleaded precisely because the employer is not culpable for the injury suffered by the claimant. Here however there was negligence by the employer. It was found that Fr McTernan was negligent in supervising Fr Clonan, even by the standards of the time. He knew or should have known that his junior colleague was abusing boys, or at the very least that this was a strong possibility, and yet failed to take any action.³⁵⁷

³⁵⁵ Ibid, per Longmore LJ para 83.

³⁵⁶ Ibid, 86.

³⁵⁷ Ibid, per Neuberger MR para 70.

It is submitted, however, that it would have been preferable for the judges to have laid more emphasis on the claim in negligence against the diocese, rather than making a finding of vicarious liability for trespass without detailed reasoning to substantiate this and to provide guidance for future courts. The victim could have gained compensation for his injury which he suffered through the negligence of Fr McTernan.

It was conceded for the purposes of the case that priests were to be treated as employees for the purposes of vicarious liability, so it was uncontroversial that the diocese were vicariously liable for any negligence on the part of Fr McTernan. It was also clear from the facts that Fr McTernan had indeed been negligent in failing to monitor the activities of his curate, when he had been put on notice that he posed a potential risk to children. Finding the diocese liable for harm suffered by the claimant as a result of this negligence would have avoided further muddying the already clouded waters of vicarious liability for deliberate wrong-doing.

There is another interesting parallel with the *Jacobi* case here. Although the defendants were found not to be vicariously liable, the case was remitted to determine whether the club was liable '*under a fault based cause of action*',³⁵⁸ whether negligence or breach of some other duty. If an employee is using his or her employment to gain access to young people for purposes not connected to the proper performance of his or her duties, and the employer knows or ought to know that this is happening, then that employer may well be directly liable in negligence if those young people suffer abuse or other harm.

Obviously whether a cause of action lies in negligence will depend upon the facts, but in many instances of this kind it will be more appropriate to pursue negligence than vicarious

³⁵⁸ *Jacobi v Griffiths* 174 DLR (4th) 71, para 87.

liability for deliberate wrong-doing. There is no need for claimants or courts to stretch credibility in asserting a connection between the employee's duties and the abuse if, as in *Jacobi*, it is not obviously apparent. The employer is not liable because the employee was acting on its behalf when the tort took place; the employee may well not have been so doing. The employer is liable because they knowingly exposed third parties to a risk of foreseeable harm, and straightforward *Donoghue v Stevenson* principles apply.³⁵⁹

If the employer carried out appropriate criminal record checks and employee training, and the employee was doing nothing ostensibly wrong or beyond what was required of them, then any harm or abuse suffered by third parties would probably not be reasonably foreseeable. If however, the employer becomes aware that the employee is using his or her position to do something suspicious which was not required of him or her, for example to spend time alone with children or young people, then harm does become reasonably foreseeable. Lord Atkin's neighbour principle applies;³⁶⁰ the defendant employer should have those children or young people in mind when deciding to continue to place its employees in a position of privileged access to them.

2.3 Post-Maga Cases - Close Connection Test

The lack of clear guidance which the 'close connection' test and its application have given has been apparent in subsequent case law. Up until the recent judgement by the Supreme Court in *Various Claimants*, UK courts were inclined to emphasize connection rather than

³⁵⁹ *Donoghue v Stevenson* [1932] AC 562.

³⁶⁰ *Ibid*, 11 Lord Atkin defined the concept of neighbour for the purposes of negligence: 'Who then, in law, is my neighbour? The answer seems to be persons who are so closely and directly affected by my act that I ought reasonably to have them in contemplation as being so affected when I am directing my mind to the acts or omissions which are called in question.'

risk.³⁶¹ Even now it could not be said that the Supreme Court has definitively adopted ‘enterprise risk’ as a test; risk appears to remain simply a strong indication and a highly persuasive factor in establishing the required ‘close connection’ between the tort and the relationship between the tortfeasor and his or her employer. Nothing akin to the checklist outlined in *Bazley* was proposed or set out. Neither was it wholly clear whether UK courts looking for evidence of a ‘creation of risk’ are looking for the same factors as Canadian courts considering enterprise risk.

2.3 (a) Various Claimants - In the Court of Appeal

In *Various Claimants v Catholic Welfare Society and others*,³⁶² the Court of Appeal was required to determine whether a religious brotherhood, ‘the Institute’, (existing in law as an unincorporated association) was vicariously liable for sexual abuse perpetrated by its members.

The brothers were a teaching order of laymen,³⁶³ and at the relevant time had brothers teaching in a school which was run by an independent organisation. This third party organisation was the brothers’ employer. Some of the brothers abused pupils at the school, and the question arose as to whether the Institute could be held vicariously liable for their actions.

The Canadian cases were not explicitly discussed, and the judicial analysis focused on close connection. However, ripples of the ‘enterprise risk’ doctrine were felt via reference to Lord Millet’s judgement in *Lister*. Hughes LJ interpreted Lord Millet’s *dicta* as setting out the following highly relevant consideration to questions of close connection ‘*whether D2 has*

³⁶¹ *Various Claimants v The Catholic Society Welfare and Others* [2012] UKSC 56.

³⁶² *Various Claimants v The Catholic Society Welfare and Others* [2010] EWCA Civ 1106.

³⁶³ *Ibid*, per Hughes LJ para 19.

put D1, for his own purposes, into a position, in which the risk of a tort of the kind committed is inherent.³⁶⁴

Even though the court acknowledged that following the decision in *Viasystems (Tyneside) Ltd v Thermal Transfer (Northern) Ltd*,³⁶⁵ there was no difficulty in finding that more than one party could be vicariously liable for the actions of the same tortfeasor. Therefore, both the employing school and the brotherhood could have been found vicariously liable,³⁶⁶ but the brotherhood was nevertheless still not found to be liable for the actions of an abusive brother.³⁶⁷

This was despite the fact that the brothers were readily identifiable as such by their title, even if not wearing a habit.³⁶⁸ The brotherhood was more akin to a professional organisation than an employer,³⁶⁹ and whilst teaching the brothers were not acting on behalf of others in the society.³⁷⁰ All of this was so even though the mission of the brotherhood was teaching and the brothers were subject to the discipline and direction of their order.³⁷¹ Because the order had not taken on a duty to care for the pupils at this particular school, and then delegated this to brothers sent there to teach, such individuals could not be said to be fulfilling their duties on behalf of the order.³⁷² And even if this conclusion was wrong, the other members of the order were scattered all over the world

³⁶⁴ Ibid, para 44.

³⁶⁵ *Viasystems (Tyneside) Ltd v Thermal Transfer (Northern) Ltd and others* [2005] EWCA Civ 1151.

³⁶⁶ *Various Claimants v The Catholic Society Welfare and Others* [2010] EWCA Civ 1106 per Hughes LJ, para 45.

³⁶⁷ Ibid, para 58.

³⁶⁸ Ibid, para 54.

³⁶⁹ Ibid.

³⁷⁰ Ibid, para 57.

³⁷¹ Ibid.

³⁷² Ibid, para 57.

and could not be said to have the necessary interest in the running of this particular school to satisfy the close connection test.³⁷³

In commenting on the decision Coe and Leonard observe that the conclusion is difficult to reconcile with *Maga*.³⁷⁴ The issue was not that there was no employment relationship, and it was clear on the facts that the brothers had ‘two managers’.³⁷⁵ Although legally employed by a third party, their order had control over all aspects of their lives, including their teaching. The argument that the brothers were scattered all over the world and could not therefore have the necessary close connection could be made of any large organisation operating worldwide. Why should members of an unincorporated association be treated differently from employees, if an employment relationship was not required for vicarious liability?

There is considerable merit in this reasoning, especially as the judgements do not unpack why geographical distance is inconsistent with a ‘close connection’. It is also submitted that a different conclusion might have been reached if the ‘enterprise risk’ test had been applied. The fact the Supreme Court returned to focusing on risk and came to the opposite decision lends considerable weight to this argument.

Teaching was the enterprise in which the unincorporated association was engaged. Conferring members with status and respectability and sending them to schools as teachers potentially enabled the individual abusers to gain trust and authority, and sexual abuse of pupils by adults is an inherent risk of operating in a school context. If in *Maga* a particular brief for youth work and outreach, combined with priestly status was sufficient to establish

³⁷³ Ibid.

³⁷⁴ R Coe and P Leonard, ‘Moving Target’, *The Lawyer*, 6 December 2010.

³⁷⁵ Ibid.

a 'close connection', it was not clear why recognising and enabling a lifetime vocation to teaching, combined with conferring religious status was not treated in a similar manner. If a list of factors like the one set out in the Canadian cases had been applied, it might be easier to understand the reason for the Court of Appeal distinguishing between this case and *Maga*. But the close connection test does not set out clear criteria in this way.

2.3 (b) JGE v English Province of Our Lady of Charity and another

In the subsequent case of *JGE v English Province of Our Lady of Charity and another*,³⁷⁶ MacDuff J at first instance confirmed that employment was not necessary for vicarious liability, and that a Roman Catholic priest was in a relationship 'akin to employment'.³⁷⁷ The judge had been asked to determine as a preliminary issue whether the diocese could be held vicariously liable for the alleged actions of a priest (something which was not challenged by the diocese in *Maga*).³⁷⁸

The case concerned a claimant who had been resident in a children's home which was run by an order of Roman Catholic nuns (the first defendant). She argued that the second defendant charitable trust (the Trust) were responsible for a church in the diocese of which one Fr Baldwin was priest. As resident at the children's home, the claimant had attended this church. The claimant issued proceedings against both defendants, alleging, inter alia, that she had been repeatedly sexually abused and raped by Fr Baldwin, both when he visited the children's home and when she attended church.

³⁷⁶ *JGE v English Province of Our Lady of Charity and another* [2011] EWHC 2871 (QB).

³⁷⁷ *Ibid*, para 43.

³⁷⁸ *Maga v Trustees of the Birmingham Diocese of the Roman Catholic Church* [2010] EWCA 256 per Lord Neuberger para 36.

Although the Canadian cases were cited and considered in the judgement, MacDuff J observed that ‘*close connection may be easier to recognise than to define*’.³⁷⁹ A worrying statement in relation to certainty for future litigants, and an effective admission that the ‘close connection’ test as it has emerged from *Lister* is not providing judges with clear principles to apply.

When the case was considered by the Court of Appeal, the court expressed unease at determining the matter of vicarious liability as a preliminary issue given that both stages of the two stage test were fact sensitive.³⁸⁰ Nevertheless they reluctantly consented to consider the terms of issue which had been defined by the Master at an earlier stage in the litigation process.³⁸¹ But they were clear the decision related solely to vicarious liability arising between a parish priest and a bishop, not as between a bishop and other priests carrying out non-parochial functions within the diocese.³⁸²

Ward LJ analysed the problem in terms of the priest’s relationship with the bishop, on the basis that the Roman Catholic Church had no legal personality.³⁸³ It was common ground between the parties that priests were not employees of the bishop.³⁸⁴ Nevertheless he still considered this question, with assistance from the joint statement prepared by the parties’ respective experts on canon law, before concluding that there was no contract of service

³⁷⁹ *JGE v English Province of Our Lady of Charity and another* [2011] EWHC 2871 (QB) para 41.

³⁸⁰ *JGE v English Province of Our Lady of Charity and another* [2012] EWCA Civ 938 per Ward LJ para 3 .

³⁸¹ *Ibid* para 6.

³⁸² *Ibid* para 6: ‘*Others will have to decide if and when the question arises whether this judgement is capable of establishing that a bishop is “never, never” free of responsibility as opposed to “well then, hardly ever” (with apologies to the right good Captain of HMS Pinafore).*

³⁸³ *Ibid* para 18.

³⁸⁴ *Ibid* para 22.

between the bishop and the diocese. In fact there was no contract at all, as there was no intention to create legal relations in secular law.³⁸⁵

From this starting point Ward LJ went on to examine whether the relationship between the priest and the bishop could be described as 'akin' to employment for the purposes of vicarious liability. He considered the Canadian case of *John Doe*³⁸⁶ in which the Supreme Court of Canada applied the principles set out in *Bazley and Jacobi* to find a Roman Catholic bishop vicariously liable for sexual abuse by a priest. Ward LJ emphasised that the court in that case had been satisfied that the necessary connection existed between the 'employer' created or enhanced risk and the wrong which the plaintiff sought to establish.³⁸⁷

He noted the point made by counsel for the diocese that the facts in *JGE* differed significantly from those in *John Doe*, where the priest had been operating in an isolated rural community, and was consequently placed in a position of far greater power and influence than priests most in other settings. Nevertheless, he concluded that the case was authority from a powerful court which commanding respect even though it was not binding in this jurisdiction.³⁸⁸ This response to the point made by counsel is slightly confusing, as the argument that the facts could and should be distinguished does not relate to the powerful persuasive value of non-binding judgments given by appellate courts in the common law world. If the facts could be properly distinguished then the decision would not

³⁸⁵ Ibid para 30: 'I am completely satisfied that there is no contract of service in this case: indeed there is no contract at all. The appointment of Father Baldwin by Bishop Worlock was made without any intention to create any legal relations between them. Pursuant to their religious beliefs, their relationship was governed by canon law, not the civil law. The appointment to the office of parish priest was truly an appointment to ecclesiastical office and no more. Father Baldwin was not the servant nor a true employee of the bishop'.

³⁸⁶ *John Doe v Bennett* [2004] SCC 17 (2).

³⁸⁷ *JGE v English Province of Our Lady of Charity and another* [2012] EWCA Civ 938 per Ward LJ para 33.

³⁸⁸ Ibid para 35.

be binding even if it had come from the UK Supreme Court. Given the significance which Ward LJ attached to the decision, it is important to examine it in comparison to *JGE*.

The facts in *John Doe* were both unusual and extreme. The priest worked in geographically isolated communities which were overwhelmingly Roman Catholic and devoutly religious, even the schools were denominational. There were few other community leaders and authority figures, as well as an absence of nearby and visible state authority in the form of police officers and courts.³⁸⁹

In such circumstances the priest exercised a degree of power which was not comparable to that of a Roman Catholic priest in a UK context. Functioning within the part of the UK covered by the Portsmouth Diocese of the Roman Catholic Church, the priest in *JGE* was a representative of a minority religion in a mixed religious and social setting. There were no comparable issues of geographical isolation, and no absence of alternative authority figures. The statement given in evidence in *John Doe*, that some members of the community believed that '*the priest could turn you into a goat*'³⁹⁰ would be shocking and unlikely in a modern Western European context.

It is also significant that the Roman Catholic Church does not teach, promote or even condone the notion that priests have magical powers and can zap errant parishioners into caprine form.³⁹¹ It is not responsible for folk-beliefs unrelated to its doctrine or practice.

³⁸⁹ *John Doe v Bennett* [2004] SCC 17 (2) per McLachlin CJ para 30: '*The communities were entirely Roman Catholic and the devoutly religious inhabitants placed the Church at the centre of their daily lives. There were few other authority figures; the communities lacked municipal government, diverse business activities, secular organisations, police, courts or any other form of community leadership, leaving the role entirely to the parish priest. The only schools were denominational, and as such, were influenced by the priest, who served as the only local representative of the distant school board.*'

³⁹⁰ *Ibid* para 31.

³⁹¹ CIC Canon 279:1: '*Even after ordination to the priesthood, clerics are to pursue sacred studies and are to strive after that solid doctrine founded in sacred scripture, handed on by their predecessors, and commonly accepted by the Church, as set out especially in the documents of councils and of the Roman Pontiffs. They are*

Neither does it have any control over geography or secular infrastructure. Which raises the question of to what extent was it really the employer or principal who conferred the power on the tortfeasor? If in reality the power was conferred by the victim or a third party, is vicarious liability appropriate?

Once again a sharp contrast is apparent between the decision in *John Doe* and the decision in *Jacobi*, as well as in the approach of different senior Canadian judges. In both cases it could be argued that the employer or principal knowingly placed the tortfeasor in a context in which he would be able to exercise social and emotional power, but in neither case did the employer or principal create that context or confer that power. The power came from the way in which third parties *chose* to respond to a youth leader and a priest. Not all Roman Catholic priests are placed on a pedestal by the entire community in which they serve, and not all youth leaders are hero-worshipped by the young people they work with.

In *John Doe* the employer's role was sufficient, whereas in *Jacobi* it was not; yet the language used in the cases was extremely similar. Both abusers enjoyed 'god-like' status in the eyes of their victims.³⁹² However, the judges disagreed as to where their employers should be held accountable for this. In both cases, McLachlin J was of the view that the employer had placed an individual in a position likely to attract reverence and trust, and furthermore this was not incidental to the role, but something which was intended and

to avoid profane novelties and pseudo-science' and 279:3 '*They are also to acquire knowledge of other sciences, especially of those which are connected with the sacred sciences, particularly insofar as such knowledge contributes to the exercise of pastoral ministry.*' Neither of these canons are compatible with promoting the belief that clergy have magical powers in conflict with modern scientific understanding, and not recognised within traditional Catholic doctrine.

³⁹² *John Doe v Bennett* [2004] SCC 17 (2) per McLachlin CJ para 31 and *Jacobi v Griffiths* 174 DLR (4th) 71 per Binnie J para 85.

conducive to the role being successfully fulfilled.³⁹³ It was foreseen by the employing authorities and considered a benefit that parishioners should look up to their priest; in *Jacobi* she had expressed the same way about young people and a coach or mentor, fostering trust and respect was part of the role. But in *Jacobi* McLachlin was in the minority, and Binnie J who gave the leading judgement stated:

*'The liability of the club cannot be determined solely on the basis of the subjective reaction of the victim. There is no suggestion that an ordinary girl of Jody's age and background, knowing the nature of Griffith's employment as an organizer of after school recreation, would have considered that he had "god-like" job created status.'*³⁹⁴

He also noted with approval United Kingdom case law which had affirmed:

*'The need to relate the victim's impressions to some objective inducement, express or implied, by the employer.'*³⁹⁵

However, interestingly, McLachlin CJ found herself again in the majority, and in agreement with Binnie J in the subsequent case of *KLB v British Columbia*.³⁹⁶ In that case she held that the state was not vicariously liable for the actions of foster parents, as there was insufficient control, and the independence of the foster family was essential to the government goal of providing family care.³⁹⁷ The fact that the State deliberately placed foster parents in a position of great power over vulnerable children was not in itself enough. Although the court was not unanimous in this reasoning, Arbour J gave a strong dissenting judgement,

³⁹³ *Jacobi v Griffiths* 174 DLR (4th) 71 per McLachlin J para 16 and *John Doe v Bennett* [2004] SCC 17 (2) per McLachlin CJ para 30.

³⁹⁴ *Jacobi v Griffiths* 174 DLR (4th) 71 per Binnie J para 85.

³⁹⁵ *Ibid*, citing *Armagas Ltd v Mundogas SA*, [1986] 2 All ER, 385 (H.L.) p 393.

³⁹⁶ *KLB v British Columbia* [2003] 2 SCR 403, 2003 SCC 51.

³⁹⁷ *Ibid* per McLachlin CJ para 24.

arguing that foster parents do act on behalf of the government³⁹⁸ and emphasising the power given to them.³⁹⁹ It may or may not have influenced both judges that the argument was academic, given that all agreed that the claim was statute barred for limitation reasons. However, the differing outcomes of *Jacobi*, *KLB* and *John Doe*, and the significantly different analyses of the judgements involved, do demonstrate an employer's liability for unauthorised deliberate wrong-doing carried out for the personal gratification of an employee is complex and fact specific. This kind of case will always be on the margins of vicarious liability.

It is therefore puzzling that Ward LJ did not address the important factual differences between *John Doe* and *JGE* in his otherwise thorough and extensive judgement, if only to explain why he concluded that they were not material. What were the similarities which established a sufficient link between the enterprise of the bishop and the conduct of the priest? This would be particularly helpful for future courts and litigants faced with non-Roman Catholic clergy, attempting to assess whether a sufficient connection could be established within a different church structure.

However, Ward LJ did go on to note recent United Kingdom case law establishing that more than one party may be held vicariously liable for the actions of the same tortfeasor.⁴⁰⁰

These cases demonstrate that vicarious liability can apply in circumstances where there is no standard employment relationship between the principal and the tortfeasor. Such

³⁹⁸ Ibid per Arbour J para 71.

³⁹⁹ Ibid para 94 '*it is clear that the foster care arrangement reflects the highest possible degrees of power, trust and intimacy. The relationship does more than merely provide an opportunity for child abuse; it materially increases the risk that foster parents will abuse*'.

⁴⁰⁰ *JGE v English Province of Our Lady of Charity and another* [2012] EWCA Civ 938 per Ward LJ paras 36-41. discussing in particular *Viasystems (Tyneside) v Thermal Transfer (Northern) Ltd* [2006] QB 510 and *Hawley v Luminar Leisure Ltd and ASE Security Services Ltd* [2006] EWCA Civ 18.

instances generally concern ‘borrowed’ employees, who were effectively acting under the direction of more than one party at the time of the tort.⁴⁰¹

Ward LJ then considered the underlying reasons of principle for the imposition of vicarious liability, ultimately concluding that it was born out of a mixture of policy considerations.⁴⁰²

Furthermore, he noted that whilst understanding that policy was key to understanding legal development, the law needed to proceed on the basis of principle rather than expediency if it was to be coherent.⁴⁰³ He therefore went on to attempt to establish and set out the principles governing this area, in an effort to determine whether vicarious liability could properly apply in the case of a Roman Catholic priest.

Citing an academic article by Richard Kidner,⁴⁰⁴ Ward LJ set out five signposts for vicarious liability, and analysed the relationship between priest and bishop against them. The signposts were: 1) Control by the employer of the employee; 2) Control by the contractor of himself; 3) The organisation test: how far is the activity of the employee central to the employer’s business in relation to its objective?; 4) The integration test-how far is the activity of the employee integrated into the organisational structure of the enterprise?; and 5) Is the person in business on his own account?⁴⁰⁵

⁴⁰¹ *Viasystems (Tyneside) v Thermal Transfer (Northern) Ltd* [2006] QB 510 *Viasystems (Tyneside) v Thermal Transfer (Northern) Ltd* [2006] QB 510-A fitter and a fitter’s mate were supplied by their employer on a labour only basis to a sub-contractor doing some ducting work. The fitter’s mate negligently damaged the fire protection sprinkler section and causing a massive and expensive flood. There was found to be no problem on the facts holding that both the subcontractor and the employer who supplied the fitter’s mate were vicariously liable for his carelessness. Both were responsible for his actions and had the power to exercise control when the accident took place. In *Hawley v Luminar Leisure Ltd and ASE Security Services Ltd* [2006] EWCA Civ 18 both the night-club using their services and the security firm who employed some heavy-handed bouncers were found to be vicariously liable for their conduct.

⁴⁰² *JGE v English Province of Our Lady of Charity and another* [2012] EWCA Civ 938 per Ward LJ paras 50-54. The main policy considerations identified were: Control, compensation/deep-pockets, deterrence, loss spreading and enterprise liability/risk.

⁴⁰³ *Ibid* para 54.

⁴⁰⁴ Richard Kidner, ‘Vicarious Liability: for whom should the ‘employer’ be liable?’, LS 15 (1995) 47.

⁴⁰⁵ *JGE v English Province of Our Lady of Charity and another* [2012] EWCA Civ 938 per Ward LJ para 7

On the basis of the above, Ward LJ concluded that it was proper for vicarious liability to apply.⁴⁰⁶ Although the relationship was akin to employment rather than employment, enough of the signposts were pointing in the right direction. Whilst the control exercised by the bishop was not that of a conventional employment, parish priests were subject both to canon law and Episcopal direction, authority and sanction.⁴⁰⁷ Ultimately Ward LJ found that there was little difference between the control exercised by a bishop over a priest and a health trust over a surgeon:

'neither is told how to do the job but both can be told how not to do it'.⁴⁰⁸

Ward LJ then described the ecclesiology of the Roman Catholic Church in the following terms for the purposes of the organisation test:

*'Translating that into secular language, there is an organisation called the Roman Catholic Church with the Pope in the head office, with its "regional offices" with their appointed bishops and with "local branches", the parishes with their appointed priests. This looks like a business and operates like a business. Its objective is to spread the word of God. The priest has a central role in meeting that target.'*⁴⁰⁹

With regard to the integration test, the parish priest was found to be wholly integrated into the organisational structure of the Church's enterprise.⁴¹⁰ As far as the entrepreneur test was concerned, on balance the priest was found to be more like an employee than an independent contractor. Even though his income came from collections at Mass rather than

⁴⁰⁶ Ibid paras 73-83.

⁴⁰⁷ Ibid para 74-75.

⁴⁰⁸ Ibid para 75.

⁴⁰⁹ Ibid paras 76-77.

⁴¹⁰ Ibid para 78.

a salary, he was required by canon law to reside in the parochial house, which looked like an employee making use of his employer's tools of the trade.⁴¹¹

In summary:

*'I distilled the essence of being an employee to be that he is paid a wage or salary to work under some, even if only slight, control of his employer in his employer's business for that business. Father Baldwin may not quite match every facet of being an employee by in my judgement he is very close to it indeed.'*⁴¹²

This however was not in itself sufficient for vicarious liability to be imposed; in Ward LJ's view, it also had to be 'just and fair' to it to apply.⁴¹³ He supported the conclusion that it was in two ways. Firstly by recourse to the man on the fictional Clapham omnibus, who would see the priest as a servant of the parish.⁴¹⁴ But secondly, and Ward LJ considered more importantly, on the basis of a hypothetical scenario.⁴¹⁵

Ward LJ posed the question of a priest riding a bicycle to administer the last rites, as he was bound to do by canon law. Suppose that he negligently injured somebody on a pedestrian crossing; the priest is uninsured and has taken a vow of poverty;⁴¹⁶ would it really be right to conclude that the injured party had not right to recover against the bishop or the diocese?

⁴¹¹ Ibid para 79.

⁴¹² Ibid para 80.

⁴¹³ Ibid para 81.

⁴¹⁴ Ibid para 82.

⁴¹⁵ Ibid paras 83-84.

⁴¹⁶ Whilst not all priests necessarily take a vow of poverty in the same way as religious, many are also monks and may have made such a commitment. In fairness the example is a hypothetical one; there is nothing after all to prevent some priestly cyclists from having taken out insurance.

Ward LJ emphatically thought not.⁴¹⁷ However, this conclusion highlights a problem with his analysis. Having satisfied himself that the abusive priest was in a relationship akin to employment, Ward LJ did not go on to explain *why* his conduct in sexually abusing children was so closely related to the duties within the scope of the quasi-employment relationship as to make the imposition of vicarious liability appropriate. Presumably Roman Catholic bishops cannot be liable for every tortious action committed by their parish clergy, so where do the boundaries lie, how can a connection and enterprise risk be established? In *Maga* the priest had a special brief for Evangelism and youth work, which was a significant factor in the court concluding that the bishop was liable for his actions in abusing a minor whom he had befriended.⁴¹⁸ Therefore in *Maga* it was clear that the priestly status of the abuser did not confer a duty of care towards the world at large, and the fact that his senior colleague was aware of the potential risk was important. But what was it about the circumstances in *JGE* that justified the imposition of liability?

To say that bishops are potentially vicariously liable for the actions of their clergy does not answer the question of which actions and when. What if a priest were to commit a sexual assault whilst in plain clothes and on holiday, and in place where no-one was aware of his clerical status? Presumably the bishop would not be liable in such an instance. So what are the factors needed to establish the necessary nexus between his duties and the assault?

Ironically the supposedly uncontroversial example given by Ward LJ of a bicycle accident illustrates the problem very well. Perhaps if the priest is rushing to administer sacraments

⁴¹⁷ Ibid 83.

⁴¹⁸ *Maga v Trustees of the Birmingham Diocese of the Roman Catholic Church* [2010] EWCA 256 Para 47 per Neuberger MR and para 73: 'To treat this as a duty to the world at large is, in my view, to mischaracterise it'.

to the dying that is fairly clear, as Ward LJ noted it is required of him by canon law.⁴¹⁹ Also at the other end of the spectrum it may be quite simple. If a priest crashes into someone on his bicycle whilst visiting his best friend on his day off, outside of his parish boundaries, then it seems clear that his bishop will not be liable. The accident in no way related to his duties or the 'enterprise' of the diocese.

However, what about a case somewhere between these two extremes? But priests do not have set working hours or specific duties. What of a priest on a journey into town, planning to buy his sister a birthday present and intending to visit a housebound parishioner if he has time before the evening mass. Will the bishop be liable for an accident on that journey? Or supposing priest rides off to the supermarket, intending to buy food for himself and some biscuits and crayons for the Sunday school, he negligently crashes into a pedestrian on the way home, and as his shopping spills onto the tarmac he realises that he forgot the crayons and biscuits after all. Was the journey related to his duties? Is the bishop liable? Nothing in the judgement of Ward LJ really assists in reaching a conclusion.

Some of these difficulties were eluded to in the dissenting judgement given by Tomlinson LJ. He observed that it would have been easier for the claimant to have established liability if the abusive priest had been given some responsibility for the home in which she had been resident was when the abuse took place, or special care or oversight for the order of nuns who ran it.⁴²⁰ The link between his duties and the alleged abuse was unclear. Furthermore

⁴¹⁹ *JGE v English Province of Our Lady of Charity and another* [2012] EWCA Civ 938 per Ward LJ para 83; CIC, Canon 468.

⁴²⁰ *JGE v English Province of Our Lady of Charity and another* [2012] EWCA Civ 938 per Tomlinson LJ para 89.

he also expressed disquiet about characterising the priest as being in a relationship akin to employment, especially on the basis of *John Doe*.⁴²¹

Tomlinson LJ noted the extreme and unusual geographical and social context of that case,⁴²² and also some confusion in the judgement. It was not clear which elements of the power, which the priest in the Canadian case of *Doe* so terribly abused, were conferred by his appointment as an agent or quasi-employee of the diocese, and which flowed from his status as an ordained priest.⁴²³ Put slightly differently, a priest is always a priest, whatever he is doing and whenever he is doing it, ordination is a permanent state and if valid never becomes invalid.⁴²⁴ However, this is very different from stating that every action undertaken by a priest is pursuant to the particular appointment or office which he occupies at the time in question. Therefore, which actions are and actions are not within or related to the duties conferred by a particular appointment are key to the question of vicarious liability.

Tomlinson LJ also expressed his dissatisfaction with transposing the concepts of 'enterprise' and 'benefit' into a church context, as it was difficult to say that the priest was acting for the benefit of the bishop, and a commonality of interest is not sufficient to constitute an enterprise.⁴²⁵ Furthermore, the *Maga* case was distinguishable from the present litigation

⁴²¹ Ibid para 94.

⁴²² Ibid para 96.

⁴²³ Ibid para 97: '*Nonetheless I do not think that the court in Doe v Bennett observed a consistent distinction between the power conferred upon the priest by virtue of his appointment as the employee or quasi-employee or agent of the Bishop and the power which was conferred upon his solely by virtue of his status or standing as an ordained priest*'.

⁴²⁴ CIC, Canon 290.

⁴²⁵ *JGE v English Province of Our Lady of Charity and another* [2012] EWCA Civ 938 per Tomlinson LJ para 105.

precisely because employment and all the assumptions accompanying it were accepted without question in *Maga*.⁴²⁶

Although he agreed with Ward LJ in dismissing the appeal, Davies LJ considered that the analysis in *John Doe*⁴²⁷ related to the status conferred by ordination to the priesthood rather than arising from appointment as priest of a parish. Therefore, it was not his appointment to that particular parish which generated the risk. He also doubted the appropriateness of the trial judge in the present case having been influenced by it to possibly conclude that placing a priest into a community was a 'risky enterprise'.⁴²⁸

However, Davies LJ did accept that there was a quasi-employment relationship.⁴²⁹ The priest is appointed and entrusted to further the bishop's aims and purposes.⁴³⁰ In addition, where a bishop is repeatedly warned of the misconduct of a parish priest, it would be odd if his legal duty to investigate and take action had no real content because he was held to have no power to take action.⁴³¹

Unlike Tomlinson LJ, Davies LJ regarded Fr Baldwin's duties as parish priest to visit and care for those within his parish constituting a sufficient connection between his appointed role and the alleged abuse.⁴³² There was no need to have recourse to the problematic concepts of benefit or enterprise; in visiting the residential home he was carrying out the duties of the role to which he was appointed.

⁴²⁶ Ibid 106.

⁴²⁷ Ibid per Davies LJ para 120.

⁴²⁸ Ibid para 121.

⁴²⁹ Ibid para 122.

⁴³⁰ Ibid para 129.

⁴³¹ Ibid para 132.

⁴³² Ibid para 135.

Taken together the three judgements demonstrate how little current judicial consensus there is in this area. The current state of the JGE litigation appears to establish that a Roman Catholic bishop is vicariously liable for the actions of his parish priests in carrying out the duties to which they are appointed. However, which actions relate to those duties remains unclear, particularly in relation to sexual abuse.

2.3 (c) EL v Children's Society

Another recent case in this sphere is *EL v Children's Society*.⁴³³ It concerned abuse which took place in a residential home run by a Church of England charity.⁴³⁴ The charity employed a couple to live in and run one of their homes along family lines, with the intention that they became parental figures for the children in their care (in fact the term 'house-parents' was used by the Children's Society).⁴³⁵ Their son Frank lived with them, initially full-time and afterwards during breaks from national service and university. He admitted to having abused the claimant and other boys living at the home in the 1950s. After his death his estate settled a claim from the claimant, who continued to pursue the defendant for vicarious liability.⁴³⁶

In considering this claim Haddon-Cave J made reference to Lord Millet's *dicta* on risk in *Lister*,⁴³⁷ and went on to state that a two-stage was required to determine vicarious liability:

1) was the relationship between the Defendant and the tortfeasor such that vicarious liability should apply; and 2) was there a connection between the Defendant and the act or

⁴³³ *EL v Children's Society* [2012] EWHC (QB).

⁴³⁴ *Ibid*, para 2.

⁴³⁵ *Ibid* para 36.

⁴³⁶ *Ibid*, paras 4-19.

⁴³⁷ *Ibid*, para 24.

omission of the tortfeasor in question? The court is required to make a judgement on a synthesis of these two factors.

On the facts it was found that the claim for vicarious liability failed because not only was Frank not an employee of the defendant, it had not been established that he was ever officially or unofficially left in charge of the house and children.⁴³⁸ Frank had no duties conferred on him by the Children's Society. Although his parents had authority to engage suitable third parties to deputise for them at a daily-rate, Frank would not have been regarded as a suitable person and was not so engaged.⁴³⁹

Furthermore, it was accepted by the claimant that when the instances of abuse took place, Frank's parents were at home and he was not in even the most casual or temporary charge of the household.⁴⁴⁰ The only real status or position which Frank had was an '*air of authority*'⁴⁴¹ conferred on him by being son of the House-parents.

Taken as a whole, therefore, '*The evidence does not begin to satisfy the fact sensitive tests of vicarious liability in Lister and Various Claimants. Indeed, the evidence, if anything, points to a conclusion of positive non-employment of Frank Bibby by the Defendant*'.⁴⁴²

Haddon Cave J also concluded that the claim was time-barred, and that it would not be appropriate to exercise discretion under section 33 of the Limitation Act 1980.⁴⁴³ Therefore a full trial did not take place in this case. This is also relevant because the length of time since the events took place made gathering and assessing evidence on vicarious liability

⁴³⁸ Ibid, para 53.

⁴³⁹ Ibid, para 54.

⁴⁴⁰ Ibid, para 55.

⁴⁴¹ Ibid.

⁴⁴² Ibid, para 56.

⁴⁴³ Ibid, para 91

extremely difficult. Nevertheless, there are a number of issues which can be drawn out of the judge's approach to this question.

The 'fact sensitive' test was concerned with closeness of connection rather than risk, and once again there is a difficulty in identifying precise factors which led to the judge's finding. The dicta that the evidence pointed to, if anything, '*a positive non-employment*'⁴⁴⁴ of Frank Bibby is particularly hard to understand, given that in light of *Various Claimants* employment status is not a determinative factor in vicarious liability. The court appeared to mistakenly assume a need to establish an employment relationship. In *Various Claimants* (see discussion above) the brothers could well be described as 'positively not employed' by the Institute, as remuneration flowed from them to the Institute rather than the other way around. Nevertheless considered as a whole, the relationship was one to which vicarious liability was found to attach. In over emphasising the employment dimension, the court did not consider the facts as holistically as it might have done.

Because of the long lapse of time, and death of all of the Bidy family, much of the evidence about what the Defendant did came from its official policies and handbook. But as a non-human person, the defendant could not *do* anything without acting through human agents. Frank's mother and father were two such human agents, and there was little direct and reliable evidence about how they used Frank and the status which they accorded him. Had the evidence been available, and had an enterprise risk approach been taken, it is possible that vicarious liability might have been established regardless of Frank's lacking employment status.

⁴⁴⁴ Ibid, para 56.

As in the *Bazley* case, the enterprise was concerned with caring for children in a residential setting and attempting to provide a substitute family environment. The enterprise, acting through the two House-parents, chose to achieve this by allowing other adult members of their immediate family informal and unsupervised access to the children in their care, as would be the case in most biological families. In bonding appropriately with the children, Frank would have been furthering the aims of the enterprise by helping to provide a quasi-familial environment.

If an enterprise is prepared to use an adult to further its aims, why should it automatically be absolved from vicarious liability simply because no employment relationship existed? Employment status is not a requirement for vicarious liability. As the Canadian courts argued, an enquiry focused on risk shifts any analysis away from semantics about scope of employment and onto the defendant. What risks did the defendant create or enhance with its enterprise? By allowing various adults unfettered access to the children in pursuance of their aims, the defendants in *EL* created the risk that the children would be abused.

But as with *Maga* the position in *EL* was complicated further by culpability on the part of the defendants. Had the case been brought in time, and had the relevant evidence therefore been available available, it might well have been possible to establish that the Mr and Mrs Bibby failed to appropriately oversee their son's interaction with the children, and that this failure was negligent and a direct rather than vicarious claim could have been made.

Furthermore, although not relevant to the instant case, the defendants were aware of separate allegations of sexual abuse by Mr Bibby senior.⁴⁴⁵

⁴⁴⁵ Ibid, para 12.

In addition to negligence and wrong-doing by Mr and Mrs Bidby in the house, there was evidence that the charity had been negligent at an institutional level. One former employee who worked in the house gave evidence that she had been concerned about the regime there, and wrote to the charity's headquarters asserting that Mr Bibby senior was violent and that the children were afraid of him. Rather than investigating this claim, the response of the charity was to write to Mr Bibby, who responded by dismissing the employee.⁴⁴⁶

Because of the evidentiary difficulties and the limitation issues, the question was academic in this case. But it is submitted that had a full trial been possible, as in *Maga*, it would have been more appropriate to focus on negligence on the part of the defendant (arising both from the negligence of Mr and Mrs Bidby in failing to monitor their son's contact with the children, and also from the Children Society's failure to investigate when concerns were raised by third parties about the conduct of the Biddys in their role as house-parents) than vicarious liability for trespass. Where a principal has been negligent, there is no need to introduce the complexity of vicarious liability.

Furthermore, stretching the law of vicarious liability to spare apparently deserving claimants the difficulty and trauma of establishing negligence on the part a culpable defendant (as arguably happened in *Maga* and could potentially have happened in *EL v Children's Society*) will not produce good precedent for future cases in which employers and quasi-employers are less culpable.

⁴⁴⁶ Ibid, para 39.

2.3 (d) Various Claimants-Supreme Court

The Supreme Court demonstrated a move back towards highlighting the significance of risk in this context, in a decision which reversed that of the Court of Appeal set out above.⁴⁴⁷

The Supreme Court held that the Institute *was* vicariously liable for criminal assaults committed by brothers working as teachers. However, they did not abandon the test and language of close connection; rather they emphasised the creation of risk as a significant factor in establishing such a connection. Neither did they adopt the term ‘enterprise risk’ from the Canadian authorities, nor provide clear guidance as to what actually constitutes creating a risk.

The only substantial judgement was given by Lord Phillips, with the assent of Lady Hale, Lord Kerr, Lord Wilson and Lord Carnwath. He noted that ‘*the law of vicarious liability is on the move*’,⁴⁴⁸ and provided an overview of the issues, summarising recent developments with the following propositions:

- i) It is possible for an unincorporated association to be vicariously liable for the torts of its members.
- 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.
- iii) Vicarious liability can even extend to liability for a criminal act of sexual assault.
- iv) It is possible for two different defendants, D2 and D3, each to be vicariously liable for the single tortious act of D1.

⁴⁴⁷ *Various Claimants v The Catholic Society Welfare and Others* [2012] UKSC 56.

⁴⁴⁸ *Ibid* para 19.

None of the propositions in points i) to iv) above were new, rather than were an attempt to encapsulate the legal position which had emerged from recent case law. He also adopted the two stage test outlined by Hughes LJ at para 37 of his judgement in the *Various Claimants* litigation in the Court of Appeal, and affirmed the requirement for there to be a synthesis between the two stages.⁴⁴⁹ However, he differed from Hughes LJ in his understanding of the second stage. He accepted Hughes LJ understanding that stage one involves assessing whether the relationship between D1 and D2 one which is capable of giving rise to vicarious liability.

Lord Phillips declined to follow Hughes LJ with regard to the second stage. Hughes LJ described this as an examination of the connection between D2 and D1, and the act or omission of D. In contrast Lord Phillips explained it as follows:

*'What is critical at the second stage is the connection that links **the relationship between D1 and D2** [my emphasis] and the act or omission of D1, hence the synthesis between the two stages'*⁴⁵⁰

In the instance case both stages were in issue. It was necessary to establish whether the relationship between the Institute (the brotherhood as a whole, an unincorporated association in UK secular law) and the individual brothers teaching in one particular school was capable of giving rise to vicarious liability. The Institute argued, and the Court of Appeal had agreed, that the relationship of individual brothers to the Institute was insufficiently close to give rise to vicarious liability for sexual abuse.⁴⁵¹

⁴⁴⁹ Ibid, para 21.

⁴⁵⁰ Ibid.

⁴⁵¹ Ibid, para 23.

Lord Phillips acknowledged that he could understand the difficulty which Hughes LJ had had with accepting that individual brothers on the other side of the world could be vicariously liable for sexual assaults committed in an English school.⁴⁵² However, counsel for the Institute had not taken any point on the nature of the Institute before the Supreme Court; and Lord Phillips in any case regarded theoretical arguments about its nature to be a long way from the *'realities'* of the case; in his view the critical issue would be access to funds held by trusts and insurance cover of trustees.⁴⁵³

In other words, there might be practical difficulties in extracting money from brothers and funds outside of the jurisdiction, but this was not relevant. There were funds within the jurisdiction which potential claimants could look to if successful in bringing a claim and these were held by entities with legal personality.⁴⁵⁴

This pragmatic approach by Lord Phillips arguably makes good sense in relation to financial reality. If claimants are able to enforce judgement against a legal entity with funds in the UK, any theoretical difficulties or opportunities relating to enforcing against different entities abroad, could well be viewed as an unhelpful distraction. However, the logic of this position is less easily defensible in relation to matters of principle and justice.

⁴⁵² Ibid, para 32: *'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 worldwide 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 the point on the nature of the Institute.'*

⁴⁵³ Ibid, para 32: *'At the end of the day what is likely to matter will be access to funds held by the trusts, or to insurance effected by the trustees. Whether one looks at the picture worldwide or within Great Britain, the salient features are the same'*

⁴⁵⁴ Ibid: *'To carry out its activities it has formed trusts that have recognised legal personality'*

Lord Phillips asserted that the Institute was not a contemplative order, and that the reason for its existence was to carry on the activity of teaching.⁴⁵⁵ But this is a somewhat simplistic analysis of the De La Salle brotherhood. Their self-understanding is not that they are a group of men engaged on a joint enterprise to provide a certain sort of education. The brothers see themselves as living out their particular vocation to the religious life; this involves community, chastity, obedience, evangelism and work in Christian education.⁴⁵⁶ The Institute does not straightforwardly exist to provide education, in the same way that a secular charity might conceivably exist simply for the purpose of helping retired donkeys or saving a particular piece of woodland. The object of the brotherhood is not solely to provide education, but a relational context in which the brothers can live out their vocation and spirituality.

It is potentially problematic to say that *all* endeavours which might come within the ambit of the brothers' vocation are acts done to further a joint enterprise. Much the same issue exists as discussed about in relation to priests; it is very difficult to discern which activities constitute acts done in an individual's capacity as a brother and might be defined as actions done purely on the individual's own behalf. It is doubtful in either case that Roman Catholic priests or lay brothers would recognise the distinction as meaningful, as defining some aspects of life as spiritual and others as non-spiritual is inconsistent with Roman Catholic theology and Canon Law.⁴⁵⁷

⁴⁵⁵ Ibid: *'The Institute is not a contemplative order. The reason for its 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 brothers teach, and it sends its brothers out to teach in schools managed by others.'*

⁴⁵⁶ Lesallian Association in Great Britain, *Lesallian Vocations*, <http://www.delasalle.org.uk/fsc/vocation.htm> (accessed 15/12/2012)

⁴⁵⁷ The Roman Catholic understanding of priesthood as a vocation which encompasses every aspect of an individual's life is reflected in Canon law; see for example CIC Can 245:1 on the formation of priests *'Through their spiritual formation, students are to become equipped to exercise the pastoral ministry fruitfully and are to*

Taking a concrete example, evangelism is a key part of the mission and vocation of the De La Salle brotherhood.⁴⁵⁸ Imagine a case in which a lay teaching colleague invites a brother to the christening of his infant daughter and to the party afterwards: both events take place within the school where the brother works. Attending the post-service gathering could reasonably be interpreted as an opportunity to make contacts and evangelise, much as the priest in *Maga* was said to be engaged in evangelism whilst discussing his sports car with a young boy.⁴⁵⁹ Whilst at the party, he gets into an argument about religion with an aggressive atheist, the discussion becomes heated and the brother throws a punch. Would the Institute be liable for this trespass? Or suppose that the brother spills hot tea over a fellow guest or drops a heavy tray of sausage rolls on their foot; are the institute liable in negligence for personal injury? However these questions are answered, the conclusion is problematic in relation to Lord Phillips' analysis.

If they are answered in the affirmative (and this would be the logical conclusion from his reasoning, and the broad brush approach which he took to the purposes of the Institute) then where *can* the line reasonably be drawn? What if a brother went into a pub of his own accord, had a similar argument and hit somebody, would liability still attach? The mission

be formed in a missionary spirit; they are to learn that ministry always carried out in living faith and charity fosters their own sanctification. They also are to learn to cultivate those virtues which are valued highly in human relations so that they are able to achieve an appropriate integration between human and supernatural goods.' The same is true of vocations to the religious life, which are understood as a 'form of life' not merely a set of duties, see for example 573:2: '*The Christian faithful freely assume this form of living in institutes of consecrated life canonically erected by competent authority of the Church. Through vows or other sacred bonds according to the proper laws of the institutes, they profess the evangelical counsels of chastity, poverty, and obedience and, through the charity to which the counsels lead, are joined in a special way to the Church and its mystery.'*

⁴⁵⁸ Lesallian Association in Great Britain, *Lesallian Vocations*, <http://www.delasalle.org.uk/fsc/vocation.htm> (accessed 12/12/2012): '*From their personal prayer and the mutual support of their association, the Brothers find energy and enthusiasm for a commitment to helping others, especially the disadvantaged and the underprivileged. They seek specifically to help young people who are suffering from the "famine of the Word of God" (Amos 8.11). It is the Brother's vocation to share the Good News with them, to be "brother" to them as individuals, accompanying them on their faith-journey, helping them to grow in Christ.*

⁴⁵⁹ *Maga v Trustees of the Birmingham Diocese of the Roman Catholic Church* [2010] EWCA 256 per Neuberger MR para 11.

of the Institute and vocation of the brothers is so wide and all encompassing that more or less any activity will be covered. Effectively the brotherhood would all be liable for all torts committed by one of their brethren.

This kind of liability has long since been abandoned in relation to husbands and wives.⁴⁶⁰ If the spiritual commitments and promises in the marriage service do not leave the parties mutually legally responsible in tort, why should the vows of lay brothers be treated differently? There are possible Human Rights Act objections to imposing legal burdens on individuals whose religious convictions and lifestyle choices lead them to devote themselves to a celibate community which are considerably greater than those imposed upon individuals who commit themselves to marriage or civil partnership.⁴⁶¹

Article 8 of the ECHR confers a right to respect for private and family life and as discussed above Article 9 confers a right to freedom of conscience, belief and religion. Furthermore, Article 14 prohibits discrimination with respect to Convention rights on a number of grounds, including on religious belief.

If therefore, individuals who choose to order their private and family life around a celibate community rather than a sexual partnership are subjected to burdens (i.e. liability in tort) not placed upon adults opting for marriage or civil partnership, then there is the possibility

⁴⁶⁰ See J H Baker, *An Introduction to English Legal History*, fourth edition (Oxford University Press: Oxford, 2002), 489: 'Her inability to own property did not render a married woman less capable of committing torts, any more than it exempted her from criminal liability. But it rendered her incapable of paying compensation, and as a matter of procedure an action for the wife's tort had to be brought against the husband and wife jointly. The wrong was not visited on the husband personally, even in a vicarious sense, for if the wife died his liability came to an end; but he nevertheless bore the brunt of any successful suit. Under the 1882 Act, it became possible to sue married women in tort as though they were single, but judgement could only be executed against their separate property. Husbands remained liable as well, until they were relieved from this obsolete consequence of the doctrine of unity of person in 1935.'

⁴⁶¹ Arguably there would be issues with Article 8 and the right to private and family life and Article 9 and the right to freedom of thought, conscience and religion if individuals choosing to live as celibates within religious communities were treated differently by State courts than those living in marriages, civil partnerships or as single people.

of a claim under Article 8, possibly in conjunction with Article 14. In addition, in choosing to live as part of a celibate brotherhood the members of the Institute are manifesting their religious beliefs. Consequently, there is also the potential for a claim under Article 9, again either freestanding or in conjunction with Article 14.

If however the Institute would *not* be liable for the actions of an individual brother at a Christening party or in a pub, then that leaves the question of which activities would be covered by the vicarious liability of the Institute. In this case, clearly *not all* activities which could plausibly be said to be within the scope of the brothers' vocations or the Institute's mission and purposes are within the ambit of the vicarious liability. Having made this concession, it is no longer easy to see why brothers working in a different school (and possibly on a different continent) are construed as being engaged in a joint enterprise with brothers teaching elsewhere, purely because they are providing education which is one element of the Institute's mission.

Is it truly fair, just and reasonable to impose vicarious liability on the whole Institute in these circumstances? This question is especially pertinent when it is remembered that there was no danger of vulnerable claimants being left without a remedy if such liability was not imposed. In the instant case, there was no doubt that the secular employer was vicariously liable; indeed the claimants were content to recover from the employer. In almost all circumstances in which a brother teaching in a school committed a sexual assault on a pupil, the institution which employed him in secular law, and/or the institution which owned and managed the school in secular law, would be vicariously liable for the tort. Both such institutions (if different) would need to have legal personality, assets and insurance in order to fulfil these functions. Consequently, failing to find the Institute vicariously liable would

not have left claimants either without an action, or without an action against a defendant with assets and insurance.

However, regardless of the merits, Lord Phillips made the finding which he did, and went on to consider the essentials of a relationship giving rise to vicarious liability. He identified the policy objective underlying vicarious liability as being to ensure, as far as fair, just and reasonable, that liability for tortious wrong is borne by a defendant who amongst other things has the means to compensate the victim.⁴⁶² He did not however engage with the point that in the case before him (and realistically in similar future cases involving religious orders teaching in schools) the claimants would have an alternative defendant with sufficient means to pay any costs and damages which might be awarded. Any organisation owning and running a school and employing teachers would have legal personality, assets and insurance.

Lord Phillips then went on to consider the issue of control in vicarious liability, reiterating that in contemporary law control requires an employer to be able to direct *what* an employee does, not how he or she might do it.⁴⁶³ However, he did not regard the way in which the doctrine of control had been applied in some judgments relating to dual vicarious liability as either correct or helpful.⁴⁶⁴ In the *Mersey Docks* case May LJ (at para 16) found that where there was potential for dual vicarious liability, the court should consider who had responsibility to prevent the negligent act; who was entitled to give orders as to how the work should or should not be done?⁴⁶⁵ In contrast, Rix LJ reached the same conclusion as May LJ, but via a different route. He questioned whether the doctrine of vicarious

⁴⁶² *Various Claimants v The Catholic Society Welfare and Others* [2012] UKSC 56 per Lord Phillips para 34.

⁴⁶³ *Ibid*, para 36.

⁴⁶⁴ *Ibid*, para 45.

⁴⁶⁵ *Ibid*, para 41.

liability, designed for the benefit of claimants was about control. Instead, the relevant question was whether the employee was so much a part of the work, business or organisation of both employers as to make it just for them to answer for his or her negligence.⁴⁶⁶

Lord Phillips preferred the analysis of Rix LJ.⁴⁶⁷ He even questioned whether the subsequent decisions of the Court of Appeal in *Hawley v Luminar Leisure* and *Biffa Waste Services* might have had a different outcome if the court had followed Rix LJ rather than May LJ.⁴⁶⁸ In both of those cases the court found that on the facts only one defendant was vicariously liable, but Lord Phillips suggested that if an integration test rather than a control test had been applied a finding of dual vicarious liability might have been reached. Given that vicarious liability is not based upon any fault, it might be argued that spreading the compensation load is just where there is genuinely joint employment and responsibility for the tortfeasor.

Turning to the issue of the relationship between the Institute and individual brothers, Lord Phillips again rejected the reasoning of the Court of Appeal in having distinguished the present case from *JGE* (which concerned the relationship between a Roman Catholic priest and his bishop).⁴⁶⁹ He found that the relationship between brothers and the Institute had many of the '*all the essential elements*' for the purposes of vicarious liability of an employment relationship.⁴⁷⁰ He listed these as follows:

⁴⁶⁶ Ibid, para 43.

⁴⁶⁷ Ibid, para 45.

⁴⁶⁸ See *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.

⁴⁶⁹ *Various Claimants v The Catholic Society Welfare and Others* [2012] UKSC 56 per Lord Phillips para 54: '[In *JGE* the Court of Appeal] found it possible to describe the relationship between the bishop and priest as being "akin to employment" Ward LJ achieved this by treating 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'.

⁴⁷⁰ Ibid, para 56.

- i) The Institute was divided into a hierarchical structure and conducted its activities as if it were a corporate body.
- ii) The teaching activity was conducted by the brothers because their superior in the order directed them to do this; the secular employment contracts with the other defendants would not have existed but for this direction.
- iii) The teaching activity was undertaken 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. (Of course their behaviour was also governed by the rules and procedures of the schools, but Lord Philips did not address the implications or significance of this in any detail. Questions like what would have been in the position in the event of a conflict between the rules of the school and the commands or rules of the Institute were not considered. Neither was the relevance of the fact that the relationship which the brothers had with the school was enforceable in secular contract law, whilst their relationship with the Institute was not).

Lord Phillips did acknowledge two key differences between the relationship and employment, namely that it was governed by vows rather than contract, and that rather than being paid by the Institute, the brothers transferred their earnings to it.⁴⁷¹ However, he did not consider either of these differences to be material, and in fact regarded them as rendering the relationship between the brothers closer than that of employer and

⁴⁷¹ Ibid, para 57.

employee.⁴⁷²

There are a number of problems with this assessment. It is far from clear that points ii) to iv) are necessarily and obviously points which make the brothers' relationship with the Institute akin to employment rather than akin to a private spiritual or social arrangement, such as marriage or membership of a club. And in any case, given that employment is not an absolute requirement for vicarious liability, it is questionable as to why this should have been such a dominant focus.

Point ii) appears to relate to the brothers' motivation for entering into secular employment contracts, namely that of having received instructions from their Superior in the order.

However, those instructions would not have force in secular law, the brothers being bound to the Institute by their vows rather than contract law, as Lord Phillips himself acknowledged.⁴⁷³ Why should a private, spiritual arrangement between individuals give rise to liability in civil law in this particular context, when such arrangements are not ordinarily within the ambit of secular jurisdiction? Consider for instance a couple had married using a form of vows which required obedience on the part of the wife, who both supported this ideological stance. An obvious example would be the BCP 1662.⁴⁷⁴

As discussed above, husbands are no longer liable for the tortious conduct of their wives.

Even if a husband instructed his wife to take a particular job, or the couple both regarded

⁴⁷² Ibid, para 58.

⁴⁷³ Ibid, para 57.

⁴⁷⁴ See for example the wording of the marriage service in the 1662 Book of Common Prayer: *'Then shall the Priest say unto the Woman, N. WILT thou have this man to thy wedded husband, to live together after God's ordinance in the holy estate of Matrimony? Wilt thou obey him, and serve him, love, honour, and keep him, in sickness and in health; and, forsaking all other, keep thee only unto him, so long as ye both shall live?'* Not only is this service lawful within the Church of England, it is advertised and offered as a choice for couples on the Church of England website, The Church of England <http://www.yourchurchwedding.org/your-wedding/marriage-services.aspx> (accessed 7/01/2013).

working in a certain field as part of a shared vocation, for example as missionaries, there is no reason to suppose that the general doctrine would be reversed. In fact the legislation which released husbands from liability for their wives was passed at a time in the BCP 1662 marriage service requiring wifely obedience remained the only form of words offered by the Church of England.⁴⁷⁵ Therefore, had the promise of obedience affected the legal position some provision would surely have been made for it, given that it formed part of the form of service of the established church. So why was a private, spiritual promise requiring obedience on the part of an order of lay brothers so clearly and obviously different from a private, spiritual promise requiring obedience by a wife?

Point iii) is similar in many ways. It appears that Lord Phillips is here categorising teaching as part of the 'enterprise' of the Institute (although he explicitly did not adopt the word 'enterprise' from the Canadian cases). Presumably in order to demonstrate that the conduct giving rise to the tort was undertaken in furtherance of this enterprise. However, this is only relevant if the Institute is categorised in institutional rather than relational terms. Are the vows of the brothers binding them to a collective enterprise, or are they sacred promises to adopt a shared lifestyle and pursue connected vocations? In other words, do the brothers understand themselves to be engaged in a joint project of Christian education, or supporting one another in their common but individual vocations in this field? Only if the former analysis is adopted rather than the latter does Lord Phillip's third point become relevant.

Exactly the same logic applies to the fourth point. The rules of the Institute do not just

⁴⁷⁵ Law Reform (Married Women and Tortfeasors) Act 1935.

cover the teaching activities of the brothers, but to the whole of their lives and lifestyle.⁴⁷⁶

Exactly the same point could be made in relation to marriage vows. These cover behaviour in the home, workplace and everywhere else. If they affect how a person functions they necessarily affect how they conduct themselves at work, but they do *not* generate vicarious liability.

So, therefore, everything hinges on the first point. On the facts the Supreme Court decided that the Institute conducted its affairs as if it were a corporate body, and had a hierarchical structure which supported and enabled this endeavour. There is scope to question how fair and accurate this analysis was, and little reasoning is given to support it. Presumably, however, this will be a significant question for other religious orders in a similar situation; do they function as a corporate body with a shared and identifiable mission? Otherwise it is hard to see how or why they should be differentiated from other private arrangements and commitments between individuals.

The Supreme Court concluded that the brothers were effectively teaching for the Institute, even though it did not employ them. Again it is not clear where or how the line will be drawn in future cases. What about religious orders with a more general mission, and with members in secular employment to support themselves and their brothers or sisters? Was the fact that the brothers were part of a teaching order and committed the torts whilst teaching critical? As it stands the *Various Claimants* judgement has apparently widened the scope of vicarious liability without clearly indicating where its boundaries might lie.

This is further demonstrated by an apparently casual but critical point made by Lord Phillips

⁴⁷⁶ See for example Lesallian Association in Great Britain, *Lesallian Vocations*: <http://www.delasalle.org.uk/fsc/vocation.htm> 'The Rule of Brothers is one which promotes a life of prayer, a deeper awareness of God's presence, a spirit of faith, faithfulness and trust in God.' (accessed 12/12/2012).

at paragraph 61. After such a lengthy discussion he proceeded to briefly adopt an alternative analysis:

'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 action by 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.'

This perfectly illustrates the points discussed above about the scope of liability within religious communities. Suppose the example given by Lord Phillips is tweaked very slightly; what if the brother set out on foot but chose to borrow a friend's bicycle? What if he forgot to buy bread for the Institute but went off for a bicycle joyride on a summer evening and ran into a pedestrian? What if he was using a third party's car but driving with insurance paid for by the Institute? Again there is the undesirability of rendering his brothers liable for everything which he might do amiss in the eyes of secular law on the one hand, and the impossibility of providing coherent guidance as to which actions should properly be excluded from liability on the other.

But whatever the weaknesses may be identified in his argument, there is no doubt that Lord Phillips held that the connection between the brothers and the Institute was sufficient to justify the imposition of vicarious liability. He therefore went on to consider whether in the circumstances it was appropriate to impose liability for sexual abuse.

In this context Lord Phillips did specifically note the importance of the employer or quasi-

employer having created or 'significantly enhanced' a risk to the victims.⁴⁷⁷ It was essential that the employer or quasi employer had a relationship with the abuser which put him or her in a position to:

- a) carry on the employer's business or further its interests, and;
- b) did so in a manner which created or significantly increased the risk of the victims suffering the relevant abuse.⁴⁷⁸

If this was the case then Lord Phillips asserted that there would necessarily be a strong causative link between the close connection and the acts of abuse. He stated that creation of risk was not merely a policy consideration, but one of the criteria for establishing a close connection.⁴⁷⁹ Whilst creation of risk was not of itself sufficient to give rise to vicarious liability '*it is always likely to be an important element in the facts which give rise to such liability*'.⁴⁸⁰

Consequently, the current position in UK law appears to be that the 'close connection' test encompasses the 'enterprise risk' test, but goes beyond it. Lord Phillips did not specify what additional elements must be found as well as enterprise risk if the close connection test is to be established, or the way in which the Canadian concept of 'enterprise risk' and the UK concept of 'close connection' interrelate. This is regrettable, as it leaves scope of continued uncertainty in future cases.

⁴⁷⁷ *Various Claimants v The Catholic Society Welfare and Others* [2012] UKSC 56 per Lord Phillips para 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 further its own interests, has done so in a manner which created or significantly enhanced the risk that the victim or victims would suffer the relevant abuse. The essential closeness of the connection between the relationship between the defendant and the tortfeasor and the acts of abuse thus involves a strong causative link.*'

⁴⁷⁸ Ibid.

⁴⁷⁹ Ibid, para 87.

⁴⁸⁰ Ibid.

On the facts the Supreme Court had no hesitation in finding that the close connection test was satisfied. The relationship between the Institute and the brothers was much closer to employment than that of the bishop and priest in the *JGE* case, and the mission and business of the Institute was common to every brother in it.⁴⁸¹ According to Lord Phillips the business and mission was the provision of a Christian education to boys, and all brothers joined and remained members of the Institute to further this⁴⁸².

In this instance the Institute placed the brothers in cloistered accommodation on school premises alongside very vulnerable boys.⁴⁸³ They were vulnerable because they were in a school, ‘*virtually prisoners*’ within a school, in addition their personal histories made it unlikely that their complaints would be believed if they attempted to disclose their abuse.⁴⁸⁴ The Supreme Court found that this was not a borderline case, but that in all circumstances it was fair, just and reasonable for the Institute to be held vicariously liable for the abusive and tortious conduct of the brothers.⁴⁸⁵

However, it is submitted that overall the analysis of the Court of Appeal was to be preferred. It was far from clear that the evidence demonstrated that the members of the Institute were genuinely engaged in a shared enterprise, rather than fulfilling their personal vocations within the shared framework of their order. Furthermore, there were secular employment contracts in place, and an employer who clearly was vicariously liable for their

⁴⁸¹ Ibid, para 89.

⁴⁸² Ibid, para 90. However it is the public statements made by the Institute appear to contradict this narrow and specific understanding of their mission. Their work involves running retreat centres as well as schools, and providing aid to girls as well as boys in the developing world. See for example Lesallian Association in Great Britain, <http://www.delasalle.org.uk> (accessed 12/12/2012) It is not clear whether a broader understanding of the mission of the Institute would have altered the outcome of the case. However it certainly complicates, and arguably weakens this narrow understanding of a shared, identifiable mission.

⁴⁸³ *Various Claimants v The Catholic Society Welfare and Others* [2012] UKSC 56 per Lord Phillips para 92.

⁴⁸⁴ Ibid, para 92.

⁴⁸⁵ Ibid, para 94.

abusive actions as teachers. Once again, there was no need to stretch the boundaries of vicarious liability in order to provide a remedy for deserving claimants.

2.3 (e) The combined impact of the Post Maga cases and the Close Connection Test in Current UK law

Although UK courts since *Lister* have purported to endorse the decisions in *Bazley* and *Jacobi*, in reality the 'close connection' test adopted by Lord Steyn in *Lister* is different from the consideration of 'enterprise risk' which played a prominent part in the two Canadian decisions. And although Lord Phillips in *Vicarious Claimants* did focus more on risk as an element of the close connection test, he did not elucidate how the two tests relate in practice. As discussed above, something more than enterprise risk is required to satisfy the close connection test, but exactly what additional, mandatory elements are required remains uncertain.

Whilst the appellate courts in Britain continue to refer to risk in analysing vicarious liability, they do not systematically look at the factors which may generate or enhance such risk, in a way comparable to that seen in the Canadian case law.

Rather, they look for a 'close connection' without having any objective standard by which to measure such closeness. The result is a less clear and predictable test. Two regrettable consequences have flowed from this: 1) a degree of confusion about the appropriate distinction between vicarious and direct liability in negligence; and 2) a continuing uncertainty about when vicarious liability will be established, particularly in relation to religious institutions.

The blurring of boundaries between vicarious and direct liability is illustrated by both *Maga* and *EL v Children's Society*. In both instances there were good reasons for the focus of the case to rest primarily on negligence by the principal, and yet this was not drawn out in the judgements. This may partially be because seeking a 'close connection' between the tort and the principal ties the principal 'closely' to the misfeasance. In contrast, asking 'Did the enterprise carry an inherent risk of this kind of wrong doing' is a more objective question. Risk may be inevitable and exist independently of any carelessness or poor practice.

Following *Lister* and *Maga* confusion about the proper boundaries of vicarious liability is apparent in academic commentary as well as case law. In an article on *Maga* and vicarious liability,⁴⁸⁶ Cranmer cites and discusses *Webster v The Ridgeway Foundation School*⁴⁸⁷ as a decision on vicarious liability. This is striking as the case did not concern any question of vicarious liability, and the word 'vicarious' appears nowhere in the judgement.

The first claimant was a schoolboy who got into an argument with another pupil.⁴⁸⁸ The two arranged a fight on school property after the end of the school day, deliberately choosing the tennis courts as an unobserved spot. Unbeknown to the first claimant, his opponent contacted family members and friends to provide support, and a group of adults turned up at the tennis court. One of these attacked the first claimant with a claw-hammer. The first claimant attempted to sue the school for the injuries which he suffered; the other claimants were members of his immediate family who saw him lying in a pool of blood after the

⁴⁸⁶ Frank Cranmer, 'Maga and Vicarious Liability for Sexual Abuse' *Law and Justice: The Christian Law Review* No 167, Trinity/Michaelmas 2011.

⁴⁸⁷ *Webster v The Ridgeway Foundation School* [2010] EWHC 157 QB.

⁴⁸⁸ *Ibid*, paras 1-3

attack, and attempted to sue the school for the post-traumatic stress disorder they suffered as a result.⁴⁸⁹

Their claims were not founded upon any suggestion that the school was vicariously liable for the action of strangers with weapons. Nichol J summarised the negligence claim as being in three parts: 1) that the school failed to take proper care to keep the site secure; 2) that the school was negligent in failing to do more to establish better discipline and deal more effectively with racial tensions; and 3) that the school should have done more to protect the first claimant on the date of the attack.⁴⁹⁰

Thus all of the claims were based on a duties in negligence owed directly by the school to the first claimant. The claimants pleaded that the third party attackers were a danger against which the defendants should have guarded the first claimant. In that sense they were no different from a non-human danger, such as faulty electric wiring or a broken banister in the school building.

In the event the claim failed, as the court found that whilst the school owed the first claimant a duty to take reasonable care to keep him reasonably safe whilst on school premises, they were not in breach of that duty.⁴⁹¹ Furthermore in relation to many of the alleged omissions the claimants were not able to demonstrate a causal link between the alleged failing and the injury suffered.⁴⁹² Although a factually complex case, it ultimately

⁴⁸⁹ Ibid, para 5.

⁴⁹⁰ Ibid, para 6.

⁴⁹¹ Ibid, para 203.

⁴⁹² Ibid.

turned upon the well established principles of negligence flowing from *Donoghue v Stevenson*⁴⁹³ and subsequent case law.

At no stage did the claimants, defendants or the judicial analysis attempt to introduce the concept of vicarious liability. This is unsurprising. There is scope for debate about the most appropriate encapsulation of the legal test of the link between the defendant, the tortfeasor and the tort in the context of vicarious liability; however, there is no doubt that there must be a strong nexus must exist. It is well established that a school will not be vicariously liable if an employee whose work does not involve direct contact with the children commits an assault.⁴⁹⁴ If they have been negligence in selection or supervision a school might be directly liable for an assault by a gardener, but it will not be vicariously liable.

This being the case, it is impossible to see how they could be vicariously liable for an assault by a stranger and a trespasser. Not only is there no employment or quasi-employment relationship, there is no relationship of any sort and no possible way of asserting that the tortious action or omission is somehow committed on behalf of the defendant.

Therefore, given that the case which Cranmer cites to support his contention that vicarious liability for sexual assault is treated different from vicarious liability for non-sexual assault is in fact wholly unconnected with vicarious liability, the rest of his argument must fall.

However, the very fact that he makes the argument is a worrying indication of the current confusion between direct and vicarious liability.

The second unfortunate consequence of the way in which the law has developed from *Lister* onwards, is the continuing uncertainty about when vicarious liability will be established,

⁴⁹³ *Donoghue v Stevenson* [1932] AC 562.

⁴⁹⁴ *Lister and others v Hesley Hall Ltd* [2001] UKHL 22 per Lord Millet, para 82.

particularly in relation to religious institutions. In going down the route of ‘close connection’ rather than focusing more consciously on ‘enterprise risk’ and the five factors set out in the Canadian cases, the higher UK courts have failed to provide clear guidance as to when vicarious liability will and will not apply. The differing outcomes of *Maga* and *Various Claimants* at the Court of Appeal stage provide a good illustration of this, as does the contrast in approach between the Court of Appeal and Supreme Court in *Various Claimants*.

It is not suggested that there is any way to make this area of law simple, or that cases will ever be anything other than very fact specific. The opposing outcomes of *Bazley* and *Jacob, i* and the way in which McLachlin J gave the leading judgement in the former and a dissenting judgement in the latter, demonstrate this eloquently. Nevertheless, the Canadian emphasis on ‘enterprise risk’ and accompanying factors for consideration provide a useful judicial tool. Risk factors can be listed and balanced more easily than the vague notion of a close relationship. They can be set out in a way which makes it easier for future judges, litigants and commentators to identify their relationship to the facts and ratio of a case.

It is submitted that it would be of practical benefit were the UK courts to model future judgements more closely on the two cases so warmly commended in *Lister*. It would provide greater guidance and certainty. And it would also be wholly in keeping with earlier UK caselaw.

The classic decision in *Lloyd v Grace Smith & Co*,⁴⁹⁵ which marked the beginning of the modern law of vicarious liability for intentional wrongdoing, could appropriately be analysed in terms of enterprise risk. The case concerned a solicitor’s clerk who dishonestly induced

⁴⁹⁵ *Lloyd v Grace Smith & Co* [1911-13] All ER Rep 51.

the widowed plaintiff to sign her property over to him, defrauding her all that possessed and leaving her a pauper.⁴⁹⁶ The court found that the employing solicitor should be vicariously liable, on that basis that he *'carries on business under a style or firm which implies that unnamed persons are, or may be, included in its members. Sandles [the dishonest clerk] speaks and acts as if he were one of the firm. He points to the deed boxes in the room and tells her that they are quite safe in "our" hands.....Who is to suffer for this fraud? The person who relied on Mr Smith's accredited representative, or Mr Smith who put this rogue in his place and clothed him with authority?'*⁴⁹⁷

The solicitor did business through his clerk; convincing clients to place faith in the firm was part of the clerk's role, as was handling and safeguarding their documents. An inherent risk in this was that the clerk might defraud a client in some way, especially when the firm had given him a responsible position and held him out as being trustworthy. Some of the firm's clients would inevitably be vulnerable and confused by legal documents or business matters, and would be particularly susceptible to an abuse of the clerk's power. The firm had therefore (albeit innocently) introduced the risk of them being defrauded by the confidence trickster clerk.

Although this is a retrospective analysis being placed upon an old case, it does fit with the language used in the original judgement. Lord Macnaghten emphasised the vulnerability of the client, the status conferred on the clerk and the way in which this induced the client to trust him.⁴⁹⁸

⁴⁹⁶ Ibid, per Lord Macnaghten, 55-56.

⁴⁹⁷ Ibid, 61.

⁴⁹⁸ Ibid.

Therefore, it could be argued that more thoroughly adopting the Canadian doctrine of enterprise risk would not be a new departure for UK courts and would not mark a change in the law. Rather it would illuminate previous case law and provide valuable guidance for the future.

It would not be a panacea, particularly as Davies LJ argued in *JGE* that 'enterprise' is not an easy concept in relation to churches.⁴⁹⁹ But it is submitted that although not easy it is certainly far from unworkable, and it does allow an element of flexibility. It may be possible to ask, what is the enterprise upon which a church or other religious organisation is involved in a particular context? Although the enterprise at a macro-level may be vague and couched in theological rather than temporal terms, at the level of a particular project or undertaking it may be much more concrete.

For example, asking what is the 'enterprise' of the Roman Catholic Church or the Church in Wales, in terms which make sense in relation to tort law, may well be a difficult and unfruitful enquiry for a court. But asking what is a parish attempting to do or provide for the community in which it is set, or what is the purpose of a particular youth project or drugs counselling service may be entirely possible. Given that vicarious liability relates to a particular appointment, it is possible to ask what a given individual was appointed to do and was purpose this was hoped to fulfil.

These questions are of course inextricably linked to the questions of scope of duties of care discussed in relation to negligence. What are clergy tasked with doing, what are clergy publically held out as doing and what are the risks inherent in them doing it? The question

⁴⁹⁹ *JGE v English Province of Our Lady of Charity and another* [2012] EWCA Civ 938 per Davies LJ para 135.

of enterprise risk cannot be considered in isolation from the question of clergy duties.

Hence the outcome of cases will always be fact-specific.

Different conclusions may be reached in relation to different churches or other religious groups: an Orthodox rabbi may not have the same set of duties as a Baptist minister. And different conclusions may also be reached in relation to different ministers within the same church, because they may have a different relationship with that church and also be appointed to perform different tasks. For example the vicarious liability implications for the work of a non-stipendiary curate in a rural parish, and a priest appointed to run a city centre project with young people may be radically different.

Hence we turn from the general law to the specific position of the Church in Wales.

2.4 What is the position in the Church in Wales?

2.4 (a) Clergy and their bishop - is this relationship one to which vicarious liability may attach?

Anglican theology teaches that priests do not act independently when carrying out their ministry, but collaboratively with their bishop and the rest of the presbyterium.⁵⁰⁰

Principles of canon law which are common throughout the Anglican Communion demonstrate:

⁵⁰⁰ Norman Doe, 'Ordination, Canon Law and Pneumatology within Anglicanism', 49-64 in Norman Doe (ed) *The Formation and Ordination of Clergy in Anglican and Roman Catholic Canon Law: The Acts of the Sixth, Seventh and Eight Colloquia of Anglican and Roman Catholic Canon Lawyers* (The Centre for Law and Religion, The Law School Cardiff University: Cardiff, 2009), 57: 'A priest is called *by God to*: work with the bishop and fellow priests as servant and shepherd, proclaim the Word, call his hearers to repent, absolve, baptise, prepare people for confirmation, preside at the eucharist, lead in prayer and worship (etc)'.

- 1) Priests function on behalf of the diocesan bishop, sharing and assisting him or her in the care of souls of the diocese.⁵⁰¹ (Although the words ‘on behalf of’ are not expressly used, the bishop is described as ‘chief pastor’; he or she is the person with ultimate responsibility for pastoral care in the diocese. Consequently it is reasonable to describe those to whom he or she delegates it as functioning on his or her behalf.)
- 2) Priests are accountable to the bishop for the exercise of their ministry, and are subject to discipline in accordance with the canons of their Province if they fail to carry out their duties to an acceptable standard.⁵⁰²

These principles are enshrined in both the canon law and liturgy of the Church in Wales.

The Catechism sets out the respective ministries of bishop,⁵⁰³ priest,⁵⁰⁴ and deacon.⁵⁰⁵ The bishop is described as the ‘chief minister’ of Word and Sacraments, and the role of the priest and deacon assist him in this ministry. Therefore, all priestly and diaconal actions are undertaken on behalf of the bishop. Prior to ordination both candidates for both the diaconate and the priesthood are obliged to swear an oath of obedience to the bishop, as are clerics prior to institution, collation, licensing or appointment to ecclesiastical office.⁵⁰⁶

⁵⁰¹ PCL, Principle 31:5: ‘a priest shares and assists the bishop in the care of souls’; Principle 32:12: ‘An ordination candidate must assent to....obey the lawful and honest directions of the bishop’; and Principle 37:1: ‘The diocesan bishop has a special responsibility and authority as the chief pastor, minister and teacher of the diocese, a governor and guardian of discipline in the diocese’.

⁵⁰² Ibid, Principle 31:5: ‘Bishops, priests and deacons are subject to the disciplinary jurisdiction of the courts of tribunals of the church’; Principle 37:6: ‘The bishop has a primary responsibility to maintain ecclesiastical discipline in the diocese amongst the clergy and laity in the manner and to the extent prescribed by law’; Principle 41:6: ‘The clergy of the diocese are subject to the diocesan bishop to the extent provided under the law; and Principle 41:7: ‘Clergy must comply with the lawful and honest directions of the diocesan bishop’.

⁵⁰³ BCP 1984, 691 Catechism, para 22: ‘The ministry of a bishop is to be the chief shepherd in the Church; to guard the Faith; to ordain and confirm; and to be the chief minister of the Word and Sacraments in his diocese’.

⁵⁰⁴ BCP 1984, 691 Catechism, para 23: ‘The ministry of a priest is to preach the Word of God, to teach and to baptize; to celebrate the Holy Eucharist; to pronounce absolution and blessing in God’s name and *to care for the people entrusted by the bishop to his charge*’ (emphasis added).

⁵⁰⁵ BCP 1984, 691 Catechism, para 24: ‘The ministry of a deacon is to help the priest in both the conduct of worship and pastoral care’.

⁵⁰⁶ Const. Chapter VI Part III.

Furthermore, clergy are subject to sanction by the Disciplinary Tribunal,⁵⁰⁷ if the conduct of their ministry falls into one of the following categories:

- a) *Teaching, preaching, publishing or professing doctrine or belief incompatible with that of the Church in Wales;*
- b) *Neglect of the duties of office, or persistent carelessness or gross inefficiency in the discharge of such duties;*
- c) *Conduct giving just cause for scandal or offence;*
- d) *Wilful disobedience to or breach of any of the provisions of the Constitution or the Statement of Terms of Service published pursuant to the Clergy Terms of Service Canon 2012;*
- e) *Wilful disobedience to or breach of any of the rules or regulations of the Diocesan Conference of the diocese in which such person holds office or resides;*
- f) *Disobedience to any judgement, sentence or order of the Archbishop, a Diocesan Bishop, the Tribunal or any Court of the Church in Wales.*⁵⁰⁸

Consequently clergy are accountable to both their bishop and the Church in Wales if they do not act in accordance with the law and regulations of the church, or with lawful directions and instructions given to them by their bishop. The Clergy Terms of Service set out the duties of priests in greater detail and failure to comply with these is a disciplinary offence.⁵⁰⁹

The Clergy Terms of Service lay down appropriate standards of professional competence and behaviour, for example in relation to providing pastoral care:

⁵⁰⁷ Canon to Establish a Disciplinary Tribunal of the Church In Wales and to make amendments to Chapter IX of the Constitution of the Church in Wales (2000).

⁵⁰⁸ Const. Chapter IX, Part III 'The Disciplinary Tribunal'.

⁵⁰⁹ Ibid, para(d).

*'Clergy should be aware of the help from accredited pastoral agencies so that it can be commended when appropriate.'*⁵¹⁰

Furthermore, they provide guidance on the manner in which clergy should carry out their day to day work, for instance:

*'The appropriateness of visiting and being visited alone, especially at night, needs to be assessed with care.'*⁵¹¹

They also acknowledge that clergy are representatives of the church. For example:

*'Clergy are called to leadership within the Church and the wider community.'*⁵¹²

And:

*'The dress of clergy should be suitable to their office; and, except for purposes of recreation and other justifiable reasons, should be such as to be a sign and mark of their holy calling and ministry.'*⁵¹³

As well as being representatives of the church, clergy are also recognised as being placed in a position of power by virtue of their role:

*'Clergy should be aware of the potential for abusing their privileged relationships.'*⁵¹⁴

And:

'Clergy are often placed in a position of power over others, in pastoral relationships with lay colleagues, and sometimes with other clergy. This power needs to be used to sustain others

⁵¹⁰ CTS 2.7.

⁵¹¹ CTS 2.8.

⁵¹² CTS 6.1.

⁵¹³ CTS 2.14.

⁵¹⁴ CTS 2.11.

*and harness their strengths, and not to bully, manipulate or denigrate. They should be aware of the Church in Wales Bullying and Harassment policy.*⁵¹⁵

Clergy are tasked with undertaking pastoral care on behalf of the bishop and with this pastoral role comes power and the potential for its abuse. Within the Clergy Terms of Service the church recognises that it is giving clergy such power and seeks to make provision to manage the accompanying risk.

So in summary, clergy carry out their ministry on behalf of the bishop; they are recognised as representing both him and the Church in Wales in carrying out their clerical functions. They are required to obey both his instructions and the laws and regulations of the church, and to act within defined standards of professional competence and behaviour. In addition, the church recognises that it is placing its clerics in a position of power,⁵¹⁶ in relation to other people, and seeks to impose duties and standards of behaviour to manage the inherent risk of this power being abused.

It should also be noted that as well as imposes numerous duties on clergy, the Clergy Terms of Service also confer and regulate a series of rights. The arrangement between individual clerics and the church is clearly reciprocal. These rights include provision for the following: payment of stipend, provision of accommodation, a pension scheme, holidays, sabbatical leave, training, maternity leave, parental leave, compassionate and emergency leave, expenses of office, health and safety, sick pay, grievance procedure and protection from bullying and harassment.⁵¹⁷

⁵¹⁵ CTS 3.2.

⁵¹⁶ Ibid.

⁵¹⁷ CTS-Clergy Appointments.

The position of clergy in relation to secular employment law is considered in Chapter 1. However viewed exclusively in relation to vicarious liability, it is difficult to see how in light of the foregoing a church could reach a different conclusion from that of the Court of Appeal in the *JGE*⁵¹⁸ case; namely that the relationship between bishop and clergy is one to which vicarious liability should properly attach. The factors which influenced the court in finding that the priest concerned (Fr Baldwin) was in a relationship akin to employment are all equally present in a Church in Wales context.

Ward LJ regarded it as significant that Fr Baldwin had an obligation to show obedience and reverence to his bishop.⁵¹⁹ Church in Wales clergy have a parallel obligation.⁵²⁰ He was also influenced by the capacity of the bishop to direct how the priest did his work, even though he did not exercise close, daily control; and the bishop's right and duty to exercise a disciplinary function.⁵²¹ As set out above, these factors would also apply to Church in Wales clergy. Ultimately Ward LJ:

*'distilled the essence of being an employee to be that he is paid a wage or salary to work under some, even if only slight, control of his employer in his employer's business for that business. Father Baldwin may not match every facet of being an employee but in my judgement he is very close to it indeed.'*⁵²²

In a similar way Church in Wales clergy assist the bishop in the performance of his duties and are subject to his control, in the language of Ward LJ they are working for the same business. They also received remuneration in the form of stipend and other benefits. For

⁵¹⁸ *JGE v Trustees of the Portsmouth Roman Catholic Diocese* [2012] EWCA Civ 938.

⁵¹⁹ *Ibid* per Ward LJ para 74.

⁵²⁰ Const Chapter VI Part III, 10.

⁵²¹ *JGE v Trustees of the Portsmouth Roman Catholic Diocese* [2012] EWCA Civ 938 per Ward LJ para 74.

⁵²² *Ibid*, para 80.

the purposes of vicarious liability, distinguishing their position from that of a Roman Catholic priest like Father Baldwin would be extremely difficult.

2.4 (b) Non-stipendiary clergy

One possible category of clergy who might arguably be in a different position is non-stipendiary clergy. There are no reported instances of this being tested in the courts of the United Kingdom. However it is submitted that they would be logical for them to be treated in the same way as their stipendiary counterparts.

In *JGE* payment of salary was not a critical consideration, particularly as it was noted that the priest received an income from parish mass collections rather than out of central diocesan funds.⁵²³ The fact that he was required to live in a parochial house was also significant,⁵²⁴ and this would apply to non-stipendiary clergy serving on a house for duty basis within the Church in Wales.⁵²⁵

But even clergy who do reside in a church-owned house, and not do receive any income from the church, are part of the 'enterprise' of the Church in Wales. They have the same canonical relationship with their bishop as other priests and deacons, set out in the discussion above. They wear the same clerical dress and use the same titles as stipendiary clergy, issues which the court considered highly significant in the *Maga* case.⁵²⁶ In relation to the outside world they receive the same status; members of the community who see a

⁵²³ *JGE v Trustees of the Portsmouth Roman Catholic Diocese* [2012] EWCA Civ 938 per Ward LJ para 79.

⁵²⁴ *Ibid*: 'The very fact that the priest is required by Canon Law to reside in the parochial house close to his church is rather like the employee making use of the employer's tools of trade'.

⁵²⁵ Representative Body of the Church in Wales, 'Guidance Note on House for Duty Arrangements', Section 1 point 2: 'House for Duty' (HFD) refers to an arrangement whereby an ordained cleric is licensed into a parish (or group), becoming effectively the office-holder and, whilst being 'self-supporting' (i.e. not receiving a stipend), will be required to live in a parsonage.'

⁵²⁶ *Maga v Trustees of the Birmingham Diocese of the Roman Catholic Church* [2010] EWCA 256 per Neuberger MR para 44.

person in a dog-collar will know that he or she is a cleric, they will not know whether or not he or she receives a stipend. And in policy terms, it is difficult to see why an organisation which chooses to operate through a network of trained volunteers as well as trained paid workers, essentially performing the same tasks, should escape liability for the actions of the former but not the latter.

But the all of the foregoing is only relevant to the first part of the two stage test which must be applied in assessing vicarious liability. It seems that the nexus between a Church in Wales bishop and a priest or deacon in his diocese is sufficiently close to that of an employer/employee relationship to justify the imposition of vicarious liability in some circumstances. But that still leaves the complex question of what those circumstances might be; the second part of the two stage test requires courts to consider what types of tortious conduct will give rise to vicarious liability by clergy?

2.5 Conclusions - for which acts and omissions will the bishop be vicariously liable?

As the discussion in relation to both *Maga* and *JGE* demonstrated, this is a problematic question where clergy are concerned. In *Maga* the fact that an abusive priest had a special brief for youth work and evangelism was pertinent,⁵²⁷ but the fact that his senior colleague should have been alert to the risk he posed was also highly significant. It is unclear whether his youth work and evangelism brief would have been enough without this consideration to tip the scales; and it is also unclear to whom the duty of care would have been owed without this. The court dismissed a duty of care to the world at large,⁵²⁸ but

⁵²⁷ Ibid, para 46.

⁵²⁸ *Maga v Trustees of the Birmingham Diocese of the Roman Catholic Church* [2010] EWCA 256 Para 47 per Neuberger MR and para 73.

found a duty of care to protect boys with whom Fr Clonan was associating, after a complaint had been made.

The *JGE* case was decided as a preliminary issue, which in part explains the absence of guidance or illumination on this point. The Canadian decision in *John Doe*, which influenced both the first instance judge and the Court of Appeal, seemed like *Maga* to turn partly on the church having enabled an unusual and dangerous situation. In *Maga* a potential paedophile was allowed to operate unmonitored, and in *John Doe* an individual was placed in a position of unchecked power over an isolated community.

But where does this leave churches in less extreme instances? If a cleric is clearly acting in the course of his or her duty and commits a tort, then it seems reasonably certain that vicarious liability will ensue, in light of the finding by the Court of Appeal in *JGE*.⁵²⁹ But for unauthorised actions the position remains very unclear; how will the courts decide whether there is a sufficient nexus between the tortious conduct and the cleric's authorised duties?

If the enterprise risk factors set out in *Bazley* were to be applied, then this would at least provide a framework. But so far the UK courts have been inconsistent in their use and application of this authority, and as subsequent Canadian decisions have shown, the outcome of cases remains unpredictable. For workers like Church in Wales clergy, who have no set working hours and duties, which are difficult to quantify and define, the scope of employer liability is currently hard to ascertain.

Much will depend upon whether in subsequent decisions *Maga* is revealed to be the high point of church liability, and a case heavily influenced by the direct negligence of church authorities in allowing a potential paedophile unhindered and privileged access to

⁵²⁹ *JGE v Trustees of the Portsmouth Roman Catholic Diocese* [2012] EWCA Civ 938 per Ward LJ para 83.

vulnerable children; or whether it becomes the standard, and churches are assumed to be liable for the actions of clerics, unless it can be clearly demonstrated that there was no link between their conduct and their authorised duties.

CHAPTER 3

LIABILITY OF CLERGY IN TRESPASS TO THE PERSON

3.1 Overview

Having addressed the question of vicarious liability and Church in Wales clergy, and concluded that torts committed in the course of ministerial duties will generate vicarious liability for the church (as well as personal liability for the cleric), Chapters 3 and 4 explore some instances of potential tortious liability in the course of clerical ministry.

This chapter considers trespass to the person and in two main contexts: firstly in relation to pastoral care and relationships; and secondly in relation to liturgical actions, particularly the administration of baptism. It concludes that secular law in this area is extremely complex, and that the guidance and duties set out within the CTS do not assist clergy in safely navigating this field of tort. Some alternative guidance is therefore proposed.

3.2 Trespass to the Person - Secular Law

The modern tort of trespass evolved from the ancient family of writs of trespass.⁵³⁰

Touching someone without their consent constitutes the tort of battery which is actionable per se; in contrast with negligence there is no need for a claimant to show loss or damage.⁵³¹ Causing a person to apprehend an immediate threat of such non-consensual touching constitutes the tort of assault.⁵³²

⁵³⁰ J H Baker, *An Introduction to English Legal History* (Oxford: Oxford University Press) 2002 (fourth edition), 401-402.

⁵³¹ Tony Weir, *An Introduction to Tort Law* (Oxford University Press: Oxford 2006) (second edition) 136.

⁵³² *Tuberville v Savage* (1669) 86 ER 284.

However, it would be problematic if *any* physical contact between human beings gave rise to a cause of action in the absence of consent. In *Collins v Wilcock*,⁵³³ Goff LJ acknowledged: *'a general exception embracing all conduct which is generally acceptable in the ordinary conduct of daily life'*.⁵³⁴

The Court of Appeal later added a further gloss in *Wilson v Pringle*,⁵³⁵ by stating that a touch would not constitute trespass unless it was hostile, but did not propose any clear definition of hostility. The case concerned an incident with two school boys in a corridor; one pounced on the other and grabbed his bag, causing him to fall and break a leg. The pouncer claimed that his action was playful, and that he had not intended to hurt the pouncee, who was his friend. The appellate court found that this was a relevant consideration, on the basis that hostility was a necessary element of the tort. Only one example of hostile touching was given in the judgement, that of a police officer restraining a person when they did not have legal authority to do so.⁵³⁶ In light of the decision in *Collins v Wilcock*,⁵³⁷ the Court of Appeal had to classify this instance of touching as 'hostile', but their rationale for doing so is less than clear.

If a police officer was acting in good faith, mistakenly believing that the restraint was legally justified, and was also doing everything in his or her power to avoid injury to the claimant, in what sense would the action be hostile? In the (subsequent) case of *Vellino v Chief*

⁵³³ *Collins v Wilcock* [1984] 3 All ER 374.

⁵³⁴ *Ibid*, 378.

⁵³⁵ *Wilson v Pringle* [1986] 2 All ER 440, 444 per Croom-Johnson LJ: *'Another ingredient in the tort of trespass to the person is that of hostility. The references to anger sufficing to turn a touch into a battery (Cole v. Turner, 6 Mod. 149) and the lack of an intention to assault which prevents a gesture from being an assault are instances of this. If there is hostile intent, that will by itself be cogent evidence of hostility. But the hostility may be demonstrated in other ways.'*

⁵³⁶ *Ibid* 448, per Croom-Johnson LJ.

⁵³⁷ *Collins v Wilcock* [1984] 3 All ER 374.

Constable of Greater Manchester,⁵³⁸ the Court of Appeal proceeded on the basis that police officers detaining individuals ordinarily owe them duties of care in negligence.⁵³⁹ It is difficult to reconcile a duty to care for a person's welfare with a presumption of hostility.

Furthermore, the decision raises questions about actions which are not necessarily 'hostile' in the ordinary sense, but which have always been understood to constitute a trespass. An unwanted kiss has always been understood to be a battery⁵⁴⁰ whether the giver intended it to be affectionate or aggressive.

Neither the House of Lords,⁵⁴¹ nor commentators,⁵⁴² have responded well to the decision, criticising the concept of hostility in battery as an unnecessary and unhelpful innovation. In *F v West Berkshire Health Authority*,⁵⁴³ Lord Goff went as far as to doubt expressly *Wilson v Pringle*. In the more recent case of *McMillan v Crown Prosecution Service*,⁵⁴⁴ the High Court followed *Collin v Wilcock*, finding that physical contact did not amount to trespass because it was in conformity with generally accepted standards of conduct.

On balance it appears unhelpful to analyse touching in relation to hostility. The more settled and persuasive body of case law frames the question in terms of consent and the scope of

⁵³⁸ *Vellino v Chief Constable of Greater Manchester* [2001] EWCA Civ 1249.

⁵³⁹ *Ibid*, per Schiemann LJ para 15.

⁵⁴⁰ *R v Chief Constable of Devon and Cornwall Constabulary ex parte Central Electricity Generating Board* [1981] 3 All ER 826 per Lord Denning MR, 832.

⁵⁴¹ *F v West Berkshire Heath Authority* [1989] 2 All ER 545, per Lord Goff 563-564: '*In the old days it used to be said that, for a touching of another's person to amount to a battery, it had to be a touching 'in anger' (see Cole v Turner (1704) Holt KB 108, 90 ER 958 per Holt CJ); and it has recently been said that the touching must be 'hostile' to have that effect (see Wilson v Pringle[1986] 2 All ER 440 at 447, [1987] QB 237 at 253). I respectfully doubt whether that is correct. A prank that gets out of hand, an over-friendly slap on the back, surgical treatment by a surgeon who mistakenly thinks that the patient has consented to it, all these things may transcend the bounds of lawfulness, without being characterised as hostile. Indeed, the suggested qualification is difficult to reconcile with the principle that any touching of another's body is, in the absence of lawful excuse, capable of amounting to a battery and a trespass.*

⁵⁴² Tony Weir, *An Introduction to Tort Law* (Oxford University Press: Oxford) second edition, 134.

⁵⁴³ *F v West Berkshire Heath Authority* [1989] 2 All ER 545, 564.

⁵⁴⁴ *McMillan v Crown Prosecution Service* [2008] EWHC 1457 (Admin), 172 JP 485 DC paragraph [11].

ordinary social intercourse; if either of these circumstances applies, then a touch will not be a trespass.

Determining where exactly the boundaries of generally acceptable behaviour lie is not straightforward. A hand on the shoulder might seem entirely innocent to one person, but be viewed as oppressive or intrusive by another. Furthermore as Kay LJ noted in *McMillan v Crown Prosecution Service*:

'it is important to place events in their context'.⁵⁴⁵

In that case the fact that the appellant was drunk and agitated, affected what was deemed to be acceptable behaviour for the police officer involved. It is not possible to classify actions as socially acceptable or unacceptable without assessing the wider context.

Touching a sleeping fellow passenger on the arm to wake them at a station is not socially equivalent to touching a complete stranger in a darkened cinema for no apparent reason.

So in summary, touching another human being will amount to trespass unless: either, the contact is within the bounds of generally accepted behaviour; or, there is consent. For the sake of completeness, it should be noted that for the purposes of criminal law, there are limits to the capacity of individuals to consent to a trespass.⁵⁴⁶

In the case of *R v Brown*,⁵⁴⁷ the House of Lords considered consent in relation to sadomasochistic sexual practises. The majority of the court concluded that where actual bodily harm⁵⁴⁸ is intended, the recipient of the trespass cannot give valid consent, unless

⁵⁴⁵ *McMillan v Crown Prosecution Service* [2008] EWHC 1457 (Admin), 172 JP 485 DC paragraph [11].

⁵⁴⁶ *R v Brown* [1993] 2 All ER 75.

⁵⁴⁷ *Ibid.*

⁵⁴⁸ Actual bodily harm is defined as any bodily hurt or injury which is more than merely 'transient or trifling' *R v Donovan* [1934] 2 KB 498; *R v Chan Fook* [1994] 2 All ER 552.

one of the recognised exemptions to the general rule applies.⁵⁴⁹ In his dissenting judgement, Lord Mustill expressed the opinion that ‘religious mortification’ was one of the recognised exemptions, although he did not regard it as being relevant to the case before him or usefully discussed in existing authorities.⁵⁵⁰

Subsequent commentators have uncritically included acts of religious mortification as falling within the category of recognised exceptions.⁵⁵¹ However the absence of reported judicial discussion makes it difficult to know where the boundaries of this exception lie; Lord Mustill clearly implied that not all religiously motivated actions will be covered.⁵⁵² The other exceptions also have clear boundaries, for example people engaged in contact sports only consent to contact and injuries within the accepted ways of playing the game.⁵⁵³ Consent to medical procedures is only valid if the patient has been given adequate information about the nature of the treatment carried out and understands what is proposed.⁵⁵⁴

If the ‘religious mortification’ exception exists in law, what boundaries and safeguards apply? In *R v Brown* the House of Lords dismissed as unworkable fixing a boundary between

⁵⁴⁹ None of the speeches in the House of Lords in *Brown* sought to provide an exhaustive or definitive list of exceptions to the general rule, although established lawful activities such as licensed surgery, male ritual circumcision, contact sports (e.g. boxing and rugby), reasonable chastisement, ear-piercing and tattooing are clearly included. See for example Lord Templeman p79.

⁵⁵⁰ *Ibid* per Lord Mustill 109: ‘*For the sake of completeness I should mention that the list of situations in which one person may agree to the infliction of harm, or to the risk of infliction of harm by another includes dangerous pastimes, bravado (as where a boastful man challenges another to try to hurt him with a blow) and religious mortification. These examples have little in common with one another and even less with the present case. They do not appear to be discussed in the authorities although dangerous pastimes are briefly mentioned and I see no advantage in exploring them here.*’

⁵⁵¹ See for example, Julia Tolmie, ‘Consent to harmful assaults: the case for moving away from category based decision making’, *Criminal Law Review* 2012, 656-672.

⁵⁵² *R v Brown* [1993] 2 All ER 75, per Lord Mustill 109: ‘*Nor has it been questioned on the argument of the present appeal that someone who inflicts serious harm, because (for example) he is inspired by a belief in the efficacy of a pseudo-medical treatment, or acts in conformity with some extreme religious tenet, is guilty of an offence notwithstanding that he is inspired only by a desire to do the best he can for the recipient.*’

⁵⁵³ Simon Cooper and Mark James, ‘Entertainment-the painful process of rethinking consent’, *Criminal Law Review* 2012, paragraph ‘Contact Sports’. See also *R v Johnson* (1986) 8 Cr. App. R (S) 343 which affirmed that rugby players do not consent to being bitten by their opponents.

⁵⁵⁴ See for example *Samira Kohli v Prabha Manchanda and Another* - [2008] 5 LRC 284.

actual and grievous bodily harm in the context of sexual practices.⁵⁵⁵ In practical terms, once it is accepted that the recipient has consented to a degree of physical damage, it may be difficult for the person inflicting it to gauge how serious the damage will be. Whilst it is long established law that no one can validly consent to their death at the hand of another,⁵⁵⁶ it is clearly possible to consent to lawful activities which carry a risk of serious and fatal injury. For instance, sportspeople can consent to take part in boxing matches, even though boxers are sometimes killed in the ring without any negligence or malice.⁵⁵⁷

On this basis, the 'religious mortification' exception referred to by Lord Mustill could theoretically cover extreme and dangerous practices such as crucifixion re-enactment or flagellation to the point of drawing blood. Unless and until the matter is considered by a UK court, it is difficult to assess whether the 'religious mortification' exception would be upheld and if so what its limitations would be.

It is submitted however that acts of religious mortification amounting to actual bodily harm are unlikely to have great relevance to the liability of contemporary Church in Wales clergy, at least in civil trespass claims. There are two reasons for this: firstly such actions do not form part of current UK Anglican culture and practice, and secondly, the willingness of the victim to participate would have a different significance in a civil as opposed to a criminal context.

⁵⁵⁵ *Brown*, per Lord Jauncey, 91.

⁵⁵⁶ *R v Young* (1838) 8 C & P 644; *R v Cuddy* (1843) 1 Car & Kir 210.

⁵⁵⁷ See for example the case of the American boxer Becky Zerlentes, reported BBC News Tuesday 5 April 2005, <http://news.bbc.co.uk/sport1/hi/boxing/4414235.stm> (accessed 24/11/2012).

Although not forbidden, acts of mortification are not commended or even referred to within the Catechism of the Church in Wales.⁵⁵⁸ Neither are acts of mortification (beyond fasting) ordinarily included pastoral letters circulated by bishops to parishes in penitential seasons.⁵⁵⁹ Furthermore many of the non-Anglican Christian organisations operating within the UK, which do utilise physical mortification, would nevertheless not encourage acts of violence requiring assistance from a third party.⁵⁶⁰ The theological and cultural context of the Church in Wales mean that it is unlikely that its clergy would be involved in acts of religious mortification occasioning actual bodily harm, particularly acts which required the harm to be inflicted by or on third parties.

If such acts were undertaken, however, and the religious mortification exception referred to *Brown* was found not to apply making consent irrelevant for the purposes of criminal law, the willingness of the recipient to receive the harm would still make *volenti non fit injuria* a logical defence in a civil court.⁵⁶¹ Whilst *volenti* usually operates in the sphere of negligence rather than trespass, this is simply because people do not ordinarily submit to a deliberate injury; it is more common and likely for claimants to recklessly put themselves in the way of

⁵⁵⁸ See in particular 'The Catechism-The Holy Spirit and the Church' BCP (1984) 33-36: '33-How can you carry out these Commandments and overcome temptation and sin? I can do so only through God's grace. 34-What do you mean by God's grace? I mean the help God gives me; by his grace my sins are forgiven, and I am inspired and strengthened by the power of the Holy Spirit. 35-In what ways do you receive the gifts of God's grace? I receive them within the fellowship of the Church, when I worship and pray, when I read the Bible, when I receive the Sacraments, and as I live my daily life to his glory. 36-What do you mean by worship? Worship is my response to God's love, first by joining with others in the Church's corporate offering of prayer, celebration of the Sacraments and reading his holy Word; secondly, by acknowledging him as the Lord of my life, and by doing my work for his honour and glory'.

⁵⁵⁹ See for example, Diocese of Monmouth, 'The Bishop's Sermons Addresses and Writings' Lent Pastoral Letters <http://www.churchinwales.org.uk/monmouth/learning/reading/BishopIndex.html> (accessed 24/11/2012).

⁵⁶⁰ See for example Opus Dei, 'Frequently Asked Questions-Do members of Opus Dei practise mortification?' <http://www.opusdei.org.uk/art.php?p=9709> (accessed 24/11/2012): 'In addition, as recommended by the Catholic Church, all members practise small corporal mortifications such as fasting in moderation, going without certain items of food or drink occasionally, etc. Within this spirit, numeraries and associates practise certain traditional forms of corporal mortification such as using the cilice, a discipline or sleeping on a hard surface.'

⁵⁶¹ For a successful application of this defence in recent times see *Morris v Murray* [1990] 3 All ER 801, in which the unsuccessful plaintiff chose to get into a private plane with a pilot who was very obviously very drunk.

accidental harm. Nevertheless, there is no reason why it would be barred in a trespass claim. Alternatively, if no exception were applicable on the facts, and *R v Brown* meant that the trespass was a criminal act in which the recipient chose to participate, *ex turpi causa*⁵⁶² would be a possible defence. Again although this defence ordinarily operates in negligence, there is no reason to believe that it would be precluded in a trespass case, where consent existed in fact but not in law by reason of illegality. (Obviously if consent did not exist in fact, beating the claimant would be a trespass, regardless of whether it was done for their perceived spiritual good).

3.3 Trespass to the Person - Pastoral care and relationships

3.3 (a) Pastoral Care within the Church in Wales - Definition and Duties of Clerics

Pastoral care as understood by the Church in Wales requires clergy to form relationships with individuals and express care and compassion. At times such pastoral relationships may permit, or in extreme circumstances even require, a cleric to make physical contact with another person e.g. holding a hand or putting an arm around the shoulders. How do these informal, non-liturgical interactions relate to the law of trespass?

The term 'pastoral care' is not defined within the Canons or Constitution of the Church in Wales, nor widely used within applicable legislation and case law.⁵⁶³ Nevertheless, it is used repeatedly in the Clergy Terms of Service,⁵⁶⁴ and does appear in the BCP.⁵⁶⁵ It is stated that the deacon must help the priest '*in pastoral care*'.⁵⁶⁶ Therefore, whilst the term 'pastoral'

⁵⁶² *Pitts v Hunt* [1990] 3 All ER 344.

⁵⁶³ The term is not used by commentators like Doe on the general law of the Church as a heading for discussion and analysis: see N. Doe, *The Law of the Church in Wales* (University of Wales: Cardiff 2002).

⁵⁶⁴ See particularly CTS 2.

⁵⁶⁵ BCP (1984) 691 para 24.

⁵⁶⁶ *Ibid.*

itself is not used when the ministry of the priest is set out, it must be implied in the statement that priests '*care for the people*'.⁵⁶⁷ Similarly although not expressly present, it is implied within the ministry of the bishop. Firstly, the bishop is described as 'chief minister',⁵⁶⁸ and consequently must logically share in the ministry of the priests and deacons, the other ministers in the diocese.

Secondly, the term 'chief shepherd'⁵⁶⁹ is used specifically, and 'shepherd' in this context could reasonably be understood as a synonym for 'pastor'. The word pastor derives (via Anglo-Norman and Middle French) from the classical Latin word for shepherd 'pastor'⁵⁷⁰ and the use of the term 'shepherd' for a Christian leader originates in shepherding imagery in the Bible.

But for further detail about the meaning of 'pastor' and 'pastoral care' in Church in Wales context, it is necessary to consider the Clergy Terms of Service, especially paragraph 2, headed '*You are to care for all alike, especially the poor, the sick, the needy and those in trouble*'.⁵⁷¹ This paragraph deals with pastoral care, and although it does not offer a definition, it does make a number of statements about this concept and ministry.

*'Compassion is essential to pastoral care.'*⁵⁷²

The same paragraph also refers to the need to minister sensitively and effectively to the sick, dying and bereaved,⁵⁷³ and to recognise the difference between pastoral care and counselling,⁵⁷⁴ although no explanation of the difference is offered.

⁵⁶⁷ BCP (1984) para 23.

⁵⁶⁸ BCP (1984) para 22.

⁵⁶⁹ Ibid.

⁵⁷⁰ Oxford English Dictionary Online, '*pastor*' noun, accessed via Cardiff University library <https://portal.cf.ac.uk/wps/myportal/cdfPortal/library> (accessed 12/2/2013).

⁵⁷¹ CTS, 2.

⁵⁷² CTS 2.1.

It is also stated that:

*'There is risk in all pastoral work'*⁵⁷⁵ and that the appropriateness of *'visiting and being visited'* alone must be assessed with care.⁵⁷⁶

Paragraphs 2.9 to 2.11 set out the importance of maintaining *'physical, sexual, emotional and psychological'* boundaries and the dangers of inappropriate behaviour within pastoral relationships, and note the risk of manipulation and abuse.⁵⁷⁷

When help or advice is being sought, any note-taking must be mutually agreed and data protection legislation must be complied with.⁵⁷⁸

Child Protection legislation and guidance must be obeyed,⁵⁷⁹ and clergy must wear dress appropriate to their office,⁵⁸⁰ and when conducting worship must wear appropriate liturgical dress.⁵⁸¹

⁵⁷³ CTS 2.3.

⁵⁷⁴ CTS 2.6.

⁵⁷⁵ CTS 2.8.

⁵⁷⁶ Ibid.

⁵⁷⁷ CTS 2.9-2.11.

⁵⁷⁸ CTS 2.12: *'When help or advice is being sought, any note-taking should be mutually agreed and is subject to data protection legislation'*. The CTS here do not set out which legislation is being referenced. This approach avoids the need for amendment of the wording of the CTS in the event of changes to the statutory framework. At the present time the Data Protection Act 1998 is the most important piece of legislation in this area; this Act regulates the processing of data about identifiable, living individuals. It applies (subject to certain exemptions, e.g. data held for domestic purposes, s36) to personal data held by private as well as public bodies. It would cover, for example, a file kept in a parish of names, addresses and telephone numbers relating to Home Communion or requested sick visits. Data in such a file would have to be kept and processed in accordance with the Act.

⁵⁷⁹ CTS 2.13. In addition to the Church in Wales Child Protection Policy, relevant provisions in secular law must be complied with. For example, as will be discussed below, the Children Act 1989 sets out who has parental responsibility for children and therefore capacity to make decisions on their behalf and to further their interests. Church in Wales clergy must respect these provisions and must allow persons with parental responsibility to exercise it on behalf of children when decisions are being made about baptism or attendance at Sunday school. Other current legislation in the realm of child protection imposes duties on specific public authorities (e.g. The Children Act 2004) and does not directly apply to the church; or sets out civil and criminal mechanisms to safeguard children in specific circumstances (e.g. The Female Genital Mutilation Act 2003). It is submitted that even those these types of legislative provisions do not impose any direct duties upon Church in Wales clergy, the requirement to follow good child protection practise means that clergy must cooperate with secular authorities acting in accordance with their statutory duties. Relevant legislation includes: Sex

From the foregoing, the following points can be inferred about the understanding which the Church in Wales has of pastoral care and the duties of its clergy in this regard. Clergy must show care and compassion to all, particularly the vulnerable and suffering. This involves forming relationships, visiting and being visited and giving help and advice when it is sought. However, pastoral care is not to be equated with counselling and clergy are to be aware of the limits of their own expertise. Notes of pastoral meetings may be made if the other party agrees, but there is no requirement to keep records.

Although the CTS do not elucidate what is meant by ‘risk’⁵⁸² in pastoral work, reading paragraph 2 as a whole, it is apparent that one risk is that of accusations of inappropriate behaviour by the cleric, including unwanted touching. The factors which clergy should consider when arranging pastoral meetings (such as: timing, dress, furniture and lighting, as well as the appropriateness of visiting and being visited alone are highly relevant to such accusations).⁵⁸³ Furthermore, CTS 2.9 explicitly states that:

*‘Inappropriate touching or gestures of affection are to be avoided.’*⁵⁸⁴

The use of the word ‘*inappropriate*’ implies that not *all* touching will be inappropriate, and illustrates the complexity of a cleric’s position in regard to pastoral care. Pastoral care as defined by the CTS is distinct from counselling, it does not have an identifiable therapeutic

Offenders Act 1997; The Children’s Commissioner for Wales Act 2001; Adoption and Children Act 2002; Education Act 2002; Female Genital Mutilation Act 2003 ; Sexual Offences Act 2003; Children Act 2004; Domestic Violence, Crime and Victims Act 2004; Children and Adoption Act 2006; Safeguarding Vulnerable Groups Act 2006; Forced Marriage Act (Civil Protection) 2007; Children and Young Persons Act 2008; Criminal Justice and Immigration Act 2008; Apprenticeships, Skills, Children and Learning Act 2009; Borders, Citizenship and Immigration Act 2009; Education Act 2011; Domestic Violence, Crime and Victims (Amendment) Act 2012.

⁵⁸⁰ CTS 2.14.

⁵⁸¹ CTS 2.15.

⁵⁸² CTS 2.8.

⁵⁸³ CTS 2.8.

⁵⁸⁴ CTS 2.9.

purpose, rather it is a demonstration of '*the justice and love of the incarnate God disclosed in Jesus Christ*'.⁵⁸⁵

The absence of a therapeutic or practical purpose makes it harder for a priest to demonstrate that any touching was *required* to further that purpose; his or her situation is very different to that of a health professional dealing with a sick person in need of medical treatment, or a tailor helping to fit a jacket. A priest is seeking to bring emotional and spiritual comfort rather than carry out a practical task.

But the injunctions to show compassion,⁵⁸⁶ and sensitivity,⁵⁸⁷ may mean that in some circumstances touching those in receipt of pastoral care *is* necessary. For instance a frightened and dying person may want a priest to take their hand, and for a cleric to refrain from touching them in such circumstances would hardly be a demonstration of Christ-like compassion.

Provided that clergy remain within the bounds of socially acceptable behaviour, they should not run the risk of justified accusations of trespass to the person in secular law. But the boundaries of socially acceptable behaviour are not always clear cut, and a lot may depend upon context. Taking a patient's hand in a public hospital ward may be construed differently from taking someone's hand alone in a private house at night.

Furthermore, false accusations may be difficult to guard against; clergy can control their own behaviour but not that of other people. Some of the factors listed in paragraph 2 clearly relate to evidence as well as context. For instance, the consideration of whether to

⁵⁸⁵ CTS 2.1.

⁵⁸⁶ CTS 2.1.

⁵⁸⁷ CTS 2.2.

visit or being visited alone;⁵⁸⁸ having other people present or close by during a pastoral meeting might provide the cleric with a witness should he or she be falsely accused of inappropriate behaviour.

But solo visits are not prohibited; clergy are ultimately left to balance the potential benefits against the potential dangers of any pastoral encounter. This is arguably a matter of practical necessity; for example, a priest may have to make an unscheduled emergency pastoral visit to a person living alone, and it may simply not be possible to find another suitable person to accompany him or her at short notice. The importance of comforting and reassuring a person in acute need and distress will sometimes outweigh the possible risk of false accusations of improper conduct.

From an evidentiary perspective it is interesting that clergy are not enjoined to make a written record following any pastoral encounter which they feel may give rise to an issue or complaint,⁵⁸⁹ neither are they required to report such an incident to senior clergy (unless there are child protection implications).⁵⁹⁰ Inclusion of such injunctions might have been helpful in terms of protecting both individual clergy and the church in the event of litigation arising, as they would ensure that evidence was preserved and that the cleric could receive appropriate advice and guidance at an early stage.

⁵⁸⁸ CTS 2.8.

⁵⁸⁹ CTS 2.12.

⁵⁹⁰ CTS 2.13 requires that clergy comply with provincial and diocesan guidelines on child protection. These contain duties to report risks and incidents connected with child protection in certain circumstances. For example Church in Wales Child Protection Guidelines, Annex 18 *'It is the responsibility of all those working with children and families to :-Report any knowledge, concerns or suspicions that a child is suffering, has suffered or is likely to be at risk of harm. You must ensure that your concerns are referred to Social Services or the Police Child Protection Unit. At the same time you should inform the Diocesan Child Protection Officer who will inform the Bishop.'*

For completeness it should be noted that not all touching which would contravene the CTS Guidelines would also constitute battery. A married parishioner might choose to engage in sexual activity with a cleric, and such consensual activity would not be a trespass. It would however breach the CTS guidelines:

*'in their personal life clergy should set an example of integrity in relationships and faithfulness in marriage.'*⁵⁹¹

And:

*'Clergy are to be chaste in their sexual relationships. Promiscuity is incompatible with ordained ministry.'*⁵⁹²

Therefore in some respects the CTS guidelines are more restrictive than the secular law; clergy acting within them should not face justified accusations of trespass to the person.

3.4 Trespass to the person - Baptism and the administration of Sacraments

3.4 (a) Sacraments in the Church in Wales

A sacrament is defined as *'the use of material things as signs and pledges of God's grace'*,⁵⁹³ and it is further stated that there are two parts to a sacrament *'an outward and visible sign'* and an *'inward invisible grace'*.⁵⁹⁴ In the case of baptism,⁵⁹⁵ the holy eucharist,⁵⁹⁶

⁵⁹¹ CTS 3.10.

⁵⁹² CTS 3.11.

⁵⁹³ BCP (1984) 696, *The Catechism*, para 43.

⁵⁹⁴ BCP (1984) 696, *The Catechism*, para 44.

⁵⁹⁵ The Church in Wales definition of baptism requires water to be used as the outward and visible sign, BCP (1984) 697, *The Catechism*, para 47. The BCP (1984) rubrics for the public baptism of infants require that the child be taken by the hand by the priest or to be held in the priest's arms, and that the child is either dipped in water three times or has water poured over him or her three times, BCP (1984) 661, and also that the priest make the sign of the cross on the child's forehead, BCP (1984) 662. The rite for the private baptism of infants in emergencies requires water to be poured on the child three times, BCP (1984) 664. In the case of adult baptism, the priest is similarly required to take the candidate by the right hand, before pouring on him or her

confirmation,⁵⁹⁷ ordination,⁵⁹⁸ holy matrimony,⁵⁹⁹ and the ministry of healing,⁶⁰⁰ the outward, visible and material element of the sacrament necessarily involves physical contact between the priest and the persons receiving the sacrament.⁶⁰¹ With absolution,⁶⁰² physical contact is not a requirement.

Church in Wales clergy (depending upon which order or orders they are ordained to) are required to administer baptism,⁶⁰³ confirmation,⁶⁰⁴ the holy eucharist,⁶⁰⁵ ordination,⁶⁰⁶ and

three times, or dipping him or her in water three times, BCP (1984) 677, and the sign of the cross is to be made on his or her forehead, BCP (1984) 678. Parallel provisions are contained in the 2006 service. For the public baptism of infants see SCI 27-33, in addition to the actions set out in the BCP (1984) anointing with oil is permitted but required. For the private baptism of infants see SCI 45. For the baptism of adults see SCI 71-77.

⁵⁹⁶ The outward and visible sign is the giving of bread and wine BCP (1984) 698, *The Catechism*, 53. In practical terms this requires the bread and wine to be placed into the recipients hands or mouth, although the rubrics do not specify how this must be done. See BCP (1984) 13 and HE 81.

⁵⁹⁷ The outward and visible sign is the laying on of hands by the bishop, BCP (1984) 698, *The Catechism*, 57. The bishop is required to lay both hands on the confirmand in the 1984 rite, BCP (1984) 707 and his right hand on the confirmand in the 2006 rite SCI 79.

⁵⁹⁸ The outward and visible sign is the laying on of hands by the bishop or bishops, BCP (1984) 699, *The Catechism*, 59. See BCP (1984) 716, 725 and 731.

⁵⁹⁹ The celebrant is required to join the right hands of the couple together in the latest rite, Marriage Service 2010, 8. The celebrant also blesses the couple BCP (1984) 746, Marriage Service 2010, 9; the rubrics do not specify that this blessing be accompanied by any physical action but a priest may often choose to touch a person or object which he or she is blessing, the laying on of hands being an ancient gesture of special authority and blessing (see *Greg Dues, 'Catholic Customs and Traditions: A Popular Guide'* (Twenty Third Publications: Mystic 2000), 178).

⁶⁰⁰ The outward and visible sign is either the laying on of hands or anointing with oil BCP (1984) 700, *The Catechism*, Laying on of hands, BCP (1984) 766 and anointing with oil, BCP (1984) 769.

⁶⁰¹ In the case of holy matrimony, the priest or deacon officiating is not technically minister of the sacrament, as in Anglican theological understanding this role is fulfilled by the parties to the marriage themselves. (See for example John Macquarrie, *A Guide to the Sacraments* (SCM: London 1997) Second Edition, 220). Nevertheless as detailed above, the Church in Wales rubrics require the priest or deacon to perform actions which involve physically touching the couple).

⁶⁰² See BCP (1984) 699, *The Catechism*, 61, absolution is the confession of sin in the presence of a priest, and the reception of forgiveness through his or her ministry. No physical action is required.

⁶⁰³ There is a duty to baptise infants publically in accordance with Canons Ecclesiastical 1603, Canon 68 arising out of the statutory contract of the Church in Wales and its quasi-established position (see Norman Doe, *The Law of the Church in Wales* (University of Wales: Cardiff 2002), 5-27 & 234-235) and to privately baptise any infants in danger of death in accordance with Canons Ecclesiastical 1603, Canon 69. There appears to be no specific canonical duty to baptise adults, but CTS 4.1 states that '*Mission is a primary calling*' and CTS 4.5 states that '*Suitable preparation for Baptism, Confirmation and Marriage is a primary responsibility for clergy*'; it would be difficult to argue that a cleric refusing to baptise an adult without good reason was complying with these provisions of the CTS.

⁶⁰⁴ The considerations set out in the previous footnote, in relation to a priest refusing adult baptism, would apply in the same way were a bishop refusing to confirm a candidate without good reason. Bishops are also given a specific charge to confirm at their Episcopal ordination BCP (1984) 714.

the ministry of healing,⁶⁰⁷ and also to solemnize marriages,⁶⁰⁸ and therefore have a *duty* to touch people when doing so. The kind of touching involved, e.g. pouring water over a person, laying hands on a person's head, is not likely to come within the ambit of generally socially acceptable behaviour. Therefore, it is only lawful provided that the recipient consents to it.

3.4(b) Sacraments and Adults Lacking the Capacity to Consent

The law in relation to adults whose capacity to make decisions is compromised is now governed by the Mental Capacity Act 2005.⁶⁰⁹ The statutory framework attempts to balance the need to ensure the vulnerable individuals are adequately protected on the one hand, with the desire to enable them to exercise as much autonomy as practicable on the other. The starting point is that individuals must be assumed to have capacity unless it is established that they do not.⁶¹⁰ They are not to be treated as being unable to make a decision unless all practicable steps have been taken to help them to do so without success,⁶¹¹ and the making of an unwise is not in and of itself a reason to conclude that the person lacks capacity.⁶¹²

⁶⁰⁵ Priests are charged at their ordination to preside at the Holy Eucharist BCP (1984) 722 and have a duty to help every confirmed member of the church to communicate regularly after proper preparation BCP (1984) 3. The priestly role at the eucharist is reiterated in CTS 6.

⁶⁰⁶ Bishops are charged at their Episcopal ordination to be '*faithful in ordaining and sending out new ministers*' BCP (1984) 714.

⁶⁰⁷ CTS 2.2 provides that clergy are to minister '*sensitively and effectively to those who are sick, dying and bereaved*'. Presumably the sacramental, liturgical provisions of the ministry of healing (see BCP (1984) 700 *The Catechism* 62-64 and BCP (1984) 755-773) are included within the charge to '*perform the other ministrations entrusted to you*' at priestly ordination (see BCP (1984) 722).

⁶⁰⁸ *Anglican Marriage in the Church of England and Wales: A Guide to the Law for Clergy*, issued by the Faculty Office of the Archbishop of Canterbury (1999), 6.1. See also CTS 4.5: '*Suitable preparation for Baptism, Confirmation and Marriage is a primary responsibility for clergy*'.

⁶⁰⁹ Mental Capacity Act 2005.

⁶¹⁰ *Ibid* section 1(2).

⁶¹¹ *Ibid* section 1(3).

⁶¹² *Ibid* section 1 (4).

A person will be unable to make a decision for the purposes of the Act if that person is unable:

'a) to understand the information relevant to the decision,

(b) to retain that information,

(c) to use or weigh that information as part of the process of making the decision, or

(d) to communicate his decision (whether by talking, using sign language or any other means).⁶¹³

It is important to note that capacity is determined in relation to specific decisions⁶¹⁴ rather than in the general or abstract. A person may be able to understand and weigh information in relation to a simple matter, but not a more complex one. For instance, just because an individual does not have capacity to make decisions about their investment portfolio, it does not mean that they are incapable of deciding whether they wish to receive Communion at a particular moment in time. In the latter case there are far fewer complicated factors to remember and balance than in the former.

Nevertheless, there will be individuals who will be incapable of making some or any decisions about their spiritual lives for the purposes of this Act; how does the law of trespass relate to them? For instance someone in a coma will be incapable of understanding or responding to questions about their preferences; would anointing them with holy oil be a battery?

⁶¹³ Ibid section 3 (1).

⁶¹⁴ Ibid section 2(1).

The case law,⁶¹⁵ and commentary,⁶¹⁶ on adults without capacity and consent to what would otherwise be acts of trespass has tended to focus almost exclusively on decision-making in a health and social care context. Obviously the factual context is very different in relation to pastoral and spiritual care, rendering the position for clergy both more straightforward and more complex than for healthcare professionals.

It is arguably more straightforward for interaction which might be said to come within the bounds of ordinary social interaction; such acts do not even potentially constitute trespasses and consent is therefore not an issue.⁶¹⁷ The courts have affirmed that friendly, physical gestures such as grabbing someone's hand at a party or giving them a (reasonable) slap on the back do not constitute battery.⁶¹⁸ Whilst it would be difficult to categorise even the most minor medical interventions as being within the bounds on ordinary social interaction (and indeed the case law has not explored this route), the kinds of informal gestures which a cleric may make in the course of a pastoral visit could and should properly be classified in this way. For example, gently touching someone's hand or arm, especially if they are unable to communicate easily in words, would be an ordinary and unremarkable social gesture from any visitor, clergy or otherwise.

More problematic are the formal, sacramental actions such as baptising, anointing or administering Communion. For instance, it is not generally socially acceptable to pour water over other people without their consent. Where express consent would be required to render an act anything other than a battery, and a person lacks capacity to give such

⁶¹⁵ e.g. *Re F (Mental Patient: Sterilisation)* [1990] 2 AC 1; *Re A (Medical Treatment: male sterilisation)* [2000] 1 F.L.R. 549.

⁶¹⁶ e.g. Michael A Jones, 'Detaining Adults Who Lack Capacity' *Journal of Professional Negligence* (2007) 4 PN 4 (2007) 238; David Price, 'End-of-Life Treatment of Potential Organ Donors: Paradigm Shifts in Intensive and Emergency Care', *Medical Law Review* *Med Law Rev* (2011) 19 (1): 86 1 March 2011.

⁶¹⁷ *McMillan v Crown Prosecution Service* [2008] EWHC 1457 (Admin), 172 JP 485 DC paragraph [11].

⁶¹⁸ *Collins v Wilcock* [1984] 3 All ER 374, 378 per Goff LJ.

consent, the 2005 Act states that any act or decision must be undertaken in the 'best interests'⁶¹⁹ of the person concerned. Whilst determining best interests in the context of medical treatment is not always straightforward, there are often objective factors which can be considered (e.g. will the procedure reduce the person's pain?). It is harder to demonstrate objective factors in a spiritual context.

However, as Donnelly argues,⁶²⁰ the mechanism provided within the Mental Capacity Act 2005 for determining 'best interests'⁶²¹ is sufficiently sophisticated to allow for subjective considerations to be weighed in the balance when considering best interests. Section 4 (6)⁶²² requires that the subjective views of the person lacking capacity, both past and present, to be part of the equation when balancing factors to determine best interests.

Again as Donnelly notes,⁶²³ the courts have attached differing degrees of weight to the present wishes of a person lacking capacity. In *Re S and S (Protected Persons)*,⁶²⁴ Judge Marshall QC stressed the emphasis which she interpreted section 4 of the Act as placing upon ascertaining the person's present views; and concluded that the purpose of this was to try to achieve the outcome which they preferred,⁶²⁵ going as far finding that there was an effective presumption for deciding in favour of the person's present wishes.⁶²⁶

⁶¹⁹ Mental Capacity Act 2005, s 1(4).

⁶²⁰ Mary Donnelly, 'Determining Best Interests Under the Mental Capacity Act 2005', *Medical Law Review* 19 (2) (2011) 304.

⁶²¹ Mental Capacity Act 2005, s. 4.

⁶²² *Ibid*, s. 4 (6).

⁶²³ Mary Donnelly, 'Determining Best Interests Under the Mental Capacity Act 2005', *Medical Law Review* 19 (2) (2011) 304.

⁶²⁴ *Re S and S (Protected persons)* EWHC B16 (Fam).

⁶²⁵ *Ibid*, para 55.

⁶²⁶ *Ibid*, para 57.

In contrast in *Re M*,⁶²⁷ Mumby J found that the weight to be attached to present wishes was ‘case specific and fact specific.’⁶²⁸

Donnelly acknowledges the attraction of the clarity of a Judge Marshall QC’s proposed presumption, but rejects it on the basis that it is an ‘*overly blunt legal instrument*’ for dealing with persons lacking capacity, and highlights the risks of such persons being misunderstood or misconstrued when attempting to express their preferences.⁶²⁹

It is submitted that this is a valid criticism, and also that wording of the statute itself lends more support for the approach of Mumby J and Judge Marshall. Section 4 (3) requires the decision maker to consider:

‘(a) whether it is likely that the person will at some time have capacity in relation to the matter in question, and

*(b) if it appears likely that he will, when that is likely to be.’*⁶³⁰

It is entirely conceivable that a person with temporarily impaired cognitive capacity might be expressing a preference or desire which would have deeply distressed them before their incapacity arose. If such an individual is likely to regain capacity in the future they might struggle greatly with the consequences of their wishes whilst incapacitated having been honoured. There is nothing in the wording of section 4 (4),⁶³¹ which deals with present wishes specifically, or section 4 as a whole, which justifies a presumption favouring present wishes over probable future ones.

⁶²⁷ *Re M* [2009] EWHC 163 (Ch).

⁶²⁸ *Ibid*, para 35.

⁶²⁹ Mary Donnelly, ‘Determining Best Interests Under the Mental Capacity Act 2005’, *Medical Law Review* 19 (2) (2011) 304.

⁶³⁰ Mental Capacity Act 2005, s. 4 (3).

⁶³¹ *Ibid*, s. 4(4).

Furthermore, the decision is being made for the person precisely because they lack the capacity to make it for themselves. How valid and real are preferences if they are not based on a realistic understanding of the situation? For example in a medical context, an incapacitated person 'P' may dislike pain. P may strongly express a preference not to have an injection as he knows that needles are painful. However, if P's true desire is to have as little pain as possible for as little time as possible, and an injection is the best method of achieving this, then P's best interests and genuine wishes would probably be most effectively served by having the injection he is protesting about. P is objecting because he does not understand that an injection would result in less pain rather than more. In such an instance elevating P's apparent preference above other considerations, by way or presumption or otherwise, would not be helpful in arriving at a true determination of his best interests.

Therefore, there are persuasive reasons to favour the stance of Mumby J,⁶³² in relation to the expressed views of the person without capacity. Such views will not be determinative, or even necessarily strongly indicative of best interests. A cleric dealing with a person without capacity could not rely simply on their apparent views. For instance, baptising a person who had been a devout follower of another faith for their entire life prior to losing capacity, could arguably not be best interests, and therefore a battery in the absence of any valid consent. This scenario could arise in a family of mixed religious convictions. A Christian spouse, son or daughter might request a priest to baptise the person, and the person could appear compliant but fail to understand the significance of what was taking place. Should the person recover capacity, or other family members object, the priest might not have a valid defence to the trespass.

⁶³² *Re M* [2009] EWHC 163 (Ch).

Best interests have been held to encompass social as well as material interests. In both *Re M*,⁶³³ and *Re P (Statutory Will)*,⁶³⁴ the court found that a person lacking capacity had an interest in the way in which they were remembered after their death. The same reasoning which was applied in that case to financial matters could apply to spiritual ones.

Incapacitated persons could be deemed to have an interest in how they were remembered and regarded by their family, friends and faith community. If receiving particular rites around the time of death, or being seen to remain loyal to the faith in which they lived most of their lives would have an impact upon the way in which they would be perceived by their social group, then these would presumably be relevant factors in determining best interests.

Furthermore, there is no logical reason why the social dimension of best interests should be confined to the end of life. Being treated as a individual human being with dignity and a member of a faith community by receiving sacraments and having contact with a cleric could be seen as benefits throughout the lifetime of a person lacking capacity, as could the comfort which this participation might provide for family members. The definition of best interests set out in the Mental Capacity Act is wide enough to encompass social as well as physical and financial interests.⁶³⁵

Furthermore, in practical terms, the social context of an adult lacking in decision-making capacity is likely to be critical to their continuing involvement with a church. Aside from time spent in hospital, it is unlikely that an adult with seriously impaired mental capacity would have contact with a priest without the knowledge, and probably also the facilitation, of family members and carers. If the individuals effectively managing the person's affairs

⁶³³ Ibid, paras 37-38.

⁶³⁴ *Re P (Statutory Will)* [2009] EWHC 163 (Ch), para 44.

⁶³⁵ Mental Capacity Act 2005.

are encouraging and enabling participation in Christian sacraments, they are hardly likely to bring an action for trespass in the name of the adult without capacity.

Such an action would only be a real possibility if there was some religious conflict amongst those people, or if the impaired adult recovered his or her capacity and objected to what had taken place. Therefore, only in very limited circumstances would a cleric face a realistic threat of liability in tort.

3.4(c) Sacraments and Children

However, the position where children are concerned is very different from that of adults lacking capacity, for a number of reasons:

- 1) The law involving children is governed by the Children Act 1989,⁶³⁶ and the *Gillick*⁶³⁷ line of authority, rather than the Mental Capacity Act 2005.
- 2) The potential for religious conflict amongst persons with parental responsibility for the child, and the human rights of such persons to bring up the child in accordance with their religious convictions.⁶³⁸
- 3) The link between religious upbringing and a child's developing sense of identity⁶³⁹. Adults, whatever their mental capacity, will generally have an established religious or non-religious identity. With children however this identity is in the process of development; and the impact of initiation and participation in religious rites may be

⁶³⁶ Children Act 1989.

⁶³⁷ *Gillick v West Norfolk and Wisbech Area Health Authority* [1985] 3 All ER 402.

⁶³⁸ E.g. *Re S (Specific Issue Order: Religion: Circumcision)* [2004] EWHC 1282 (Fam); *Re D (Care Order: Declaration of Religious Upbringing)* [2005] NI Fam 10.

⁶³⁹ See for example the discussion in *Re J (Specific Issue Orders: Child's Religious Upbringing And Circumcision)* 1 FLR 1, 571 CA.

very different for them than adults. Different considerations will consequently apply in seeking to determine best interests.

- 4) The potential for conflict between the child and those with parental responsibility, and the potential capacity of the child to make decisions on religious matters.

3.4 (c)(i) The legal background

In addition to recognition of universal right to freedom of thought, conscience and religion in the International Covenant on Civil and Political Rights (ICCPR),⁶⁴⁰ and the protection afforded by Article 9 of the ECHR, the United Nations Convention on the Rights of the Child (UNCRC) is a child focused treaty which the United Kingdom has ratified and which specifically protects the right of a child to freedom of thought, conscience and religion.⁶⁴¹

Nevertheless, as commentators like Langlaude recognise,⁶⁴² the outworking of these rights in complex where children are concerned, because their individual capacity still evolving.

By their very nature, children are still in the process of formulating their personal beliefs and sense of identity. They are therefore potentially vulnerable to manipulation by parents, religious organisations or the State. Yet any interference with parental freedom to pass on religious or ideological beliefs to the next generation may have an impact on Article 9 rights vested in parents. Equally States have obligations in international law to safeguard the

⁶⁴⁰ ICCPR Article 18 provides that all persons have the right to freedom of thought, conscience and religion, and that freedom to manifest this shall only be subject to such limitations as are prescribed by law and are necessary to protect public safety, order, health or morals or the fundamental rights and freedoms of others. Furthermore Article 18:4 provides that States undertake to have respect for the liberty of parents and legal guardians to ensure that the religious and moral education of their children is in conformity with their own beliefs and convictions.

⁶⁴¹ UNCRC Article 14.

⁶⁴² S Langlaude, *The Right of the Child to Religious Freedom in International Law* (Leiden & Boston: Martinus Nijhoff Publishers) 2007,101-116.

welfare of minors⁶⁴³ and a legitimate interest in the development of future citizens.

Therefore appropriately protecting and recognising the religious freedoms of children presents unique challenges for any legal system.

The domestic statutory law in relation to decision-making on behalf of children is set out primarily in the Children Act 1989. The rights, duties, powers, responsibility and authority to make decisions in relation to a child are conferred by parental responsibility,⁶⁴⁴ and the act sets out who shall have parental responsibility for a child.⁶⁴⁵ In the ordinary course of events, decisions about a child's religious upbringing are made by those with parental responsibility.

Where parties with parental responsibility disagree they may apply to the court for a decision; section 1 (1) of the Act states that where a court is required to determine any question in relation to a child's upbringing, the welfare of that child shall be the paramount consideration.⁶⁴⁶

However, the decision of the House of Lords in *Gillick v West Norfolk and Wisbech Area Health Authority*,⁶⁴⁷ and the cases which have followed it, add a further layer of complexity to the position. In *Gillick* the court ruled that the parental right to make decisions on behalf of a child terminates if and when the child achieves sufficient intelligence to understanding

⁶⁴³ See for example UNCRC, in particular Article 3 (which provides that the best interests of children must be the primary concern in making decisions about them) and Article 4 (which provides that governments have a responsibility to take all available measures to make sure that children's rights are respected, protected and fulfilled).

⁶⁴⁴ Children Act 1989 s.3.

⁶⁴⁵ Ibid s.2.

⁶⁴⁶ Children Act 1989 s.1(1) (a).

⁶⁴⁷ *Gillick v West Norfolk and Wisbech Area Health Authority* [1985] 3 All ER 402.

to make the decision for him or herself.⁶⁴⁸ Whether the child has achieved such capacity will be a question of fact.⁶⁴⁹

In relation to the law of trespass therefore, an act which would otherwise be a battery will be lawful if a person with parental responsibility for a child consents to it, or if a *Gillick* competent child consents to it. This raises a number of issues which will be explored below.

Conflict between persons with parental responsibility for a child

Whilst most decisions relating to a child's upbringing can be made by one party with parental responsibility acting unilaterally, the courts have acknowledged that there are a number of issues which require either universal agreement amongst the holders of parental responsibility or a court order.⁶⁵⁰ These issues include ritual circumcision,⁶⁵¹ which raises the question of whether other religious rites might be categorised in the same way. In the event of dispute, does Christian baptism of a child require a court order? If so and one is not obtained, would the lack of a valid consent render the physical element of baptism a trespass?

The first case to consider the issue of circumcision was *Re J*.⁶⁵² Five year old J was the child of a Turkish father who was a Muslim, but who freely admitted that he did not observe many of the tenets of his faith. Similarly J's mother was nominally a member of the Church of England, but did not claim to be a practising Christian.⁶⁵³

⁶⁴⁸ Ibid, per Lord Scarman 423.

⁶⁴⁹ Ibid.

⁶⁵⁰ *Re J (Specific Issue Orders: Child's Religious Upbringing and Circumcision)* 1 FLR 571 CA per Butler-Sloss LJ, 577.

⁶⁵¹ Ibid, also *Re S (Specific Issue Order: Religion: Circumcision)* [2004] EWHC 1282 (Fam); and *Re A and D (Local Authority: Religious Upbringing)* [2010] EWHC 2503 (Fam) 1 January 2011.

⁶⁵² *Re J (Specific Issue Orders: Child's Religious Upbringing and Circumcision)* 1 FLR 571 CA.

⁶⁵³ Ibid, 572.

After his parents separated J lived with his mother in what the court described as an ‘*essentially secular household*’.⁶⁵⁴ Although this term was not explicitly defined, the court set out the factual background making it clear that J’s mother did not actively practise her faith, so he was not exposed to Christian worship or teaching in his home environment. Neither did he have any contact with the local Muslim community or receive instruction in Islam. Nevertheless, it was important to J’s father that his son be circumcised, and he applied to the court for a specific issue order. The first instance judge refused to grant the specific issue order for circumcision, and the father appealed.

The Court of Appeal upheld the decision, and Thorpe LJ gave the following reasons for this:⁶⁵⁵

- 1) Given that J would experience a secular upbringing in England, circumcision would not enable him to share the experiences of his peers as it would in Turkey . If anything it would mark him out as different.
- 2) The procedure was an irreversible surgical intervention. It was not required for therapeutic reasons and carried with it small but identifiable physical and psychological risks. Consequently there would have to be clear demonstrable benefits for the child in order to justify it as being in his best interests.
- 3) J’s mother would find the operation a stressful experience. As his primary carer she would struggle to explain to J why he was undergoing the procedure, or to present it in a positive light. This would be very different from a Turkish, Muslim setting, where there would ordinarily be a family celebration. Furthermore J’s age increased

⁶⁵⁴ Ibid, per Thorpe J para 3 adopting factual summary given by judge at first instance per Wall J 2 FCR 345, at 347, 348, 349.

⁶⁵⁵ Ibid, 571-576.

the probability of him experiencing circumcision negatively; he was old enough to be distressed, but not to comprehend the reasons for the event associated with the discomfort.

- 4) J's mother, who was responsible for his to day to day care, and currently the most important person in his life, was opposed to the procedure and had a rational basis for her opposition.
- 5) The trial judge was correct that the father's right to manifest his religious beliefs under Article 9 of the European Convention of Human Rights had to be balanced against the welfare of J and the Article 9 rights of his mother. Therefore denying the order was not an infringement of the father's Article 9 rights.
- 6) The judge had also been correct to focus on the child's religion of upbringing rather than religion of birth. A child's perceptions were formed more by experience of worship and teaching than by theoretical doctrines of a faith community.

Schiemann LJ,⁶⁵⁶ and Dame Butler-Sloss P,⁶⁵⁷ both agreed with this judgement. Taking each of Thorpe LJ's points in turn, to consider both their validity and applicability to Christian baptism:

- 1) The question of whether undergoing a ritual would enable a child to feel differentiated from his peer group, or enable him to share their experiences is a material factor in assessing best interests. The Children Act sets out criteria which a court should consider in assessing whether the welfare of a child would be promoted by granting an order.⁶⁵⁸ These include: the child's ascertainable wishes and

⁶⁵⁶ Ibid, 576.

⁶⁵⁷ Ibid, 577.

⁶⁵⁸ Children Act 1989 s.1(3).

feelings;⁶⁵⁹ physical, emotional and educational needs;⁶⁶⁰ likely effect of a change in his circumstances;⁶⁶¹ and age, sex, background and other relevant characteristics.⁶⁶² Although not stated explicitly, it was clearly implicit within the judgement in this case that faith context was being treated as both background and a relevant characteristic for the purposes of the analysis. The child's actual context was contrasted with a hypothetical Turkish context.

The emotional impact of undergoing the procedure would almost certainly be different for a boy in a community where his peers were having the same experience, and where his extended family saw it as a joyful occasion, and a boy surrounded by friends and family for whom circumcision in middle childhood was an uncommon experience, and whose primary carer regarded it very negatively.

How these same considerations would relate to Christian baptism would depend upon the facts of the case. Obviously it would not render a child physically different from his or her peers, or be perceived as a distressing medical procedure. However, in some contexts it might be factor in social inclusion or exclusion. If for example the child was part of a family in which one parent and siblings attended a church which permitted only baptised members to receive Communion might feel isolated on a regular basis.

⁶⁵⁹ Ibid s 1 (3) (a).

⁶⁶⁰ Ibid s 1 (3) (b).

⁶⁶¹ Ibid s 1 (3) (c).

⁶⁶² Ibid s 1 (3) (d).

- 2) Baptism does not involve an irreversible surgical procedure, nor does any other Christian sacrament. Most Christians believe that it is spiritually irreversible,⁶⁶³ and this is certainly the Anglican view,⁶⁶⁴ but this does not equate to a permanent physical change of kind involved in ritual circumcision. A child who later decides to renounce Christianity is not left with any observable bodily mark, or prevented from converting to another faith. Neither does he or she undergo any physical or psychological risk akin to that inherent in circumcision.
- 3) Essentially the same considerations would apply here as in relation to the first point. All of these are contextual factors which a court would need to weigh in making a welfare determination.⁶⁶⁵ A child whose primary carer was a devout follower of another faith or a fervent atheist might be distressed by the idea of baptism, and struggle to portray it in a positive light. But this could be the case with *any* decision affecting the child's life about which a significant adult felt strongly, and this therefore cannot be a reason for categorising it a decision requiring universal assent amongst holders of parental responsibility.⁶⁶⁶ If as the Court of Appeal has held there are only a small number of special, identifiable decisions falling into this category, it cannot be appropriate to categorise all or almost all decisions in this way.
- 4) Regrettably the court did not make it absolutely clear why or which aspects of the mother's objections were 'rational'. From the overall context it would appear that

⁶⁶³ Thomas Aquinas, *Summa Theologica*, Question 66, Article 9.

⁶⁶⁴ PCL Principle 61:10: 'Valid baptism is indelible and cannot be repeated'.

⁶⁶⁵ Children Act 1989 s. 1(3).

⁶⁶⁶ *Re J (Specific Issue Orders: Child's Religious Upbringing and Circumcision)* 1 FLR 571 CA per Butler-Sloss LJ, 577.

because there were objective reasons why the procedure might be to J's detriment (e.g. it would entail unnecessary pain and risk) his mother's objections could be categorised as rational. On this basis, a parent could object to Christian baptism, or any other matter, on the grounds that there were objectively identifiable reasons why it might in the circumstances have a negative impact upon the child. Again this consideration cannot in itself justify treating circumcision as a matter needing the consent of all parties with parental responsibility.

- 5) Thorpe LJ acknowledged that J's father right to manifest his religion pursuant to Article 9 of the ECHR included the right to arrange for his son to be circumcised in accordance with the tenets of his faith.⁶⁶⁷ Therefore any limitations on that freedom imposed by a court had to be (1) as are prescribed by law; and (2) as are necessary in a democratic society for the protection of the rights and freedoms of others.⁶⁶⁸

Thorpe LJ identified the relevant law as being sections 1, 2, 3 and 8 of the Children Act 1989. These set out: welfare principle as it emerges from section 1,⁶⁶⁹ the provisions giving both the mother and father parental responsibility and the power to act independently,⁶⁷⁰ and the power of the court to authorise or restrict the exercise of parental responsibility by either parent.

⁶⁶⁷ *Re J (Specific Issue Orders: Child's Religious Upbringing and Circumcision)* 1 FLR 571-576 per Thorpe LJ paragraph headed 'The European Convention on Human Rights and the United Nations Convention on the Rights of the Child.'

⁶⁶⁸ For a recent consideration of these principles by Strasburg see *Eweida and others v United Kingdom* [2013] ECHR 48420/10, discussed above.

⁶⁶⁹ Children Act 1989 s.1.

⁶⁷⁰ *Ibid* ss.2 and 3.

He noted that J's father's Article 9.1 right to manifest his religious belief was in direct conflict with the identical rights conferred on J's mother. Balancing their respective rights was necessary in a democratic society, as was safeguarding the welfare of the child J. It is submitted that this analysis is wholly correct, and that in the event of a dispute over the religious upbringing of a child, there will almost always be a legal basis in the Children Act 1989 for limiting adult Article 9.1 rights; and also a need to balance the conflicting Article 9.1 rights of the parties involved and to protect vulnerable minors. How this balance is achieved, and whether the proposed limitation to one party's Article 9.1 rights are justified will turn on the facts of the particular case.

The Strasburg case law on religious upbringing in relation to parental Article 9 rights has almost exclusively involved custody disputes where one of the parents has belonged to a minority religion. In *M.M. v Bulgaria*,⁶⁷¹ the applicant mother argued that the domestic courts effectively required her to end her involvement with the Warriors of Christ group if she wanted to regain her child. The Commission found that she had an admissible complaint based upon infringement of her Article 9 rights, but a full hearing did not take place as an amicable settlement was reached.

In *Hoffman v Austria*,⁶⁷² the mother was a Jehovah's Witness and intended to bring the children up in accordance with the principles of this faith. The Court was not persuaded that the domestic courts had established that this justified treating her differently from the non-Jehovah's Witness father and concluded that there was a

⁶⁷¹ *M M v Bulgaria* Commission Application 27496/95 decision (1996).

⁶⁷² *Hoffman v Austria* Court Application 12875/87 (1993).

breach of Article 8 (right to respect for private and family life) in conjunction with Article 14 (freedom from discrimination in relation to Convention rights). The court reached the same conclusion on very similar facts in *Palau-Martinez v France*;⁶⁷³ the mere fact that the mother was a Jehovah's Witness was not sufficient evidence that the children would suffer harm in her care and under her influence.

In contrast in *FL v France*,⁶⁷⁴ and *Deschomets v France*,⁶⁷⁵ the Court was satisfied that restrictions which domestic courts had placed on the applicant mothers (a member of the Raelian movement in *FL* and a Brethren lady in *Deschomets*) were acceptable. Both cases concerned mothers who were permitted to have custody of their children, but had their freedom to expose the children to their respective faiths and involve them in its practise limited. In *FL* the restrictions to Articles 8 and 9 were justified on the basis of the children's welfare needs, and the same conclusion was reached in relation to Article 8 in *Deschomets* (Article 9 was not addressed by the Court).

Langlaude criticises these decisions for not focusing sufficiently, or indeed at all, upon the religious freedoms of the children concerned.⁶⁷⁶ The judgements focused entirely on the adult applicants. It is submitted that whilst there is some validity in this appraisal, it is important to note that the welfare needs and best interests of the children were considered. The overall pattern which seems to emerge is that

⁶⁷³ *Palau-Martinez v France* Court Application 64927/01 (2003).

⁶⁷⁴ *FL v France* Court Application 61162/00 (2005).

⁶⁷⁵ *Deschomets v France* 31956/02 (2006).

⁶⁷⁶ S Langlaude, *The Right of the Child to Religious Freedom in International Law* (Leiden & Boston: Martinus Nijhoff Publishers, 2007), 220.

furthering the best interests of minor children will be a legitimate and sufficient reason to restrict parent freedoms pursuant to Article 9 and indeed Article 8.

This essential position has been confirmed by both Strasburg and UK case law since Langlaude's commentary was published. In *Re N* Judge Clifford Bellamy endorsed the proposition that restricting the freedom of a parent to involve their child in the practise of his or her religion may be a justifiable restriction of parental Article 9 rights, if it is a proportionate means of further the legitimate end of advancing the child's best interests.⁶⁷⁷ The case concerned a dispute between two separated parents, a Jehovah's Witness mother and a practising Anglican father. The father of four year old N was seeking to restrict the extent to which his mother forced N to live in accordance with the tenets of her faith.

In considering this matter the judge carried out a detailed analysis of what this particular mother's understanding of being a Jehovah's Witness was mean for her son, for example in relation to attending the birthday parties of friends and attending church with his father.

In both *M and another v Romania*,⁶⁷⁸ and *Vojnity v Hungary*,⁶⁷⁹ the European Court of Human Rights accepted the same fundamental point. In *M and another v Romania*, it was noted that national authorities will have a wide margin in determining what is appropriate on the facts of individual cases; recognition of the

⁶⁷⁷ *Re N (A child) (Religion: Jehovah's Witness)* [2012] All ER (D) 165.

⁶⁷⁸ *M and another v Romania* (App. No. 29032/04) - [2011] ECHR 29032/04.

⁶⁷⁹ *Vojnity v Hungary* (App. No. 29617/07) - [2013] ECHR 29617/07.

complexity and sensitivity of disputes which involve vulnerable children as well as competing human rights claims. Nevertheless *Vojnity v Hungary* again demonstrated that mere membership of a particular group or denomination is unlikely to be sufficient reason to restrict the Article 9 rights of a parent; the facts must be carefully weighed and the restriction must be proportionate. In that case the domestic court had labelled the father's worldview as 'irrational' but had failed to demonstrate that his teaching his child about it was necessarily harmful.

Ultimately, domestic courts must be able to show that any restrictions of parental Article 9 rights are indeed based upon genuine and demonstrable child welfare or other weighty issues. In almost all cases mere membership of a particular religious group by one of the adult parties to a dispute will not be determinative. This is in keeping with the point made earlier, that the relevant question is not and cannot be whether it is in the best interests of a child to be brought up in any particular faith. Rather it is whether it is in the best interests of a given child to receive the specific kind of religious upbringing offered by their parent or caregiver in their unique social and family context. This is further evidence that cases will always turn on their facts.

- 6) Nevertheless, the kind of reasoning applied by Thorpe LJ in this respect has received some criticism from commentators.⁶⁸⁰ In making a welfare determination, he regarded the actual impact of religious practice on the child to be far more significant than abstract doctrinal ideas held by parental faith groups. This is entirely in keeping with the Strasburg case law and domestic legislation, but Jivraj and

⁶⁸⁰ S Jivraj and D Herman, 'It is difficult for a white judge to understand: orientalism, racialisation and Christianity in child welfare cases' CFLQ (2009) 283.

Herman argue that a lack of focus on parental understanding and belief where minority cultures are concerned has resulted in an inherent prejudice in favour of underlying Western values. However, it is very difficult to substantiate this criticism on the facts of *Re J* or reconcile it with the wording of the Children Act.

The court approached both parental religions in the same way. The fact that J was born to a Muslim father and the significance which this had to his faith community carried as much weight as the fact that he was born to an Anglican mother. In neither case was the doctrinal status of the child in terms of parental religion treated with as much gravity as the child's actual experience of that faith and its day to day impact upon his life. It is difficult to see how a welfare determination could be made in accordance with the statute⁶⁸¹ in any other way, as the text explicitly requires the court to consider the effect of the proposed order on the child and to make his or her welfare the paramount consideration.

Commentators like Morris have supported the court's method in highlighting the significance of family and societal context when making a welfare determination in religious upbringing cases.⁶⁸² Arguably this strategy also makes sense in terms of recognising individual religious freedoms. Edge⁶⁸³ argues convincingly determining the *content* of religious beliefs is deeply problematic for courts, and that the most appropriate approach is to simply focus on the beliefs of the parties before the court:

⁶⁸¹ Children Act 1989 s. (1).

⁶⁸² G Morris, *Family: Conflicting Views* 162 NLJ 984.

⁶⁸³ P Edge, 'Determining Religion in English Courts', *Ox. J Law Religion* 1(2) (2012) 402.

‘One way forward is to focus on the individual in order to determine the content of their beliefs. This strategy would treat the content of acknowledgedly authoritative texts, the statement of acknowledged members of a religious hierarchy, and even the beliefs of acknowledged co-religionists, as simply evidence to answer the fundamental question—what does the individual before the court believe?’⁶⁸⁴

In a family law context this is especially helpful, as the question is never in reality ‘What would it mean for this child to be brought up as a Christian or a Muslim or a Hindu?’ There is such a variety of practice and understanding within religions as to render a question couched in the above terms too general to be useful. As argued above, in addressing the welfare needs of a specific child, the issue will always be, what would it mean to follow the relevant faith, as understood by the relevant caregivers and the immediate faith community in which they participate? But not only will this approach further the best interests of the child, it will also do full justice to the adults involved in any dispute, as it requires a sensitive and individual handling of the facts at issue.

Exactly the same factors would be considered if the application was being made in respect of an order for baptism or some other Christian rite as opposed to circumcision. The court would consider how it would have an impact upon the child’s experience in making a decision about his or her welfare, and this would be dependent upon the facts of the case.

⁶⁸⁴ Ibid, 419.

Overall the decision in *Re J* says nothing which strongly indicates that baptism or other Christian sacraments would necessarily join circumcision in the category of decisions requiring unanimity amongst holders or parental responsibility, or a court order.

The subsequent case of *Re S* had somewhat different facts, but supports the same conclusion.⁶⁸⁵ In this case a Muslim woman had married a Hindu of the Jain tradition. They agreed during their relationship that any children were to be raised as Hindus with Islamic influences, and did in fact become parents to a son and a daughter. At this stage the mother asked the father to convert to Islam. He refused, but he did take part in a Muslim wedding ceremony whilst pretending to be a Muslim.

When the couple separated the mother applied to the court for the children to become practising Muslims, and for her son to be circumcised. She was living with her family again, practising her religion enthusiastically and taking part in the spiritual and social life of the Mosque. She argued that if her children did not fully convert, she would be expelled from her religious community and her wider family would risk a similar fate. The children's father was opposed to their conversion, fearing that he would lose all contact with them, and that they would be denied any freedom of choice. The issue of circumcision was particularly problematic, as the evidence in the case was that it was required by Islamic doctrine to render an adult male's acts of prayer valid.⁶⁸⁶ In contrast it was strictly forbidden by Jainism, as a violent act which mutilated the body.⁶⁸⁷ Furthermore, it was submitted in evidence and accepted by the court that in the Jain community marriages, were usually arranged, and it would be almost impossible for a circumcised man to find a match.

⁶⁸⁵ *Re S (Specific Issue Order: Religious Circumcision)* [2004] EWHC 1282 (Fam).

⁶⁸⁶ *Ibid*, para 25.

⁶⁸⁷ *Ibid*, para 17.

Baron J rejected the mother's application for the following reasons:

- 1) The issue stemmed not from the children's needs, but from the mother's desire to portray herself as a Muslim.⁶⁸⁸ The court could not sanction or condone deception, especially when the children knew the truth. Furthermore, the mother would be able to lead a perfectly satisfactory life without the order, and there was no evidence that she or her family would be ostracised. There was no judicial speculation about what the implications would have been had the evidence in fact suggested that such a reaction from the relevant community was likely.
- 2) The children were too old (at eight and ten) respectively to seek to favour one of their parental religions over the other. During their parents marriage they had had exposure to both traditions as agreed. It was in their best interests that this continued; for them to understand their heritage fully and to allow them the freedom to choose which religion, if any, they wished to follow in adult life.
- 3) Circumcision was not in the boy's best interests as it would limit his freedom of choice. Islam permitted it at a later stage, at which point he would be in a position to make his own decision.
- 4) The concern about the impact of conversion upon the children's relationship with their father was genuine.

Despite the very different factual context, *Re S* affirmed that circumcision was a matter requiring either universal consent from persons with parental responsibility or a court order. The physical permanence of the procedure was emphasised, especially in a context

⁶⁸⁸ Ibid, para 83.

where it would permanently exclude the child from full participation in his father's faith and cultural community.

Again these particular considerations would not apply to a Christian sacrament such as baptism. And in fact it was not suggested that there would be any issue with the children participating in Islamic or Jain rituals which did not involve the kind of physical risk and permanence of circumcision. Nothing in the case law indicates that any participation in the physical aspects of Christian worship would be likely automatically to require the consent of all parties with parental responsibility. Therefore, it appears at the present time to be the case that a single adult can give valid consent on behalf of a child, and therefore remove the realistic potential for an action in trespass, at least where the child is lacking capacity.

The child's developing sense of religious and cultural identity

In the case of adults lacking in capacity, it was argued that in determining best interests, it would be proper for a court to consider their social and cultural context, and their place and identity within their family and community. There is support in case law for considering the way in which individuals are regarded and remembered, as well as their immediate physical, emotional and material needs.⁶⁸⁹

With children the same case can be made; and contextual factors are explicitly referred to by the Children Act⁶⁹⁰ amongst the considerations to be weighed by a court making a welfare determination. However, the courts have repeatedly acknowledged that children are still developing their religious and social identity, and that they have a need both to

⁶⁸⁹ *Re P (Statutory Will)* [2009] EWHC 163 (Ch); *Re M* [2009] EWHC 163 (Ch).

⁶⁹⁰ Children Act 1989 s.1(3)

understand their family heritage,⁶⁹¹ and to be in a position to make independent choices when they reach sufficient understanding to do so.⁶⁹² At the two polar extremes, the situation of a dying adult with dementia who is not expected to regain capacity and who has been a devout member of a particular faith for his or entire life is very different from that of an infant whose carers disagree about religious upbringing and rites of initiation.

In considering best interests, a court will regard giving children an opportunity to understand and participate in their parental religious and cultural heritage as a benefit, and something to be enabled where possible. In *Re S* favouring one parental religion when children had previously been exposed to both was expressly rejected.⁶⁹³ In *Re J Thorpe LJ* quoted passages from the judgement of Wall J with approval, including the judge's acknowledgement that identifying with his Turkish father and his culture would be a benefit which circumcision would confer.⁶⁹⁴

However, this potential benefit is not so overwhelming as to outweigh all other considerations. In *Re P* the Court of Appeal emphasised that the welfare of the child is always the paramount consideration.⁶⁹⁵ The court should not prioritise establishing or maintaining links with parental culture and religion above all other matters. In this case the child was the daughter of Orthodox Jewish parents. She was born with Down Syndrome, and during her infancy her family were unable to cope with her care. She was fostered as a baby by a Roman Catholic couple, and despite several applications by her parents, she was still with them at the age of eight when her case came before the Court of Appeal. It was

⁶⁹¹ *Re S (Specific Issue Order: Religious Circumcision)* [2004] EWHC 1282 (Fam) para 83; *Re and D (Local Authority: Religious Upbringing)* [2010] EWHC 2503 1 January 2011.

⁶⁹² *Re S (Specific Issue Order: Religious Circumcision)* [2004] EWHC 1282 (Fam) para 83.

⁶⁹³ *Ibid.*

⁶⁹⁴ *Re J (Specific Issue Orders: Child's Religious Upbringing and Circumcision)* 1 FLR per Thorpe LJ 574.

⁶⁹⁵ *Re P (A Child)* [1999] All ER (D) 449.

held that in the circumstances remaining resident with the people who had cared for her almost all life was in P's best interests, regardless of the cultural and religious differences with her birth family.

In *Re D* the child of a Presbyterian mother and a Roman Catholic father was being brought up by his paternal grandparents.⁶⁹⁶ His mother wished to have the child returned to her, or failing that for an order that he attend a Presbyterian Sunday school each week. D himself was refusing to attend the Sunday School. Again the court determined that in all the circumstances of the particular case, it was in the interests of D's welfare to allow him to be brought up in the faith of his primary carers. The welfare of D was the paramount consideration.

Similarly, in *Re T and M*, the court found that participation in parental religion, at least to the extent desired by the adult applicant, was not in the best interests of the child.⁶⁹⁷ In this case the mother T and M converted to Islam some time after her divorce from their Roman Catholic father with whom they lived. Their mother applied to have residence transferred to her, the children removed from collective religious education and to attend an exclusively Muslim school when they were old enough.

Rejecting her application the court found that it was not in the children's best interests for them to be subjected to a sudden change of life-style and environment. They had not so far spent their lives immersed in Islam, and it would be a traumatic for this to happen abruptly at this stage. Furthermore, they were old enough to express some preference, and didn't want this kind of dramatic change.

⁶⁹⁶ *Re D (Care Order: Declaration of Religious Upbringing)* [2005] NI Fam 10.

⁶⁹⁷ *Re T and M (Minors)* [1995] ELR 1.

Both *Re D*⁶⁹⁸ and *Re T and M*⁶⁹⁹ illustrate that honouring parental wishes in respect of religious upbringing will come secondary to furthering the welfare of the child when courts are required to make a determination. As discussed above, this is in accordance with the wording of the Children Act which stipulates that the welfare of the child must be the paramount consideration.⁷⁰⁰ It is also compatible with the Human Rights Act 1998,⁷⁰¹ and the European Convention on Human Rights. Although restricting a parent's freedom to determine their child's religious upbringing will ordinarily be a limitation of their Article 9.1 right to manifest their belief,⁷⁰² the need balance one individual's Article 9 rights with another (e.g. the other parent) and the need to protect a vulnerable child, will often provide sufficient justification for such limitation. Whether the limitation is justified in any particular case will of course depend upon the facts, but there is no necessary or inherent conflict between the present state of UK law and the European Convention on Human Rights in this regard.

With children, as with adults lacking capacity, it is necessary for courts to make decisions in relation to religious matters on the basis of best interests. However, because the factual context will very different with children, different factors will often need to be considered.

3.4 (c)(ii) Conflict between the child and those with parental responsibility

Where the child lacks capacity to make a decision, decision-making authority lies with those who have parental responsibility.⁷⁰³ If there is no conflict between holders of parental

⁶⁹⁸ *Re D (Care Order: Declaration of Religious Upbringing)* [2005] NI Fam 10.

⁶⁹⁹ *Re T and M (Minors)* [1995] ELR 1.

⁷⁰⁰ Children Act s. (1).

⁷⁰¹ Human Rights Act 1998.

⁷⁰² *Re J (Specific Issue Orders: Child's Religious Upbringing and Circumcision)* 1 FLR 571-576 per Thorpe LJ paragraph headed 'The European Convention on Human Rights and the United Nations Convention on the Rights of the Child.

⁷⁰³ Children Act ss (2) and (3).

responsibility, and no application to the court, the position is straightforward.

Furthermore, on balance it appears that consent to the kind of liturgical actions undertaken by Christian clergy could validly be given by a single holder of parental responsibility acting alone. There is no serious physical or psychological risk associated with them, nor is there a permanent physical change. The factors which have weighed heavily on courts deciding circumcision cases,⁷⁰⁴ especially the infliction of bodily injury and change, would not apply to anything which an Anglican priest would legitimately be doing.⁷⁰⁵

Therefore, provided one person with parental responsibility consents, baptising a squirming and howling baby will not amount to a battery in law, however disgusted the child might be about it. But with older children the situation is more complicated. What level of understanding does a child need to have to be *Gillick* competent to decide whether to be baptised or to receive Communion? What is the effect of the child's capacity on the parent's capacity to consent?

The law, as set out by Lord Scarman in *Gillick*,⁷⁰⁶ appeared to be quite clear cut. Once a child achieved capacity in relation to a certain issue, the right of those with parental responsibility to make decisions about that issue terminated. However, the position was clouded by later judicial pronouncements in relation to consent to treatment.⁷⁰⁷ Lord Donaldson MR stated, *obiter*, that even where a child was capable of consenting to

⁷⁰⁴ *Re J (Specific Issue Orders: Child's Religious Upbringing and Circumcision)* 1 FLR; *Re S (Specific Issue Order: Religious Circumcision)* [2004] EWHC 1282 (Fam).

⁷⁰⁵ In light of the House of Lords finding in *R (on the application of Williamson and Others) v Secretary of State for Education and Employment and Others* [2005] UKHL 15 there is not even a theoretical possibility of Anglican clergy delivering corporal punishment in a Christian school. In this case it was found that a ban upon corporal punishment in schools was an appropriate and proportionate means of achieving the legitimate aim of protecting vulnerable children, and was therefore a justified restriction of the Article 9 rights of any parents, teachers or faith groups believing that corporal punishment in schools was part of their religious life and practice.

⁷⁰⁶ *Gillick v West Norfolk and Wisbech Area Health Authority* [1985] 3 All ER 402 per Lord Scarman 423.

⁷⁰⁷ *Re R (A Minor) (Wardship Consent to Treatment)* [1992] Fam 11.

treatment his or her refusal of treatment could be overridden by the provision of an alternative valid consent.⁷⁰⁸ At first sight this contradicts the dicta of Lord Scarman in *Gillick*, and has been much criticised by commentators.⁷⁰⁹ However, it is submitted that Lord Donaldson's statement can be interpreted in a way which is consistent with *Gillick*, and which sheds some useful light on the position in relation to consent and religious issues.

Macfarlane argues that Lord Donaldson's analysis is incorrect.⁷¹⁰ He argues that if the hypothetical situation in fact arose, a court should not overrule the wishes of a competent young person for the following reasons:

- 1) There has been a move in case law away from a paternal and protectionist approach towards a rights-based evaluation in respect of each child.
- 2) This movement is in harmony with Articles 5 and 12 of UNCRC.⁷¹¹
- 3) The individual rights-based approach draws in the flexible and sophisticated scheme for assessing capacity which is set out in the Mental Capacity Act.⁷¹² Whilst the Act is not directly applicable, it is a legitimate way of understanding the common law test for capacity.
- 4) The Mental Capacity Act draws no distinction between the capacity to refuse and the capacity to consent.
- 5) Rejecting Lord Donaldson's approach to capacity and adopting one which mirrored the statutory scheme for adults would enable a court to create one standard for

⁷⁰⁸ *Re R (A Minor) (Wardship Consent to Treatment)* [1992] Fam 11.

⁷⁰⁹ Mr Justice McFarlane, 'Mental Capacity: One Standard for All Ages' Fam Law (2011) 479 1 May 2011.

⁷¹⁰ *Ibid.*

⁷¹¹ UNCRC Article 5-(Parental guidance): Governments should respect the rights and responsibilities of families to direct and guide their children so that, as they grow, they learn to use their rights properly. Article 12-(Respect for the views of the child): When adults are making decisions that affect children, children have the right to say what they think should happen and have their opinions taken into account.

⁷¹² Mental Capacity Act 2005.

evaluating capacity, irrespective of age. This would be much more in tune with the organic development of capacity described by Lord Scarman in *Gillick*.

The primary flaw with Macfarlane's argument is his analysis of the Mental Capacity Act.⁷¹³

Capacity as defined by the statute is decision-specific. To state that the Act draws no distinction between the capacity to consent to treatment and the capacity to refuse it, is ironically to underestimate the very sophistication which he praises. It is actually entirely possible that an adult could be found to have capacity to consent to treatment under the Act, whilst at the same time be lacking consent to refuse it.

In mounting a partial defence of Lord Donaldson, Gilmore and Herring argue in relation to children, that different levels of understanding are required depending upon the course of action contemplated.⁷¹⁴ Capacity to consent to treatment requires simply an understanding of the treatment and its consequences, whereas refusal requires an understanding of the consequences of refusal. One may be more complex than the other, allowing for the real possibility that a child might have capacity to consent but not refuse. They cite the example of applying a plaster to a cut, understanding about having a plaster put on a graze is a different matter from understanding about septicaemia and infection.

It is submitted that this is correct, and that the same reasoning applies whether dealing with an adult and the Mental Capacity Act or a child and the common law. Whatever test of understanding is being applied, capacity will inevitably vary depending on the issues which must be understood in order to make an informed choice. If a child has capacity to refuse treatment then his or her refusal may not be overridden, but having capacity to refuse may arrive later than having capacity to consent.

⁷¹³ Mr Justice McFarlane, 'Mental Capacity: One Standard for All Ages' Fam Law (2011) 479 1 May 2011.

⁷¹⁴ S Gilmore and J Herring, 'No is the hardest word: consent and children: autonomy' CFLQ (2011) 31

This is a helpful insight when it comes to considering decision-making in relation to religious matters; capacity is effectively decision-specific for children as well as adults. Whether a child has capacity will turn on whether or not he or she understands and can assess the risks, benefits and other consequences of that decision.

It is regrettable that there has not been more judicial guidance on children and capacity in the case law on religious upbringing. In many cases the child's preferences have been noted,⁷¹⁵ but their lack of capacity has simply been assumed without analysis of explanation. As Langlaude observes,⁷¹⁶ this failure is apparent in the jurisprudence of Strasbourg as well as national courts, at least in cases concerning disputes between adults over religious upbringing (as opposed to children seeking to assert their own rights in an educational context). However, it is submitted that the child would need to have some understanding of the social, cultural and emotional consequences of any proposed action, not merely its physical dimension.

For example, in *Re S*⁷¹⁷ it would not be enough for S to have attained capacity to decide about the physical risks of circumcision. In order to decide the matter for himself, he would also have had to have understood the lifetime consequences of excluding himself from participation in his father's religion and marriage within his community. Although the absence of discussion on the point is unfortunate, it seems reasonable to assume that at eight S would almost certainly not have had capacity to make such a decision, especially when he would doubtless have been under pressure from both sides of his family. In fact it is somewhat surprising that the court confidently asserted that by puberty he would be

⁷¹⁵ *Re D (Care Order: Declaration of Religious Upbringing)* [2005]; NI Fam 10; *Re T and M (Minors)* [1995] ELR 1.

⁷¹⁶ S Langlaude, *The Right of the Child to Religious Freedom in International Law* (Leiden & Boston: Martinus Nijhoff Publishers) 2007, 220.

⁷¹⁷ *Re S (Specific Issue Order: Religious Circumcision)* [2004] EWHC 1282 (Fam).

Gillick competent to decide.⁷¹⁸ Understanding and weighing those issues would require great emotional and intellectual maturity from a thirteen year old.

Similarly, it is submitted that in the context of Christian sacraments, a child would need to understand more than what was physically involved. For example, agreeing to be sprinkled with water and dabbed with holy oil does not carry great physical risk, but if deciding to be baptised would damage a child's relationship with a parent of another faith, then understanding this would be a material factor in attaining capacity to make the decision.

This is illustrated in one of the few UK cases which deal with a child in conflict with a parent in relation to religious upbringing, *In the Matter of C*.⁷¹⁹ The case concerned C, a ten year old girl who wished to be baptised in the Church of England church where her father worshipped. Her father supported this desire whilst her mother opposed it. Consequently, a section 8 application was made in accordance with the Children Act 1989, for the matter to be determined by the court.

Both of C's parents were Jewish, but her father converted to Christianity after their marriage broke down. The couple divorced in 2010; prior to this time, C and her younger brother had been brought up in an essentially non-practising household. The family did not observe Jewish festivals or Kosher dietary regulations; they attended the synagogue only if invited as guests to a wedding or Bar Mitzvah. When their father began attending church both C and her brother wanted to accompany him, and did so with the consent of their mother. C also attended a Christian event, the 'New Wine' festival, and it was after this that she announced that she wanted to be baptised.

⁷¹⁸ Ibid, para 83.

⁷¹⁹ *In the Matter of C-Between A Mother (Applicant) and A Father (Respondent)* Before his Honour Judge Platt, May 2012.

As well as her mother, both sets of grandparents expressed opposition to the proposal. The wider family argued that C was too immature to make such a decision, and that she had been unduly influenced by her father. However, her father maintained that C knew her own mind, and had been consistent about the matter. Furthermore, he had no objection to C attending a synagogue, receiving Jewish religious instruction or taking part in Jewish worship.

Judge John Platt found that there was no binding precedent on this issue.⁷²⁰ Therefore, the section 8 application fell to be decided on the welfare principle set out in section 1(1) of the Children Act, the delay principle set out in section 1(2) and the statutory checklist set out in section 1(3).

On this basis he found that it was in the C's best interests for her to begin attending baptism classes.⁷²¹ Furthermore, she should be presented for baptism as soon as the Minister of her church deemed her ready.⁷²² He found that C's emotional needs would be best met by her wishes being respected, and that further delay carried risk of her suffering further emotional harm. He also concluded that C had reached 'a sufficient degree of maturity and understanding to make a properly informed decision'.⁷²³

In addition he found that baptism was not an 'irrevocable' step.⁷²⁴ It would not prevent reverting to the Jewish religion later in life if she so chose. It was also only the first step towards full membership of the Church, which was conferred by Confirmation. Her father

⁷²⁰ Ibid, para 50.

⁷²¹ Ibid, The Order, para 3.

⁷²² Ibid, Letter to C.

⁷²³ Ibid, para 61.

⁷²⁴ Ibid, para 36.

was forbidden to arrange for C to be confirmed until she attained the age of sixteen, without the written consent of her mother.⁷²⁵

He also stated that the court had no power to order C to be baptised, as this decision was for the Minister of her church to take in light of his evaluation of her understanding and commitment.⁷²⁶ He did not discuss the implications of Canon B22, which imposes a duty on ministers to baptise infants presented to receive this sacrament provided that due notice has been given. The Canon permits delay for the instructions or parents, guardians and Godparents, but makes no provision for delay so that infant baptismal candidates may be instructed.⁷²⁷ It appears to have been drafted with only babies and very young children in mind, which is problematic in cases such as this.

The judgement could be harmonised with the Canon on the basis that the presentation for baptism here, by the parents on the basis of the Court order, was made contingent upon the minister deeming C to be spiritually, emotionally and intellectually ready to receive the sacrament. So that C was effectively being presented for baptism, but not immediate baptism. However, there is no internal evidence from the judgement that the judge intended this interpretation, or indeed that he had in any way turned his mind to the implications of Canon B22.

⁷²⁵ Ibid, The Order, para 2.

⁷²⁶ Ibid, The Order, para 3.

⁷²⁷ Canon B22:4: *'No minister shall refuse or, save for the purpose of preparing or instructing the parents or guardians or godparents, delay to baptize any infant within his cure that is brought to the church to be baptized, provided that due notice has been given and the provisions relating to godparents in these Canons are observed.'*

There are a number of worrying aspects about this decision, and the judicial reasoning which underpins it. It does not appear to be either internally consistent, or in harmony with case law on child decision making capacity. The judgement appears to imply that C was effectively Gillick competent to decide for herself about baptism, and yet the court nevertheless made an order and decided the matter for her. There was no coherent explanation of the factors which the child or the court needed to understand or weigh in relation to decisions specifically of this kind (e.g. decisions about whether to receive a sacrament or other rite of initiation into a religious faith). Furthermore the specific comment that it was for the minister responsible for baptising C to assess whether she understood the necessary issues is problematic. Anglican priests do not claim any legal or psychological expertise which would equip them for such a task. When an analogy with medical treatment is made the statement seems even less satisfactory; it is hard to imagine that in a case of dispute in that context a court would place ultimate responsibility for assessing capacity with a doctor. And on top of all of this, there are statements in the judgement which suggest that the judge had not adequately understood and considered the doctrinal and cultural issues at play within C's family context.

Taking the last of these issues first, it should be emphasised that this was a case of parental conflict as well as conflict between a child and a party with parental responsibility. Trust had broken down between the parents; the mother feared that preparations were being made behind her back for C to be baptised, and made an *ex parte* application to prevent this.⁷²⁸ The judge was extremely critical of the mother for making an application in this way;

⁷²⁸ Ibid para 5: *'That application was prompted by a conversation which mother had had with C following a long telephone conversation between C and her father on the evening of 13th November 2011. According to the mother C confessed that she had initially lied to her mother about the subject matter of her conversation with*

he argued that after having gained the impression from C that such preparations were under way she should have taken steps to ascertain from the father and his minister whether this was true, rather than rushing to apply to the court.⁷²⁹

It is far from clear that such direct and harsh criticism would be helpful in encouraging C's mother to accept the terms of the Order and seek to work more collaboratively with her ex-husband in future. But the more fundamental point is that regardless of where the balance of culpability lay, the reality was that C was caught between two feuding adults who neither trusted nor respected one another. Very little consideration is given in the judgement to the potential which this situation would have had to reduce C's chances of attaining capacity to make decisions about her religious path, when this was so intimately bound up with questions of identity and conflicting loyalties. Her context was very different from one in which both of her parents agreed about religious matters.

Importantly, the judge attached very little significance to the complex romantic life of C's father after his divorce, despite the mother's concerns that this had placed considerable stress on C.⁷³⁰ In less than two years he had been engaged to one woman and had subsequently married another. This degree of domestic turbulence must inevitably have had the potential to affect C's decision making in relation to religious matters.

her father and then confessed that she had been talking with her father about doing a course which would lead to her being baptised as a Christian and that her father had told her not to discuss this with the mother.'

⁷²⁹ Ibid para 46: 'I do not accept the validity of the reasons put forward by the mother for making her without notice application. It was wholly wrong for her not to have checked either with the father or with his Minister to discover the truth before applying to the court. There simply was no immediate danger. This has had serious consequences. She obtained her order on an assertion of fact that both children has secretly been enrolled in baptism classes without her knowledge or consent which was simply untrue'

⁷³⁰ Ibid para 24: 'She [the mother] also points out that the events of the past two years have been very stressful for the children, first with the divorce, then the father's decision to remarry first one woman and then another whom he has now been married to for five months.'

Was sharing her father's religion a way of attempting to attach herself to him more closely, possibly at an unconscious level, following the trauma of no longer sharing a family home and subsequently being introduced to first one stepmother and then another? C would have been an exceptionally emotionally mature ten year-old if she was able to consider this possibility and assess its impact on her decision-making. But if she could not consider this, then it is difficult to conclude that she could understand the possible social and emotional consequences of being baptised, effectively publically allying herself with her father against the wishes of her mother and both sets of grandparents.

As a child at the centre of a bitter parental and familial dispute, C was particularly emotionally vulnerable. And regrettably, cases in which a court is asked to adjudicate on matters of religious upbringing will frequently involve minors caught in such a situation. This emotional vulnerability is likely to have an adverse impact on decision-making capacity, and it is important that courts take cognisance of it. It should also be a factor which clergy consider in cases where courts are not involved, and they are making decisions about whether minors have capacity to consent to baptism. If relatives later wish to assert that the child lacked capacity, and that a trespass took place, it may well be relevant that the young person's judgement would have been likely to be impaired by emotion or coercion.

It is also important that courts fully understand the religious and cultural context within which the case is set, otherwise it is impossible for them to assess the impact of decisions on a child's future. There are a number of statements within the judgement which suggest that Judge Platt did not have adequate knowledge of either Judaism or Christianity. For

instance, in paragraph 6 there is a reference to an order that neither child be baptised nor celebrate a bar mitzvah without the consent of both parents or a final hearing.⁷³¹

The coupling and apparent equation of bar mitzvah and baptism suggests a worrying lack of understanding of both Christianity and Judaism. The term 'Bar Mitzvah' means literally son of the commandments, and refers to a boy coming of age for religious purposes at thirteen. Technically under Jewish law, children are not obliged to observe the commandments, although they are of course encouraged to do so as preparation for their adult life. When boys reach the age of maturity, a Bar Mitzvah ceremony is a public demonstration and celebration of attaining this status and responsibility. However, the ceremony is not a requirement, does not fulfil a commandment and does not confer Jewish status (that is conferred by birth or conversion).⁷³²

Strictly speaking from a Jewish perspective, it is not possible to prevent a boy becoming a Bar Mitzvah, as it happens automatically when he reaches the relevant age. In fairness the court order in this case was worded so as to prevent the celebration of a Bar Mitzvah, which does make logical sense. However, C's younger brother was many years away from his thirteenth birthday, and the term Bar Mitzvah does not apply to girls.

In relation to C, the relevant term would be Bat Mitzvah, or daughter of the commandments. A girl becomes a Bat Mitzvah when she turns twelve, and in the modern world this event is marked with a ceremony and party which in many branches of Judaism is parallel to that at a boy's Bar Mitzvah, and is always a celebration.⁷³³ It is not really exactly

⁷³¹ Ibid, para 6

⁷³² See further, The United Synagogue, Bar Mitzvah http://www.theus.org.uk/lifecycle/bar_mitzvah/your_bar_mitzvah/ (accessed 5/11/2013)

⁷³³ See further, further, The United Synagogue, Bat Mitzvah (accessed 5/11/2013) http://www.theus.org.uk/lifecycle/bat_mitzvah/your_bat_mitzvah_bat_chayil/

analogous to Anglican confirmation, because it is generally linked to the spiritual consequences of attaining a fixed age (although older persons can and do sometimes have a Bar or Bat Mitzvah⁷³⁴), rather than a personal decision to make a mature profession of faith, which may appropriately occur at any time after the candidate has reached the age of discretion, and the timing of which will depend upon individual circumstances.⁷³⁵

It is disturbing that the judge did not even use the correct term for the child at the centre of the case, and said nothing which displayed any understanding about the religious or social context from which the terms Bar and Bat Mitzah are drawn. Specifically the point was entirely overlooked that from a Jewish perspective prior to attaining the age laid down in the commandments, a boy or girl cannot be a Bar or Bat Mitzvah, and is not understood to be obliged or capable of assuming adult obligations or decisions in a religious context. Any relevance which this may have had for C's mother or grandparents, and possible consequent impact upon C, was excluded from judicial consideration.

It might be argued that C's mother should have obtained more careful expert evidence, but it should be remembered that this was a case in the Family Division and not a commercial dispute; the primary obligation of the court was to base its decision on the best interests of the child at the centre of the case.

Regrettably the judge displayed an equally distorted and superficial understanding of baptism from an Anglican perspective. He correctly acknowledged that there are multiple and sometimes mutually inconsistent doctrines and practices relating to baptism within

⁷³⁴ See for example, The Jewish Federation of North America, Jewish Life Cycle/Rituals: Adult Bar/Bat Mizvah <http://www.jewishfederations.org/page.aspx?id=921> (accessed 5/11/2013).

⁷³⁵ PCL Principle 65:1: '*Only a baptised person who has reached the age of discretion may be confirmed*' and Principle 65:2 '*Confirmation is a rite in which a person makes a profession of the faith and a mature expression or reaffirmation of the commitment to Christ made at baptism*'.

contemporary Christianity.⁷³⁶ However, the interpretation of Anglican baptismal theology which he went on to put forward is problematic in a number of respects:

‘However it is clear from the evidence that the father belongs to the Anglican Church and I accept his evidence and understanding of mainstream Anglican belief, which is the view of his church, that baptism is a ceremony in which the child is welcomed into the community of the church and starts his or her journey in faith. Through a process of instruction and the test of time that journey may, but does not inevitably, lead to a moment when the child, usually not before the child reaches the age of 16, has attained sufficient maturity and understanding of the Christian faith and chooses to become a full communicant member of the church by the ceremony of confirmation.

I am also satisfied on the evidence that C understands that in order to be baptised she must declare her belief in God, which she has done to both her father and her mother, and having made that declaration she can then be welcomed into the fellowship of her church through the ceremony of baptism.’⁷³⁷

To classify baptism as a first step in an individual journey of faith is not necessarily inaccurate, but this description does not reflect the fundamental belief that it is the rite by which an individual becomes a Christian and a member of the Church Universal.⁷³⁸ The

⁷³⁶ *In the Matter of C-Between A Mother (Applicant) and A Father (Respondent)* Before his Honour Judge Platt, May 2012 para 32: ‘It is essential first of all to establish exactly what baptism means firstly for C, then for her parents, and also for the Church community which she wishes to join. It cannot be disputed that within the Christian religion there are many different beliefs as to the significance of baptism, derived from differing interpretations of scripture which cannot be reconciled with one another.’

⁷³⁷ *Ibid*, para 33-34.

⁷³⁸ PCL, Principle 61:1: ‘The sacrament of baptism, instituted by Christ, is a sign of regeneration or new birth by which those who receive it are incorporated into the Church of Christ’ and 61:3 ‘All baptised persons belong to the church universal’.

sacrament of baptism is not the beginning of a process by which a person becomes a Christian, but the sacrament which makes a person a Christian.

In talking about becoming a 'full communicant member' of the church, Judge Platt demonstrates no understanding of the distinction in Anglican theology of being a member of the Church Universal and being a member of an institutional church.⁷³⁹ In spiritual terms to Anglicans, the capacity to take a full, adult part in the polity of their particular church is less significant than the Christian status conferred by baptism. The rite of Confirmation is a reaffirmation of the commitment to Christ made at baptism.⁷⁴⁰ Confirmation is not absolute requirement for admission to Communion within Anglican theology.⁷⁴¹ Some Anglican churches, including the Church of England permit baptised children who are not confirmed to receive Communion.⁷⁴² In essence being baptised was a far more serious step than the judge in this case appeared to acknowledge.

In separating baptism from confirmation in C's case, the judge was also treating her as an infant for the purposes of Church of England Canon Law, and therefore the law of the State.⁷⁴³

Furthermore, Judge Platt underplayed the significant differences between Christianity and Judaism. For instance, he stated that in order to be baptised C must '*declare her belief in God*'.⁷⁴⁴ This statement misses that point that as a member of the Jewish religion C would

⁷³⁹ PCL Principle 61:4: '*Baptism alone may not effect institutional membership of a church save to the extent provided by its law*'.

⁷⁴⁰ PCL Principle 65:2.

⁷⁴¹ PCL Principle 68.

⁷⁴² Admission of Baptised Children to Holy Communion Regulations 2006.

⁷⁴³ See Canon B24:3: '*Every person thus baptized shall be confirmed by the bishop so soon after his baptism as conveniently may be; that so he may be admitted to the Holy Communion.*' Therefore where adult baptismal candidates are concerned there must be no undue delay between baptism and confirmation.

⁷⁴⁴ *In the Matter of C-Between A Mother (Applicant) and A Father (Respondent)* Before his Honour Judge Platt, May 2012 Para 34.

have a belief in God; in order to be baptised she would need to declare her faith in the distinctively Christian, Trinitarian understanding of God.⁷⁴⁵

All of these points of doctrine mattered, because they affected how C, her family members and the Jewish and Christian communities of which was a part understood and interpreted her baptism. They had an impact on the way in which the step moulded her personal, social and religious identity. Without an adequate knowledge of this, it is impossible for a court to assess the impact of the decision on C, her wellbeing and future life.

It is also a matter of concern that the judge adopted an inconsistent approach to C's own capacity to make this decision. The following statement appears to imply that C was already Gillick competent to decide for herself about baptism:

*'I am satisfied that C has already reached a sufficient degree of maturity and understanding to make a properly informed decision.'*⁷⁴⁶

If this was truly the case, then why was there a need, or indeed justification, for the court to make any order beyond declaring C competent to decide the matter for herself? If Judge Platt did not intend to suggest that C was Gillick competent, then his choice of words is both puzzling and problematic, as it is hard to find a plausible alternative interpretation for them. Even if he was making the statement for the avoidance of doubt, he would have needed to clarify that C was simply exercising her own autonomy. And if this was the case, how could the condition about the minister assessing her readiness be justified?

⁷⁴⁵ PCL Principle 61:2.

⁷⁴⁶ *In the Matter of C-Between A Mother (Applicant) and A Father (Respondent)* Before his Honour Judge Platt, May 2012 Para 61.

It is also interesting that he differed from the Cafcass⁷⁴⁷ recommendation in this matter, which was that the decision should be delayed for several years.⁷⁴⁸ The reasons given for this departure were that the Cafcass officer who actually interviewed C, as opposed to the line manager who recommended the delay, raised no specific concerns about C's maturity. She presented as a bright, articulate child who had expressed a consistent desire over a matter of months and supported it with age appropriate reasons.⁷⁴⁹

With all due respect to the judge, none of these matters are directly relevant in answering the question of whether C had attained Gillick competence to make an informed and autonomous choice. There was no dispute that C was intelligent or that she lacked maturity, *for a ten year old girl*. But that does not equate to asserting that she was in a position to understand and balance the issues which baptism raised, in her particular circumstances, including its long term impact upon her family relationships and developing religious and social identity. A bright ten year old girl might well express a consistent desire for some months to marry a favourite pop star or Formula 1 driver, and give wholly age appropriate reasons for this, but that would hardly suggest that she was Gillick competent to enter into an adult relationship.

At no point in the judgement did Judge Platt clearly outline why it was in C's best interests to be baptised as soon as a minister at her church felt this appropriate, but that confirmation should be delayed until she was sixteen and had attained a greater degree of

⁷⁴⁷ The Children and Family Court Advisory and Support Service set up under the provisions of the Criminal Justice and Court Services Act 2000, with a remit to: safeguard and promote the welfare of children; give advice to the family courts; make provision for children to be represented; and to provide information, advice and support to children and their families. It operates independently of the courts, social services, education and health authorities and all similar agencies.

⁷⁴⁸ *In the Matter of C-Between A Mother (Applicant) and A Father (Respondent)* Before his Honour Judge Platt, May 2012 para 61.

⁷⁴⁹ *Ibid*, para 63.

maturity.⁷⁵⁰ The inference appears to be that confirmation entailed full and formal membership of the church, whereas he expressly stated that baptism would create no irrevocable consequences.⁷⁵¹ The difficulty with this is that baptism would have irrevocable consequences. As discussed above, Judge Platt did not have a sufficiently nuanced understanding of the doctrinal significance of Baptism and Confirmation. In reality from an Anglican perspective, and therefore in the eyes of C's father and presumably C herself, baptism did have an irrevocable effect.⁷⁵² It is difficult to argue plausibly that C's father did not attach very great significance to C's baptism, as he chose to contest C's mother's application to the court rather than settling and making a formal undertaking not to allow C to be baptised. Otherwise, why not take the line of encouraging C to wait a few more years until she proved her maturity, reassuring her that God would understand and still look after her?

Furthermore, the New Wine festival to which C's father had chosen to take her as a responsible adult is an event with a strong proselytising emphasis.⁷⁵³ C would have been likely to have witnessed Charismatic Evangelical Christians speaking in tongues, being 'slain by the spirit' and urging others to join the faithful. Exposing an emotionally vulnerable child to that environment, he must surely have known that there was a strong possibility that she

⁷⁵⁰ Ibid, para 64.

⁷⁵¹ Ibid, para 53: '*Clearly, given her background and heritage, taking the first step along the road to full commitment to the Christian faith is a significant change of circumstances for C. However there is nothing to suggest that she will be any less loved by her mother in consequence nor to their credit is their any suggestion by either grandparents that she will not continue to be welcomed by them as a much loved granddaughter. There is no suggestion that she will not be able to attend the synagogue or to lean more about the Jewish faith if she wishes. There are no irrevocable consequences which will flow from her baptism.*'

⁷⁵² PCL Principle 61:10: '*Valid baptism is indelible and cannot be repeated.*'

⁷⁵³ See for example reports in the secular press, The Independent, Thursday 6 August 2009, <http://www.independent.co.uk/news/uk/this-britain/evangelical-christianity-its-glastonbury-for-god-1767917.html>: '*It is powerfully spiritual experiences like these that the evangelical movement is keen to export. and the importance of proselytising plays a prominent role in many of the daily seminars on offer to the faithful at New Wine.*' Advertisements by the New Wine organisation make statements like '*Join us for an unforgettable week to get inspired, empowered and fired up to change lives, communities and the nation!*' www.new-wine.org (accessed 6/01/2013).

would be drawn in and wish to accept what was being forcefully and enthusiastically offered.

The judge noted that it was neither suggested nor likely that C's mother and grandparents would cease to love her if she was baptised.⁷⁵⁴ Neither would undergoing a Christian baptismal rite prevent her from reverting to Judaism if she later so chose. But neither of these considerations means that there would not be long term consequences for her relationships with the adults in her life. It is even plausible that C could end up ultimately resenting her father, if she later decided to renounce Christianity and felt that she had been unduly influenced.

The dispute had ended up and remained before a court precisely because both sides felt passionately about it. Realistically C was a child caught in a very complex situation, and there were potentially long term emotional and social consequences of publically allying herself to the cultural and religious world of her father rather than that of her mother. Whether or not the act of being baptised had irrevocable spiritual consequences for her Jewish relatives, it certainly risked having irrevocable emotional ones for them and therefore also for C.

The final anomalous aspect of the judgement is that the judge emphasised that he did not have power to order a Church of England minister to baptise C.⁷⁵⁵ However it is far from clear that this is the case. Priests within the Church of England have a duty to baptise any child brought to them, provided that 'convenient warning' is given beforehand.⁷⁵⁶ No

⁷⁵⁴ *In the Matter of C-Between A Mother (Applicant) and A Father (Respondent)* Before his Honour Judge Platt, May 2012 para 53.

⁷⁵⁵ *Ibid*, para 57.

⁷⁵⁶ Canons Ecclesiastical 1603, Can 68. Furthermore the case of *Bland v. Archdeacon of Cheltenham* [1972] Fam. 157 confirmed that refusing to baptise a child was an ecclesiastical offence, and that it did not involve

maximum age is specified for such children, so if the court order gave C's father power to bring her for baptism, then the minister would have a duty to administer it and a court could properly order him or her to comply with that duty.

Ultimately the case demonstrates how critical the factual context is in respect of disputes about religious upbringing, and how courts can only make an adequate welfare determination if they have a sufficient understanding of this context. It is to be hoped that at some stage a higher court will provide more coherent and nuanced guidance in respect of the issues which may arise in relation to Christian baptism. Clearly however the consequences for the children at the centre of such disputes are more far reaching than the immediate physical effect of being sprinkled with or immersed in water. In order to give valid consent they must have some understanding of the impact of the decision on their religious and social context and growing individual identity.

As with other matters, a child's capacity to consent or refuse participation in Christian worship will be case and fact specific. The consequences of the decision will vary, and therefore the issues which a child must be able to assess to make the decision will also vary. However once a child has attained capacity, it is submitted that despite the ambiguous judicial statements in *Re C* which are discussed above, no-one else can validly give or refuse consent on his or her behalf. It is difficult to conceive of many circumstances in which overriding the wishes of an individual with decision making capacity in relation to baptism would be compatible with Article 9 of the ECHR.

3.4 (c) (iii) Trespass to the person and the rights of the child

matters of doctrine, ritual or ceremonial. It is therefore difficult to argue that the judge in this could not have ordered C to be baptised if she were properly presented for baptism.

The law of tort is a useful mechanism for protecting the rights of the child in this respect, because battery is concerned with the corporeal integrity of the individual involved.

Infringement of a child's corporeal integrity is as much a battery as the infringement of an adult's corporeal integrity; in either case the action will be a trespass unless there is lawful justification.⁷⁵⁷ In relation to tort the critical question is whether there was valid consent in relation to the action given by or on behalf of the child. The rights and priorities of third parties are not directly relevant.

In the case law on religious upbringing, the capacity of children to make independent decisions has been almost entirely overlooked. In the one case in which it was brought to the forefront, *Re C*, the child arguably suffered potential harm because her capacity to make decisions was inadequately assessed. The question of whether she properly understood the potential risks and benefits of the proposed course of action was never tackled head on or in an adequate manner. The court itself struggled to present and assess the issues in the case coherently, and consequently was utterly unable to assess whether the child involved was in a position to do so.

Had the courts focused on trespass as the most obvious form of redress for physical rites undertaken without valid consent, the general judicial focus could not have moved so far away from the children at the centre of these cases. The questions of who did, who can and who must consent would have had to have been addressed.

⁷⁵⁷ *R (on the application of William and others) v Secretary of State for Education and Employment and others* [2005] 2 All ER 1.

The absence of higher judicial consideration of children's capacity is now regrettably reflected in the Church in Wales' guidance on parental consent for the baptism of a child.⁷⁵⁸

When an individual applies to have a child baptised, the consent of all persons with parental responsibility must be sought (save in an emergency). If one such person cannot be located, it is 'recommended' but not required that the diocesan bishop should be consulted before the baptism goes ahead. Furthermore if it appears that a person having parental responsibility for a child has applied for a court order to prohibit that baptism, the baptism cannot proceed without prior consultation with the diocesan bishop.

This raises a number of questions with regard to the meaning of the guidance:

- a) What is the purpose of a recommendation as opposed to a requirement for consultation?
- b) Does the requirement for 'consultation' only mean that consent of the bishop is not required?
- c) What definition of emergency is to be adopted for the purposes of this guidance?

But however these questions are answered, the liability of the individual cleric in secular law will remain unaffected.⁷⁵⁹ Having been instructed by a third party to commit a trespass is no defence to that trespass; prior consultation with the bishop would be in no way be protective if the cleric were to proceed without valid consent.

And at no point does the guidance deal with the child's own capacity to consent or withhold consent. A cleric following the guidance would be obliged to seek parental consent for a teenager requesting baptism. Whilst doing so would not render them liable to an action in

⁷⁵⁸ Appendix 1.

⁷⁵⁹ For consideration vicarious liability of the bishop, see Chapter 2 above.

tort, it does mean that the Church in Wales is less prepared to recognise the capacity of children for self-determination than the current secular law.

3.5 Conclusions - Trespass to the person and liability of Church in Wales clergy

Overall, as stated at the outset of this chapter, the secular law in this area is complex and the guidance currently issued by the Church in Wales is unhelpful. It is almost equally complicated and as discussed above, at times contradictory. If the CTS were amended to reflect the following basic principles, clergy would have a better framework for both avoiding potential claims and also for ensuring that they respected the autonomy and rights of those to whom they minister.

- 1) When dealing with adults who have capacity to make decisions for themselves, the wishes of such adults in relation to physical contact should be appropriately ascertained. Their wishes in declining physical contact should always be respected (provided that they are not posing an immediate physical threat to a third party).
- 2) When dealing with adults whose capacity to make decisions is impaired, clergy should act in a way which furthers their best interests and respects their dignity. In determining best interests, the wishes of both the adults in question and families and carers should be taken into account.
- 3) When dealing with children, their capacity to make decisions should be carefully assessed. If a child has capacity to make a decision then their wishes should be respected in the same way as an adult. However, in the event of there being *any* doubt about the child's capacity to consent to any action which would otherwise constitute a trespass, the permission of those with parental responsibility should be sought. If there is a dispute between those with parental responsibility, clergy

should refrain from acting until the dispute is resolved (either by the parties or a court). An exception may be made with regard to infant baptism if there is immediate danger of death, but the bishop should be informed as soon as reasonably practicable after this has taken place.

- 4) The duty to baptise should be expressly amended in both CTS and Canon law to allow for an exception where the baptismal candidate is under eighteen years of age and there is a dispute between persons with parental responsibility. (This would not prevent a cleric baptising a seventeen year old if he or she was convinced that the young person was Gillick competent to decide to be baptised. But it would remove any question of there being a *duty* to baptise a minor presented by one person with parental responsibility contrary to the wishes of others.)

CHAPTER 4

LIABILITY OF CLERGY IN NEGLIGENCE

4.1 Overview

Having considered the position in relation to trespass, the discussion now turns to individual clergy and negligence. In *Maga v Trustees of the Birmingham Archdiocese of the Roman Catholic Church* the Court of Appeal not only found a church to be vicariously liable for the trespasses of a paedophile priest, but also held that it was vicariously liable in negligence for failings on the part of other clergy, who failed to adequately address the situation when it came to their attention.⁷⁶⁰

To date most commentators have focused on the significance of the case in relation to the development and application of vicarious liability for trespass.⁷⁶¹ Whilst this aspect of the decision is undoubtedly of great consequence (and is dealt with at length in Chapter 2 of this study), it is submitted that *Maga* also has important implications for the application of the tort of negligence and direct liability in a church context.

Concentrating on vicarious liability, commentators like Scorer have regarded the decision exclusively in negative terms for those seeking to limit the exposure of clergy and churches to civil liability.⁷⁶² However, viewed from the perspective of direct liability, the case actually provides confirmation that there are clear limits to the reach of negligence. When read in

⁷⁶⁰ *Maga (by his litigation friend, the Official Solicitor to the Senior Courts) v Trustees of the Birmingham Archdiocese of the Roman Catholic Church* [2010] EWCA Civ 256.

⁷⁶¹ Charles Pigott, 'Employment, Making a connection', *NLJ* 169 (9 April 2010) 477.

⁷⁶² Richard Scorer, 'Personal Injury: Sins of the Past', *160 NLJ* (4 June 2010) 789.

light of other recent case law on the duty of care in negligence,⁷⁶³ *Maga* can be seen as conforming to a general pattern. The appellate courts have repeatedly affirmed that there remains a sharp distinction between causing harm to third parties and failing to prevent it. In the case of the latter, liability will only arise in restricted circumstances, as there is no general duty in UK law to protect others from harm.⁷⁶⁴ The defendant must have either owed a duty of care to the claimant, or acted in such a way as to assume one. As Lord Hoffman expressed it:

*'This argument is based upon the sound intuition that there is a difference between protecting people against harm caused to them by third parties and protecting them against harm which they inflict upon themselves. It reflects the individualist philosophy of the common law. People of full age and sound understanding must look after themselves and take responsibility for their actions. This philosophy expresses itself in the fact that duties to safeguard from harm deliberately caused by others are unusual and a duty to protect a person of full understanding from causing harm to himself is very rare indeed.'*⁷⁶⁵

On the facts of *Maga*, a clergy colleague of the paedophile priest was found to have assumed a duty of care to the Claimant.⁷⁶⁶ Despite having received serious complaints about the priest's behaviour, he failed to properly monitor him, or to take appropriate steps on the basis of what he either observed or should have observed.⁷⁶⁷ Consequently he

⁷⁶³ See for example *Mitchell and another v Glasgow City Council* [2009] UKHL 11' *X and another (Protected Parties represented by the Official Solicitor) v London Borough of Hounslow* [2009] EWCA Civ 286; and *Webster v Ridgeway Foundation* [2010] ELR 694.

⁷⁶⁴ *Reeves v Commissioner of Police for the Metropolis* [2000] 1 AC 360 per Lord Hoffman 368.

⁷⁶⁵ *Ibid.*

⁷⁶⁶ *Maga (by his litigation friend, the Official Solicitor to the Senior Courts) v Trustees of the Birmingham Archdiocese of the Roman Catholic Church* [2010] EWCA Civ 256 per Lord Neuberger MR paras 66-74.

⁷⁶⁷ *Ibid.*, paras 66-69.

knowingly perpetuated a dangerous situation of which (the then juvenile) claimant was unaware, allowing the claimant and other young boys to be exposed to serious risk.

In such circumstances it is unsurprising that the courts would find that the defendant had assumed a duty of care. In permitting a man accused of sexual abuse to continue to occupy a position of trust, the cleric and the church concerned could reasonably be said to be assuming a responsibility to ensure that that trust was not abused.

However, it is submitted that the tragic circumstances in *Maga* were quite extreme; beyond the realm of sexual abuse cases, the instances in which clergy could be said to owe or assume a duty of care are comparatively few and far between. Priests do not provide advice or services of a therapeutic or quantifiable nature; they are not held out as possessing expertise which would enable them to assess and safeguard the mental or physical health of those to whom they minister.⁷⁶⁸ Furthermore they are neither expected nor permitted to control people in pastoral situations.⁷⁶⁹

It is therefore hard to see what the nature and scope of a duty of care to protect third parties would be in a clergy context. Without any therapeutic expertise or power to control others, it is debatable whether clergy even really have the *capacity* to protect them from harm, much less a demonstrable duty to do so. Potential claimants would struggle to establish what the nature and ambit of any duty of care might be.

⁷⁶⁸ CTS para 2.6: *'The difference between pastoral care and formal counselling is always to be recognized'* and 2.7: *'Clergy should be aware of the help available from accredited pastoral agencies so that it can be commended where appropriate'*.

⁷⁶⁹ CTS para 3.2: *'Clergy are often placed in a position of power over other, in pastoral relationships, with lay colleagues and sometimes with other clergy. This power needs to be used to sustain others and harness their strengths, and not to bully, manipulate or denigrate'* and para 3.7: *'Pastoral care should never seek to remove the autonomy of the individual. In pastoral situations the other party should be allowed the freedom to make decisions even if clergy consider that decision to be incorrect'*.

Properly understood, *Maga* is part of a body of case law which renders actions against clergy for failing to protect others from harm unlikely in all but very restricted circumstances. It does of course affirm that liability in negligence will often ensue for conduct which places third parties in danger, but that proposition was never really in doubt. It is to be hoped that instances of clergy *causing* personal injury or property damage in the course of their work would be comparatively rare. Read in its proper context, the *Maga* decision should be more reassuring than disturbing for those concerned about clergy liability in tort.

4.2 Background - Actions in negligence for causing personal injury and property damage

As Ogilvie notes in considering the Canadian context,⁷⁷⁰ the general principles of civil and criminal law operate for clergy and religious institutions, as they do for legal persons in the secular world. The tort of negligence, as it has evolved from the legendary *Donoghue v Stevenson*,⁷⁷¹ applies to clergy as to anyone else. If clergy succeed in injuring their neighbour in the course of their duty, they will be liable provided that the claimant can establish:

- a) that the defendant owed him or her a duty of care
- b) that there was a breach of that duty;
- c) damage occurred as a result of that breach; and
- d) the damage was not too remote.

⁷⁷⁰ M.H. Ogilvie, *Religious Institutions and the Law in Canada* (Irwin Law: Toronto 2003), second edition, 317: 'Since the principles of the criminal law and the laws of contract, tort, fiduciary obligation, evidence and procedure apply in exactly the same way in these cases as in cases involving defendants not associated with religious organizations, there will be no consideration given to them here and readers are directed to legal texts about those areas of law.'

⁷⁷¹ *Donoghue v Stevenson* (1932) AC 562.

In *Donoghue v Stevenson* Lord Atkin defined a 'neighbour' as:

*'persons who are so closely and directly affected by my act that I ought reasonably to have them in contemplation as being so affected when I am directing my mind to the acts or omissions which are called in question.'*⁷⁷²

Consequently, if a priest does something which may foreseeably injure someone of whom he or she should be aware, a potential claim in negligence may arise. This could be a direct, personal action, such as placing a Communion wafer into the mouth of someone known to be unable to swallow and allowing them to choke. Or it could involve creating a dangerous situation which gave rise to an injury or property damage. In the United States, a plaintiff attempted to sue his former church for injuries sustained when he fell over 'consumed by the Spirit' and nobody caught him.⁷⁷³ He argued that the pastor had placed him in danger by allowing him to expect that 'catchers' would prevent him from hitting the floor, as they had always been present on previous occasions.⁷⁷⁴

Had the case been brought in the United Kingdom, the claimant would have needed to demonstrate that the pastor responsible owed him a duty of care, presumably on the basis that he or she had permitted and even encouraged people to collapse backwards on the understanding that they would be safely caught. If successful in this he would then have had to prove that the pastor breached the duty by withdrawing the catching service without adequate warning, and that his injuries were a foreseeable consequence of that breach.

⁷⁷² Ibid, 580.

⁷⁷³ Fox News, 'Man Sues Church for \$2.5M After Being "Felled by Holy Spirit"' Thursday July 10 2008, www.foxnews.com/0,3566,379881,00 (accessed 21 June 2011).

⁷⁷⁴ WATE.Com Knoxville, Tennessee, 'Man sues church over prayer session injuries' www.wate.com/story/8651392 (accessed 21 June 2011).

Whether or not he would have succeeded in England and Wales would depend upon the facts of the case. (Some further consideration is given to the issue within the case studies in Chapter 5.)

It is also settled law that personal injury includes mental as well as physical harm.⁷⁷⁵

Therefore if a cleric were to behave in a manner which foreseeably caused psychiatric harm to a third party, liability could ensue. However, such conduct would have to be fairly extreme, and it is unsurprising that there are no reported UK cases of a cleric *causing* such harm. More likely, as two instances from the United States demonstrate, are claims for *negligently failing to prevent* either physical or mental injury.

4.3 The contrasting cases of Nally and Tarasoff

In *Nally v Grace Community Church*,⁷⁷⁶ the defendants were pastors of a Protestant church which was sued for failing to prevent the suicide of the twenty year old Nally. His parents argued that these pastors encouraged him to take control of his own life, rather than seeking psychiatric care.

In response the defendants presented evidence that they had made every effort to persuade Nally to see and cooperate with his doctors; during a crisis they had even contacted both a psychiatric hospital, and Nally's parents, in an effort to get him admitted there. The record showed that the plaintiff's mother had actually been very obstructive when attempts were made to hospitalise her son, responding that '*no, that's a crazy hospital. He's not crazy.*'⁷⁷⁷

⁷⁷⁵ *Burchart v Home Office* [2006] All ER (D) 202 Mar.

⁷⁷⁶ *Nally v Grace Community Church of the Valley* (1988) 4 Cal. 3d. 278, 768 P; Cal Rptr 97.

⁷⁷⁷ *Ibid*, per Lucas CJ section II A.

But the conduct of the respective parties in relation to causation was ultimately not material, as the court refused to impose a duty of care on the defendants or other non-therapist counsellors.⁷⁷⁸ Lucas CJ⁷⁷⁹ observed that this was a case where the plaintiffs were seeking to make the defendants liable for the actions of another (i.e. Nally himself in committing suicide), and failing to prevent harm. He regarded such actions as succeeding only if there was some special relationship of custody or control between the parties.

On the facts Nally was not in any sense in the custody of the pastors; he was not in a hospital, prison or other institution for which they were responsible. Neither was the relationship between spiritual advisor and the recipient of pastoral care one which gave rise to a duty to prevent harm. There were two principal reasons against finding such a duty arising from this relationship: 1) such a duty would have a detrimental effect on voluntary counselling services;⁷⁸⁰ and 2) it would be difficult to establish a workable standard of care for people claiming spiritual rather than medical expertise.⁷⁸¹

Although there were also issues which concerned the US Constitution,⁷⁸² and which would not apply in an English or Welsh context, most factors in the ratio in *Nally* would carry

⁷⁷⁸ Ibid per Lucas CJ section IV B.

⁷⁷⁹ Ibid per Lucas CJ section IV B [5]: ‘Under traditional tort law principles, one is ordinarily not liable for the actions of another and is under no duty to protect another from harm, in the absence of a special relationship of custody or control’.

⁷⁸⁰ Ibid per Lucas CJ section IV B [5] d: ‘Imposing a duty on defendants or other nontherapist counsellors to , in the Court of Appeal’s words “insure their counselees [are also] under the care of psychotherapists, psychiatric facilities, or others authorized and equipped to forestall imminent suicide” could have a deleterious effect on counselling in general’ and ‘Furthermore, extending liability to voluntary, non-commercial and non-custodial relationships is contrary to the trend in the Legislature to encourage private assistance efforts’.

⁷⁸¹ Ibid: ‘the Legislature has recognised that access to the clergy for counselling should be free from state imposed counselling standards, and that ‘the secular state is not equipped to ascertain the competence of counselling when performed by those affiliated with religious organisations’ (Ericsson, ‘Clergyman Malpractice: Ramifications of a New Theory’ Val U L Rev 16, (1981) 163, 176.

⁷⁸² Ibid: ‘Because of the differing theological views espoused by the myriad of religions in our state and practiced by church members, it would certainly be impractical, and quite possibly unconstitutional, to impose a duty of care on pastoral counsellors.’ The notion of a wall of separation between Church and State is a key concept within the Constitutional law of the USA. The first amendment to the Constitution states: ‘Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof.’ The

similar weight if considered by a UK court. The public policy considerations raised by Lucas CJ,⁷⁸³ about placing undue burdens on voluntary organisations seeking to assist individuals which in need, would be equally relevant in Britain. But more compellingly UK courts will only impose a duty of care when it would be 'fair, just and reasonable' to do so.⁷⁸⁴ The difficulty of applying objective standards to people without clinical expertise would make it almost impossible for the duty to operate in a consistent, and therefore 'fair, just and reasonable' way.

Constructing something like the *Bolam* test⁷⁸⁵ for clergy and other non-therapist counsellors would be extremely problematic. What would a reasonably competent clergy person be expected to know and to do when faced with someone suffering a mental health crisis, given that they have no professed clinical expertise? Even asserting that they have a duty to alert a third party or agency with such expertise would be difficult to justify, as this still requires ministers to differentiate between somebody whose behaviour is emotional, unreasonable or eccentric and somebody who is ill and in danger. For persons without specialist knowledge and training, this judgement is a testing one.

Following *Bolam* a doctor or other professional will not be negligent if their conduct conforms to that of a reasonable body of expert opinion within their profession,⁷⁸⁶ and meets the standard expected of a reasonable professional with their level of training and expertise. But it is difficult to see how this could be made to operate in a context where

concern in *Nally* was that if courts were to begin examining the expertise of religious ministers, and assessing what was appropriate in the performance of their spiritual duties, the State would potentially be interfering with the free exercise of religion and compromising the wall of separation.

⁷⁸³ *Ibid* per Lucas CJ section IV B [5] d.

⁷⁸⁴ *Mitchell and another v Glasgow City Council* [2009] UKHL 11 para 29 per Lord Hope.

⁷⁸⁵ *Bolam v Friern Barnet Hospital Management Committee* [1957] 2 All ER 118.

⁷⁸⁶ *X and another (Protected Parties represented by the Official Solicitor) v London Borough of Hounslow* [2009] para 98-99 per Sir Anthony Clarke MR.

neither the defendant nor his or her fellow 'professionals' were claiming any expertise in diagnosing or treating mental illness. If no objective standard could be established, the defendant could hardly be shown to have negligently fallen short of it. For these reasons it is hard to imagine that the *Nally* case would have had a different outcome if it had been brought in the UK.

But what about situations which do not necessarily turn on professional expertise? In *Tarasoff v. Regents of the University of California*,⁷⁸⁷ a student at Berkley named Poder developed an unhealthy attachment to Tarasoff, a fellow student. He disclosed having had violent thoughts about her to the university therapist, who was concerned enough to alert the campus police. The campus police interviewed Poder, but took no action when he denied any wish to do her harm. Three weeks later he shot and killed Ms Tarasoff, and her family successfully sued in negligence. The court found that where there was an identifiable third party at risk, and that the therapist had a duty to warn that third party and not simply to alert other authorities. The principle in the *Tarasoff* case was subsequently taken up and applied in other US states.⁷⁸⁸

Could the *Maga* decision be used to argue for the implementation of a similar principle in UK law? At a superficial level there are some similarities. In both *Tarasoff* and *Maga*, the defendants were found liable for failing to adequately protect someone at risk from the criminal acts of a third party, when the third party in question was known to be a potential danger.

⁷⁸⁷ *Tarasoff v. Regents of the University of California*, 17 Cal. 3d 425, 551 P.2d 334, 131 Cal. Rptr. 14 (Cal. 1976).

⁷⁸⁸ Fenella Morris and Gwen Adshead, 'The Liability of Psychiatrists for the Violent Acts of their Patients', 147 *NLJ* 558, 18 April 1997.

However, despite this seeming similarity it is submitted that the cases are in fact very different, and that properly understood *Maga* sits comfortably within a body of case law discussed below, which makes it unlikely that anything like the *Tarasoff* principle could apply in current UK law.

4.4 UK law and a duty to protect others from harm

The starting point of judicial discussions on protecting others from harm is almost always that there is no general duty in the UK to act as a Good Samaritan.⁷⁸⁹ Cases where such a positive duty to safeguard is recognised, generally involve defendants who are in a position of significant control over a vulnerable person. Examples include: a parent with a minor child,⁷⁹⁰ a hospital with a person detained under mental health legislation,⁷⁹¹ or a prison or police force with prisoner.⁷⁹²

It is submitted that even though clergy are frequently in a position to exercise considerable influence over emotionally vulnerable people, as the CTS of the Church in Wales expressly acknowledge.⁷⁹³ Clergy do not wield power and control over parishioners and others receiving pastoral care which is analogous to that exercised by the persons in the three examples cited above. In the case of a child, patient or prisoner, those with a duty of care are in a position to determine almost every aspect of the environment and daily life of the person to whom the duty is owed. There are therefore pressing public policy reasons for

⁷⁸⁹ See for example *Reeves v Commissioner of Police for the Metropolis* [2000] 1 AC 360; and *Hill v Chief Constable of West Yorkshire* [1988] 2 ALL ER 238.

⁷⁹⁰ *R v Evans* [2010] 1 All ER 13.

⁷⁹¹ *Savage v South Essex Partnership NHS Foundation Trust* [2008] UKHL 74.

⁷⁹² *Butchart v Home Office* [2006] All ER (D) 202 Mar; *Reeves v Commissioner of Police for the Metropolis* [2000] 1 AC 360.

⁷⁹³ CTS para 3.4:

ensuring that this power is properly exercised and not abused.⁷⁹⁴ Infants, prisoners and patients are vulnerable and extremely dependent on those entrusted with their care.

In cases where there is not such a huge imbalance of power, the courts appear to be far more reluctant to find that a positive duty to protect is owed.⁷⁹⁵ Partly this may be because there is not the same public policy need to protect the vulnerable from an abuse of power. Furthermore it is less obviously '*fair, just and reasonable*'⁷⁹⁶ to hold claimants responsible for harm when they are in a much weaker position to guard against it.

In recent judgements where there this kind of control absent, courts have been far more reluctant to find a duty of care. In *Mitchell v Glasgow City Council*,⁷⁹⁷ an abusive tenant was called to a meeting by the Council, and threatened with eviction if he did not improve his behaviour. After the meeting he murdered his next door neighbour, whom he blamed for his troubles with the Council and towards whom he had been abusive and occasionally violent for years. The neighbour's estate sued the Council, arguing that they had owed him a duty of care. The House of Lords disagreed.

It was held that there was no duty of care owed by the Council as landlord to protect one tenant from assault by another by warning him or her of the potential risk; and that a duty to safeguard a third party from harm generally only arises where the defendant has assumed responsibility for that third party's safety.⁷⁹⁸ Neither was the Council's action in

⁷⁹⁴ *Butchart v Home Office* [2006] All ER (D) 202 Mar, para 17 per Latham LJ.

⁷⁹⁵ See for example *X and another (Protected Parties represented by the Official Solicitor) v London Borough of Hounslow* [2009] – this is discussed further below.

⁷⁹⁶ *Mitchell and another v Glasgow City Council* [2009] UKHL 11 para 29 per Lord Hope.

⁷⁹⁷ *Mitchell and another v Glasgow City Council* [2009] UKHL 11.

⁷⁹⁸ *Ibid* para 29 per Lord Hope: '*I would conclude therefore that it would not be fair, just and reasonable to hold that the defenders were under a duty to warn the deceased of the steps that they were taking, and that the*

calling the meeting in any way wrongful or negligent.⁷⁹⁹ In other cases where liability had been imposed for damage flowing from the criminal action of someone other than the defendant, the defendant's negligence had in some way enabled that criminal act. This enabling may not necessarily amount to causation, but is nevertheless an important factor in the case. The case of *Stansbie v Trotman* was cited, in which a painter carelessly left a house which he was painting unlocked, and was held to be liable for a burglary which took place.

In all of the circumstances in *Mitchell* there was no basis for asserting that a duty of care to protect the deceased arose either from his relationship with the Council, or from the Council's conduct. They owed no duty and had not acted so as to assume one.

The Court of Appeal took a similar view in *X and another v London Borough of Hounslow*.⁸⁰⁰ In this case a couple with learning difficulties living in the community with their two minor children had been exploited by a group of local youths, who used their home as a place to indulge in various species of anti-social and criminal behaviour. Their social worker was aware of this, and after certain incidents wrote to the Council housing department requesting a transfer. However, she judged that it was in the family's best interests to wait for a house rather than be moved as an emergency. It was accepted that this was an appropriate professional decision, and that there was no negligence on her part.⁸⁰¹

Unfortunately before they were moved, some of the local youths subjected the couple to an

common law case is made against them is irrelevant. I would also hold, as a general rule, that a duty to warn another person that he is at risk of loss, injury or damage as the result of a criminal act of a third party will arise only where the person who is said to be under that duty has by his words or conduct assumed responsibility for the safety of the person who is at risk'.

⁷⁹⁹ Ibid, para 58 per Lord Rodger.

⁸⁰⁰ *X and another (Protected Parties represented by the Official Solicitor) v London Borough of Hounslow* [2009].

⁸⁰¹ Ibid, para 98-99.

appalling and degrading assault in front of their two children. The couple subsequently brought proceedings against the Council.

Despite the vulnerability of the couple, the Court of Appeal found that there was no duty of care because the Council had done nothing to assume one.⁸⁰² The authority did not have a responsibility to protect the couple from deliberate wrong-doing behaviour of other people. Furthermore, it had limited power to do so; it was not in a position to regulate whom the claimants chose to admit to their home.

The same conclusion was again reached in *Webster v The Ridgeway Foundation*.⁸⁰³ After quarrelling two school boys arranged to fight on the tennis court after school; despite having agreed that this would be one to one, the younger boy called his friends and family on his mobile 'phone. A group of adults turned up to the appointed place, and one of them attacked the older boy with a claw-hammer causing brain damage.

The judge found that the school did not owe the claimant a duty of care in respect of the incident, the duty to keep the pupil reasonably safe during school hours and for a reasonable time afterwards whilst he remained on school premises, did not extend to protecting him from criminal act by third parties. The school was not in a position to prevent adults coming on to the property and behaving as they did; whatever discipline policy was in place, it would not have prevented the attack.⁸⁰⁴

All of these cases demonstrate how difficult it is for claimants to establish that defendants assumed a duty to protect them from harm caused third parties, especially when this harm

⁸⁰² Ibid, para 91 per Sir Anthony Clarke MR.

⁸⁰³ *Webster v The Ridgeway Foundation* [2010] ELR 694. The case is discussed in detail above in Chapter 2, in relation to vicarious liability.

⁸⁰⁴ Ibid, paras 173-174.

is the consequence of deliberate wrong-doing. The facts of the *Maga* case fit with this general pattern.

4.5 The Decision in Maga

The claimant met Fr Clonan when he was admiring his sports car, was befriended by him, invited to church discos and given various odd jobs to do in return for payment. He was also sexually abused by Fr Clonan. A more senior priest in the same parish, Fr McTernan, had received serious complaints and allegations about Fr McTernan. Although it was accepted that it was inappropriate to judge his response by contemporary standards, the court found that the action which he took was woefully inadequate even by the standards of the 1970s.⁸⁰⁵ He failed to observe Fr Clonan to see whether there was any substance in the allegations; had he done so, he would certainly have discovered that there was.

The House of Lords found that after he was on notice of a potential risk, he had a duty of care towards young boys who came into contact with Fr Clonan, and to be vigilant in observing the Fr Clonan's conduct.⁸⁰⁶ In failing to do so, he was in breach of that duty. It is submitted that this finding is consistent with the case law discussed above, and that it affirms the general reluctance to hold defendants liable for a failure to protect claimants from harm, for the following reasons:

⁸⁰⁵ *Maga (by his litigation friend, the Official Solicitor to the Senior Courts) v Trustees of the Birmingham Archdiocese of the Roman Catholic Church* [2010] EWCA Civ 256 paras 66-69.

⁸⁰⁶ *Ibid*, paras 72-73.

1) In reality Fr McTernan's conduct was an infliction of harm rather than a failure to act.

He chose to continue to place Fr Clonan in a position of trust, and to give him the privileged access to young people which his clerical status afforded. He was also directly responsible for Fr Clonan's day to day work and conduct, and chose to leave this unchecked. In allowing Fr Clonan into the community, Fr McTernan was effectively releasing something dangerous into the local environment. (He would, of course, have been personally liable for this as well rendering the church vicariously liable.) This is a very different situation from a landlord or a school being faced with unexpected criminal action from a third party over of whom they had no control or knowledge.

2) Even in these circumstances, the court carefully considered the scope of the duty which was owed. It was made clear that liability would only ensue from matters within the ambit of that duty.⁸⁰⁷ Fr McTernan's duty was towards boys who came into contact with Fr Clonan, not to the world in general.

Had the facts occurred in the twenty-first century rather than the 1970s, it would be reasonable to assert for example that the Fr McTernan's would not necessarily owe a duty to any boys Fr Clonan contacted anonymously via the internet at a cybercafé on his day off. If they were unaware of his clerical status and Fr Clonan was not using church equipment or premises for his activities, liability would presumably not attach.

⁸⁰⁷ Ibid, para 72-73.

This is in keeping with *Calvert v William Hill*,⁸⁰⁸ in which the Court of Appeal held that a bookmaker did owe a duty of care to a compulsive gambler with whom they had entered into an agreement, expressly to prevent him placing telephone bets and suffering harm from his losses. But that duty only extended to the responsibility which they had assumed. They did not have a duty to prevent him from gambling in other ways or with other bookmakers.

Following *Maga* and in light of the other case law in this area, Church in Wales clergy will only be liable for : a) negligent acts which *cause* harm to others; and b) failure to protect those for whom they have assumed a duty of care, for harm within the scope of that duty. The situations in which b) is likely to apply are strictly limited. It would be wrong to characterise *Maga* as a case which in any way widened the liability of clergy in direct negligence. The implications of the case for direct negligence have to date been largely overlooked amidst the commentary on vicarious liability.

4.6 Scope of responsibility assumed by Church in Wales clergy

On the basis that Church in Wales clergy will only be liable in negligence in so far as they assume responsibility for the safety of others, it is necessary to examine the scope of responsibility which they do assume.

4.6 (1) Qualifications and training

What qualifications and training are Church in Wales required to have, and what expertise do they therefore hold themselves out as possessing? Modern canon law in the Church in

⁸⁰⁸ *Calvert v William Hill Credit Ltd* All ER Transcripts (1997-2008).

Wales does not explicitly address preliminaries to ordination.⁸⁰⁹ Therefore, the matter is governed by the principles of pre-1920 ecclesiastical law (which continues to apply to the Church in Wales unless and until it is modified by the Church in Wales).⁸¹⁰

No minimum period of study is required, and no specific academic or vocational qualification is demanded before an individual can be ordained.⁸¹¹ Ordination is in the discretion of the bishop, and this discretion is wide in relation to suitability.⁸¹² The Provincial Selection Panel is responsible to the Bench of Bishops for advising the diocesan bishops as to the suitability of candidates for training for ordination. But the training and course of study to be undertaken will vary from candidate to candidate,⁸¹³ and the decision whether to ordain them at the end of it resides with the bishop.⁸¹⁴

This flexibility and diversity is unsurprising, given that the Church in Wales explicitly acknowledges that the ministry of individual priests and deacons varies widely depending

⁸⁰⁹ N Doe, *The Law of the Church in Wales* (University of Wales Press: Cardiff 2002), 146.

⁸¹⁰ *Ibid*, 6.

⁸¹¹ Church in Wales, *Criteria for selection for Ordained Ministry in Church in Wales* (undated) <http://www.churchinwales.org.uk/david/life/ministry/CRITERIACommentary.doc> (accessed 2/4/2013). The Church in Wales selection criteria for ordination list includes 'Quality of Mind' within the elements which successful candidates for ordination will demonstrate. This is explained in the following terms: '*Candidates should have the necessary intellectual capacity and quality of mind to undertake satisfactorily a course of theological study and ministerial preparation and to cope with the intellectual demands of ministry. They should demonstrate a desire to learn through the integration of academic study and reflection on experience and a commitment to this as a lifelong process of learning and formation. Candidates should show flexibility of mind, openness to change and challenge, and the capacity to facilitate learning and theological reflection within the Church community.*' However the duration, content and academic standard of the course is not specified.

⁸¹² *R v Archbishop of Dublin* (1833) Alc & N 244.

⁸¹³ Church in Wales ordinands undertaking residential or non-residential training through St Michael's theological college will have a portfolio of individual agreed learning outcomes. See further St Michael's College, The Ministerial Formation Portfolio, <http://www.stmichaels.ac.uk/residential-training-portfolio.php> (accessed 2/4/2013). However there is nothing to prevent bishops ordaining candidates who have not received training at St Michael's theological college or any other formal institution.

⁸¹⁴ The CTS do provide that every ordained person '*should have appropriate training in child protection*' CTS 2.13. However this is not a prerequisite to ordination, the training could presumably take place afterwards. Neither are any standards, assessment or level of detail set out in respect of this training, implying that what is 'appropriate' may vary according to individual circumstances.

upon the context into which they are to be deployed.⁸¹⁵ It is a defensible proposition that different types of priestly and diaconal ministry will require different skills, knowledge and aptitudes, and that therefore specifying uniform and universal training is unnecessary and potentially even unhelpful. Although conversely, it might be argued that there are some core skills and capabilities which will be needed by all ordained persons regardless of context.

But regardless of the rationale, the current bottom line is that Church in Wales clergy are not required to have any training or qualification in mental health, pastoral care, first aid or counselling.

They are not held out as necessarily possessing any specialist expertise in these areas. In assessing a candidate for ordination a bishop is formally required to be satisfied that they are of good life and conversation;⁸¹⁶ he is not required to satisfy himself that they meet any standard of competence in academic or technical disciplines.

⁸¹⁵ *The Church in Wales, 'The Ministry of a Priest'* (The Church in Wales: 2005): 'There are many ways of becoming a priest: Increasingly priests are being deployed in a wide variety of ways: In parish life the church needs ... • some priests willing and able to move around and serve in a range of different places and situations over the years • others to serve in their local church and community or near where they live. These priests live in their own homes and are financially self-supporting. Increasingly all priests in parishes serve with other ministers, lay and ordained, leading several churches in an area. Many exercise ministry in prisons, schools, chaplaincies, shopping centres, with police, fire-service, local authorities, civic chaplaincies, at work. Some priests are paid by the church; increasing numbers support themselves financially; some are employed by other agencies and organisations. There is increasing need and opportunity for priests to minister in a range of ways over the course of their ministry.' See also *The Church in Wales, 'The Ministry of a Deacon'* (The Church in Wales: 2005).

⁸¹⁶ Canons Ecclesiastical 1603 Can 34. See also Ministers (Ordination) Act 1571.

This position is reflected in the CTS; clergy are to be aware of the limits of their personal competence and skill and to recognise the distinction between pastoral care and counselling.⁸¹⁷

Ordination within the Church in Wales is not automatically indicative of any particular training or skill which would enable a cleric to provide practical support or protection to an individual in need above and beyond that which any concerned lay friend could give.

4.6 (2) Institutional representations

What representations does the Church in Wales make about the care and assistance it provides, either partially or entirely through the work of its clergy, and to what extent may these representations give rise to a duty of care?

Again modern canon law does not make explicit statements about specific forms of assistance to be provided by clergy in carrying out their pastoral duties, nor does the guidance contained within the Clergy Terms of Service.⁸¹⁸ The representations which are made are very general, for example:

*'Pastoral care will seek to bring about Christ-like wholeness, both personal and corporate'*⁸¹⁹

The statement requires clergy to promote the welfare of individuals for whom they are pastorally responsible, but it is too general to conveniently crystallise into tangible

⁸¹⁷ CTS 2.5: 'Clergy should discern and make clear their own limitations of time, competence and skill. At times they will need to see support, help and appropriate training'; and CTS 2.6: 'The difference between pastoral care and formal counselling is always to be recognised'.

⁸¹⁸ See particularly CTS 2 and 3.

⁸¹⁹ CTS 3.1: 'Pastoral care will seek to bring about Christ-like wholeness, both personal and corporate. The development of trust is of primary importance for honest relationships within ministry'.

promises. For instance, the drafting of the CTS clearly implies that the exercise of pastoral care requires clergy to meet with individuals and to visit them.⁸²⁰ But, for example, there is nothing to indicate how frequently persons on the electoral roll of a parish can expect to receive pastoral visits from clergy or within what time frame clergy can be expected to respond to a request for urgent pastoral attention. Therefore, even if a person suffered harm which might have been prevented had their received more or swifter pastoral care from a cleric it would not be possible for a claimant to identify a specific representation which had not been met.

Furthermore, there may be circumstances in which preventing harm to an individual would actually *conflict* with the understanding of pastoral care set out in the Clergy Terms of Service. Paragraph 3.7 states that:

*'Pastoral care should never seek to remove the autonomy of the individual. In pastoral situations the other party should be allowed the freedom to make decisions even if clergy consider that decision to be incorrect'*⁸²¹

Therefore, if a mentally competent adult is intent upon making choices which will have negative consequences, Church in Wales clergy are *not permitted* to interfere with their freedom to make such choices. Any attempt at coercion or control in pastoral settings is expressly forbidden,⁸²² and failure to comply with the CTS constitutes grounds for

⁸²⁰ CTS 2.8: *'The place of meeting, the arrangement of furniture and lighting, and the dress of minister are important considerations in pastoral care. The appropriateness of visiting and being visited alone, especially at night, needs to be assessed with care.'*

⁸²¹ CTS 3.7.

⁸²² All well as CTS 3.7, see CTS 3.5: *'It is always wrong to exploit or manipulate'*; CTS 3.6: *'Spiritual authority must be exercised with gentleness and sensitivity, and the minister should be aware of the possibility for spiritual abuse.'*; and CTS 3.8: *'In leadership, teaching, preaching and presiding at worship, clergy should resist all temptation to exercise power inappropriately'*.

disciplinary proceedings.⁸²³ Therefore, in this regard the representation being made by the Church in Wales is explicitly that they will *not* seek to protect individuals from themselves by infringing their autonomy.

It would therefore be difficult for a potential claimant to argue that the Church in Wales as an institution was making any representation that its clergy would protect them from self-inflicted harm or the consequences of their own actions. Furthermore, the church is not asserting that all of its clergy are training to diagnose mental illness and impairment, or assess whether an individual is in fact mentally competent.

The position is however more complicated in the case of children and vulnerable adults.

With regard to children, the Church in Wales has adopted a Provincial Child Protection Policy.⁸²⁴ This requires individual dioceses and parishes to adopt child protection policies⁸²⁵.

The main aim of child protection policies at all levels is to prevent abuse, particularly sexual abuse, of children.⁸²⁶

Whilst the ambit is theoretically wider, in that the Church in Wales expressly accepts the principle that the welfare of the child is to be the paramount consideration in all

⁸²³ CTS, Clergy Appointments, Disciplinary Rules and Procedures: 'A cleric who is found to be in breach of the standards and rules set down [i.e. in the CTS and Constitution] will be subject, following investigation, to the disciplinary procedure of the Church in Wales.'

⁸²⁴ Church in Wales, 'Children and Young People: A code of good practice for use by parishes in the Church in Wales' Revised November 2007.

⁸²⁵ Ibid, 4, Recommendation 1.

⁸²⁶ See for example, Ibid, 13, Annex 1 Sample Child Protection Policy: '1. At all times and in every way possible arrange activities to reassure parents, children and young people and to protect workers, paid and volunteers, from wrongful allegation'; 2. As far as possible an adult should never be left alone with a child or young person in a place or room which cannot be observed easily by others; 3. Workers with children and young people must not arrange to meet child or young person off church premises except in the presence of a parent or other adult'.

circumstances,⁸²⁷ almost all of the specific duties and requirements relate to the prevention, detection and reporting of abuse.

The Provincial policy is available on the Church in Wales website,⁸²⁸ and is therefore very much in the public domain. The church is representing itself as an organisation which follows guidance from the Home Office on good practice in relation to safeguarding children.⁸²⁹ On this basis it could be argued that the church was undertaking a duty of care towards children entering its premises and taking part in its activities, in accordance with the policy e.g. to ensure that volunteers working with such children had been subject to appropriate criminal record checks.⁸³⁰

Whilst the responsibility for ensuring compliance with child protection policies does not lie exclusively with clergy,⁸³¹ compliance with child protection policies and legislation is a specific duty under the Clergy Terms of Service.⁸³²

However, as with adults, it is not possible to say that the Church in Wales is undertaking specific obligations above and beyond this. Obviously the general provisions of civil law will apply to the church in this context; for example, any voluntary organisation taking group of children on a trip will potentially be liable if they are injured because they were not properly supervised. But there is nothing in the public declarations made by the church to suggest any intention to take on specific responsibilities towards children in addition to this. (For

⁸²⁷ Ibid, 13 'Annex 1: *The Church in Wales accepts and stresses the principle of the Children Act 1989 that **welfare of the child is paramount in all circumstances***'.

⁸²⁸ The Church in Wales, *Resources, Safeguarding (Children and Vulnerable Adults)*: <http://www.churchinwales.org.uk/resources/reference/pah/?page=chapter&chapter=5>

⁸²⁹ Church in Wales, *Children and Young People: A code of good practice for use by parishes in the Church in Wales* Revised November 2007, 3 'Code of Good Practice, Recommended by the Home Office "Safe From Harm"'.

⁸³⁰ Ibid, 37, Annex 14, 'Criminal Record Checks'.

⁸³¹ Ibid, '5, Recommendation 1, 'Parochial Church Councils, (PCC) are encouraged to ensure that the adoption of a policy and its aims and objectives are the responsibility of every adult member of the church'.

⁸³² CTS 2.13.

instance, a priest would be no more able than anyone else with child protection training but without clinical expertise to notice signs of mental illness in a troubled member of the Youth Group.)

Very similar factors apply to vulnerable adults. The Church in Wales has adopted guidance on ministry with vulnerable adults,⁸³³ and PCCs are required to adopt parish policies.⁸³⁴ The emphasis on the guidance is on protecting vulnerable adults from harm and abuse,⁸³⁵ and it could be argued that the Church in Wales is representing that its cleric will carry out their duties in accordance with these guidelines.

There might therefore be scope for claims arising from vulnerable adults who suffered preventable abuse because clergy failed to comply with the guidelines. This would be particularly likely if their carers had placed reliance on the representations made by the church in its guidance. For instance, if carers had left a vulnerable person alone with a Lay Eucharistic Minister bringing Communion to the home, because they believed that the individual was subject to a criminal record check and supervision. If the cleric had in fact failed to ensure that proper checks were carried out, and these would have revealed a past history of abuse or exploitation, then there might well be a case to answer if abuse or exploitation took place.

⁸³³ Church in Wales, *Recommended Policy and Good Practice Guidelines: Ministry with Vulnerable Adults* 2010

⁸³⁴ *Ibid*, *Best Practice Guide*, para 1

⁸³⁵ *Ibid*, *Policy Statement*: 'The Church in Wales is committed to encouraging an environment where everyone is able to worship and participate in the life of the Church in safety. All people are entitled to receive respectful pastoral ministry. It is recognised that vulnerable people have particular requirements as they are very likely unable to care for themselves, or unable to protect themselves against significant harm or exploitation.'

However, there are no representations within the guidance that imply that Church in Wales clergy have the capacity or duty to protect vulnerable adults or promote their welfare in specific, identifiable ways other than the prevention of abuse. It would be almost impossible for potential claimants to identify other representations made by the Church in Wales, upon which they might have relied to their detriment, and which could therefore generate a duty of care. Without such representations, a court would be very unlikely to find a duty of care.

In summary, the Church in Wales is not holding out its clergy as having special knowledge or expertise which would enable them to protect those for whom they are pastorally responsible from physical or mental harm, inflicted by third parties (or by the claimants themselves); or for that matter property damage or economic loss. As an organisation the only representations which the church makes in respect of preventing such harm are contained within the provincial Child Protection Policy and Guidelines for Ministry with Vulnerable Adults.

Clergy may well be found to have a duty of care to comply with these policies, as they are held out as doing so and third parties may place reliance on this assertion. Parents of children and those who care for vulnerable adults may rely on the church's representations that criminal record checks have taken place, and trust that both paid and unpaid church workers are monitored and complying with good practice. If the church fails to carry out the checks and monitoring it has undertaken to perform, and children or vulnerable adults suffer harm as a result, the reliance which their parents or carer's placed upon the church's representations may form the basis of a duty of care.

However, the Church in Wales does not hold out its clergy as being able to provide support, assistance and protection in specialist ways above and beyond the scope of these guidelines.

4.6 (3) Duties of Care Assumed by Individual Clergy - Sacramental Confession

The specific duties of care *undertaken* by the Church in Wales (as opposed to those imposed by the State through case law or legislation) are limited to the guidance on child protection and vulnerable adults, but what of duties of care undertaken by individual clerics? Once again the general law of tort will be applicable, and whether or not a minister has undertaken a duty of care will depend upon the facts of the case.

However, there is one area in which the duties of priests do raise particular issues; and that is in respect of information received in confidence received in the context of sacramental confession. If a person makes a disclosure which suggests that they may present a risk to themselves, or to third parties, does the priest have a duty of care to safeguard that individual and/or the people who may be at risk from him or her?

Is receiving such information in and of itself sufficient to generate a duty of care? Does the law of the Church in Wales permit or require such information to be disclosed, and is there any conflict between duties imposed by church and secular law?

Priests in the Church in Wales have a duty to instruct the people in the use of private confession;⁸³⁶ private confession being available for those who '*cannot otherwise find assurance of God's forgiveness*'.⁸³⁷ Confession is stated to operate '*under the seal of*

⁸³⁶ BCP (1984), 3, General Rubric 1.

⁸³⁷ *Ibid.*

secrecy'.⁸³⁸ It is unclear how absolute this secrecy is in the contemporary church. Doe cites the applicable pre-1920 ecclesiastical law, which states that ministers may not disclose matters confessed except in cases where secular law '*call into question the life*' of the minister for concealing the same.⁸³⁹ He argues on this basis that the prohibition against disclosure is probably not absolute within the Church in Wales.

His hesitancy in reaching a firm conclusion was justified in light of the ambiguity of the existing provisions at the time of writing, and subsequent developments have done more to cloud the issue than to clear it. The early seventeenth century canon referenced by Doe appears to apply only to instances where concealing a crime or planned crime would put the minister at risk of capital punishment.⁸⁴⁰ However, it also appears to be couched (in modern terminology) as guidance rather than command, as the canon prefaces the injunction about secrecy with the words: '*we do not any way bind the said Minister by this our Constitution, but do straitly charge and admonish him*'.⁸⁴¹

So although the secrecy may not be absolute, the circumstances when it may be broken are very tightly circumscribed, and are not directly connected with potential harm to the penitent or third parties. Rather the provision makes it clear that ministers are not required to choose between laying down their life and facing ecclesiastical discipline.

⁸³⁸ BCP (1984) 23.

⁸³⁹ N. Doe, *The Law of the Church in Wales* (University of Wales Press: Cardiff 2002), 270.

⁸⁴⁰ Canons Ecclesiastical 1603, Can 113: '*if any confess his secret and hidden sins to the Minister, for the unburdening of his conscience, and to receive spiritual consolation and ease of mind from him; we do not any way bind the Minister by this our Constitution, but do straitly charge and admonish him, that he do not at any time reveal and make known to any person whatsoever any crime or offence so committed by his trust and secrecy (except they be such crimes as by the laws of this realm his own life may be called into question for concealing the same) under pain of irregularity*'.

⁸⁴¹ *Ibid.*

Since the publication of Doe's book, the CTS have been produced, which also reference the 1603 canon.⁸⁴² They do so however as a 'note' at the end of paragraph 7 on the ministry of reconciliation. There is no explanation about the purpose or status of this note; however this statutory provision does remain part of the law of the Church in Wales as it is pre-1920 canon law which the Church in Wales has not repealed.

The guidance within the CTS on confidentiality and disclosure is internally inconsistent and therefore confusing. In CTS 7.2 the guidance states that subject to paragraphs 7.3 and 7.4 the seal of the confessional must be maintained, even after the death of the penitent.⁸⁴³

CTS 7.3 deals with admission of abuse of children or vulnerable adults, although interestingly not explicitly with individuals who confession to an urge to do these things.

The priest is enjoined to urge the person to report his or her behaviour to the appropriate secular authority, and to make compliance with this a condition of absolution, or withhold absolution until this has been done.⁸⁴⁴

Implicit in this guidance must be the idea that the penitent can consent to disclosure of the confidential information; if he or she is free to disclose matters discussed in the confessional to third parties, then presumably he or she can elect to do this through or with the confessor rather than alone.

However nothing in CTS 7.3 requires or even permits the priest to make any disclosure, this is dealt with in CTS 7.4. This clause states that:

⁸⁴² CTS 7.4 Note.

⁸⁴³ CTS 7.2: *'there should be no disclosure of what is revealed when a person confesses to God in the presence of a priest – "the seal of the confessional". This principle holds even after the death of the penitent'*

⁸⁴⁴ CTS 7.3. This is in compliance with universal Anglican theology and Canon Law, see PCL Principle 76:5: *'At a private confession the priest may give advice and must pronounce absolution except for good reason'*. The logical inference from this must be that where there *is* good reason, withholding absolution is a legitimate course of action.

'If a penitent's behaviour gravely threatens his or her own well-being or that of others, particularly children or vulnerable adults, the priest should insist on action on the penitent's part.

It should be noted that there is no absolute duty of confidentiality

A Court or the police may require disclosure. In exceptional circumstances there may also be an overriding duty to break confidence, especially where the safety of children or vulnerable adults is involved, or more rarely, where the well-being of the person who is sharing confidence is at risk.

Should a priest believe that there is a possibility that such information will be disclosed, it should be made clear to the penitent in advance, that disclosure may be necessary.⁸⁴⁵

There are a number of issues with the drafting of this clause. The first paragraph appears to instruct the priest to 'insist' on action on the penitent's part. The priest has no legal power to force a penitent to act, neither is it clear how this clause can be reconciled in all circumstances with CTS 3.7 which expressly states that pastoral care should 'never' seek to remove the autonomy of the individual.⁸⁴⁶

If an adult penitent who is not vulnerable wishes to do something which is going to gravely threaten his or her well-being (without the complicating factor of a threat to a third party)

⁸⁴⁵ CTS 7.4.

⁸⁴⁶ CTS 3.7.

how can a priest 'insist' upon a different course of action without undermining his or her autonomy? How can this be reconciled with the emphasis in CTS 3 on allowing individuals freedom to make choices, even if they are dangerous or destructive ones in the eyes of the priest?

Furthermore, what constitutes a 'grave threat' to well being, and how can a priest with no technical clinical knowledge be expected to assess this in relation to physical or mental health? Is it what a reasonable person on the top of a Clapham omnibus would consider a grave threat? If so, is this an appropriate standard? As discussed above, the law of negligence does not impose obligations to advance the welfare of third parties on random, reasonable people doing no more than sitting on the top of metaphorical buses.

The statement that there is 'no absolute duty' of confidentiality is made confusing by the inclusion of the 1603 Canon as a note. This does indeed confirm that the duty is not absolute, but it also restricts disclosure far more tightly than CTS 7 appears to do.

The observation that the police and courts may require disclosure is a reflection of secular law, which does not treat discussion between priests and penitents as privileged,⁸⁴⁷ although in criminal cases courts do have discretion to exclude evidence obtained from confession to a priest.⁸⁴⁸

The statement that in some circumstances there 'may' be an overriding duty to break confidence is also deeply problematic. Firstly, it is a novel introduction: the 1603 canon does not oblige ministers to break the seal of the confessional, it merely gives them the

⁸⁴⁷ N. Doe, *The Law of the Church in Wales* (University of Wales Press: Cardiff 2002), 271. See also R Bursell, 'The seal of the confessional', *ELJ* 2 (1990), 84; and D W Elliott, 'An evidential privilege for priest-penitent communications', *ELJ* 3(1995), 272.

⁸⁴⁸ Police and Criminal Evidence Act 1984, ss76, 78 and 82.

freedom to do so in certain circumstances if they so wish. Secondly, and more seriously, it is confusing in the extreme to state that an overriding duty 'may' exist in certain circumstances. If clergy are to comply with the guidance they need to know whether an overriding duty to disclose does or does not exist; a potential duty hovering around the ether in a quantum state is not practically helpful. Furthermore, if it does exist, then clergy need to know whether it is a legal or a moral duty, and if it is a legal one, what type of legal duty? They also need to know when it arises in order to carry it out at the appropriate time.

Having noted the confusion of the CTS provisions in this area, what guidance can be gained from them in relation to negligence and a potential duty of care? It seems clear that clergy do have the *permission* to disclose confidential information under CTS if there is a risk to the penitent or third parties, especially if they are children or vulnerable adults. Although it is not clear whether and under what circumstances a *duty* to disclose will arise under the CTS, if a secular law duty exists to protect the penitent or third parties, then the permission given by CTS 7 should allow clerics to comply with this duty without fear of ecclesiastical sanction.

It would arguably be preferable if the CTS unambiguously imposed a duty to disclose where there a cleric had reasonable cause to believe that there was a risk to third parties, particularly children or vulnerable adults. This would mean that the confessional would not be inviolate, but this is already the case; having a semi-inviolable confessional is a very Anglican but not very logical concept. Either an absolute duty of secrecy exists or it does not; as clergy have freedom to disclose in some circumstances, the seal of the confessional is clearly not absolute.

Therefore, this clarification would not require any doctrinal sacrifice. It would enable innocent and vulnerable parties to be safeguarded, and would save individual clergy anxiety and soul searching about whether to disclose if faced with a penitent who could not be persuaded to cooperate in disclosure but nevertheless posed a threat to others. If the policy was universally adopted then penitents would know the basis upon which they were making their confession, and would receive consistent treatment.

One negative aspect of this approach would be removing the discretion of clergy to keep the seal of the confessional absolute. (Assuming, that is, that this currently exists. Given the possible 'duty' discussed above, it is less than clear that it does). This is an inevitable sacrifice with taking this line, but the cost of removing individual discretion must be balanced against the benefits set out above.

Another drawback would be the potential of a court finding that this policy gave rise to a duty of care towards those at risk, if a cleric failed to make a required disclosure and harm ensued. Obviously the outcome of such a case would depend upon the facts at issue.

Arguably however, it would still be appropriate for the church to adopt a policy which might in certain narrowly defined circumstances increase its possible exposure to claims, if this policy provided greater clarity for clerics and more effective protection for the vulnerable.

At the same time it could also be made clear that there was a *discretion* but not a *duty* to disclose where there was reasonable cause to believe that the penitent was a risk.

Furthermore, it would provide an added layer of protection if the CTS were to state unambiguously and directly that clergy do not have expertise in mental health or counselling, and cannot diagnose or assess whether a person needs medical treatment or poses a risk to themselves or others.

These proposed amendments to the CTS would be compatible with secular law in this area. In *W v Egdell*,⁸⁴⁹ the court considered an application for (*inter alia*) an injunction restraining the defendant psychiatrist from communicating the contents of his report on the applicant W. W was a paranoid schizophrenic who shot five people and killed two others; he had been convicted of manslaughter and was sentenced to be detained indefinitely in a secure hospital. In the course of seeking transfer to a different secure unit, which could theoretically have been a stepping stone to release and reintegration into the community, he sought a report from the defendant as an independent psychiatrist supporting the transfer. In fact the defendant's report disclosed serious concerns about W's obsession with homemade bombs, and did not accept that he was no longer a danger to the public.

The court found that although W had a personal interest in ensuring that his confidence was kept, the maintenance of doctor patient confidentiality was in fact a matter of public rather than private interest. The public interest in protection the plaintiff's confidence was outweighed by the public interest in giving the authorities making decisions about his future full access to the available information. The disclosure of the report was therefore appropriate and proper. Commentators have supported this case, as being helpful to psychiatrists faced with difficult ethical decisions, and the judicial balancing of individual and public interests.⁸⁵⁰

Following this case, it seems likely that professionals who receive confidential information about an individual are *permitted* to disclose it if there a demonstrable public interest in doing so. The Court of Appeal noted the vulnerability of the plaintiff in this particular case,

⁸⁴⁹ *W v Egdell* [1990] Ch 369.

⁸⁵⁰ R J B Rix, 'Society and the Law: Uneasy Bedfellows', MLJ 74 (December 2006) 148.

and stressed that there had to be compelling circumstances to justify the disclosure.⁸⁵¹

Whilst clergy do make decisions about the confinement and legal freedoms of others, they nevertheless deal with vulnerable people and accordingly must have good reason in both secular and church law if they are to reveal confidential information given to them in the course of their duties.

But permission to disclose is different from a duty to disclose. There has been surprisingly little UK case law on a duty to disclose confidential information, for the protection of third parties, in the absence of statutory requirements. Is merely *receiving* such information enough to generate a duty of care in civil law towards third parties at risk?

Whilst the proposition has not been tested, it is submitted that it is unlikely that the reception of information alone will be enough to generate a duty of disclosure. It is well established that there is no duty to be a Good Samaritan and guard neighbours from harm in general.⁸⁵² A defendant has no duty in negligence to take action if he or she sees a claimant drowning in a shallow pond. If a defendant has no duty where he or she sees an actual and present risk, it is difficult to assert that a defendant has a duty when he or she simply hears about a possible risk from a third party. The capacity and opportunity to protect a third party does not translate into a positive duty in tort so to do.

If a court were to find that clergy owed a duty to care by virtue of their office which compelled them to take action when an ordinary citizen would not be required to do so,

⁸⁵¹ Ibid per Bingham LJ, 423 B-C: '*A restricted patient who believes himself unnecessarily confined has, of all members of society, perhaps the greatest need for a professional adviser who is truly independent and reliably discreet. Only the most compelling circumstances could justify a doctor in acting in a way which would injure the immediate interests of such a patient, as the patient perceived them, without obtaining his consent*'.

⁸⁵² Tony Weir, *An Introduction to Tort Law: Second Edition* (Oxford University Press: Oxford 2006) 59: '*Omissions constitute a breach of duty only where there is a duty to take positive steps*'.

then a tort of clergy professional negligence would effectively be being created, with all of the attendant problems discussed in relation to *Nally*.

When exactly would clerics be obliged to intervene? What standard of care, knowledge and expertise would be expected of a reasonable clergy person? How would this test apply to different denominations? What would be the implications for the Human Rights Act 1998? Imposing a duty to break the seal of the confessional would involve interfering with the Article 9.1 rights of both priests and penitents, could such interference be justified by the State as necessary and proportionate under Article 9.2?

The complexity in answering any one of these questions demonstrates how difficult it would be to impose a professional duty of care of this sort upon Church in Wales clergy.

Furthermore, there is no UK case law which currently suggests that the courts would regard imposing such a duty as appropriate. In the absence of this duty in secular law, there is no conflict between the current CTS and the demands of negligence. Under both regimes clergy are permitted to disclose information received in the confessional if they perceive there to be a risk of serious harm, but there is no evidence of a duty obliging them so to do unless children or vulnerable adults are involved.

As acknowledged previously, the proposed introduction of a duty in the CTS above might slightly strengthen the argument that a corresponding duty arose in negligence. But the difficulty of assessing its scope and enforcing it would remain for courts. Given the lack of reported cases on psychiatrists, who as a professional group frequently have to assess the safety of potentially dangerous individuals for both courts and health care bodies, it is unlikely that the church would ever face a deluge of claims for non-disclosure by priests.

Furthermore, the existence of a duty to disclose in the CTS would of course only increase the risk of claims if clerics failed to comply with it. If an individual cleric carried out his or her duty and alerted the police or other appropriate agency of a risk posed, there would be less chance of a successful claim than where a cleric exercised his or her discretion not to disclose and harm ensued to a third party.

Of course all of the foregoing applies only in situations where the penitent's disclosure is the *only* link between the priest and the potential harm or the third parties at risk. There may well be other factors present which would change the scenario. For example, if a volunteer working with children in the priest's parish were to confess a temptation to abuse them, the situation would be different and far more akin to *Maga* in relation to negligence. The priest would be in control of a situation, and if he or she allowed that individual continued access to children he or she would be choosing to place them in danger, and a duty of care almost certainly would arise.

But such additional factors would again take the scenario out of the realm of a general clerical duty, and into the territory of a specific and individual duty assumed by a particular cleric.

4.7 Conclusion

There was never any doubt that clergy would be liable for causing harm to third parties, in the same way any other legal person. However, properly read and understood, the *Maga* case provides reassurance that Church in Wales clergy are not subject to any special duty to take steps to protect third parties from harm. Such duties generally only arise if they are

well established in law by virtue of a relationship of responsibility and control (e.g parent and child, prison and prisoner etc), or if they are assumed by the defendant.

The Church in Wales as an institution does not hold out its clergy as possessing technical knowledge or expertise which would give third parties reason to believe that its priests are more capable than anyone else of safeguarding interests protected by the tort of negligence (i.e. physical and mental health and integrity, property and economic interest). Neither does it make promises that its clergy will provide a measurable standard or frequency of pastoral attention, allowing third parties to rely on such promises to their detriment.

Therefore (aside from the context of the confessional dealt with at length in 4.6(3)), the only duties of care which individual clergy are likely to assume are those arising out of specific factual contexts in which they find themselves, putting them in the same position as the general population, and subject to the general law of tort.

CHAPTER 5

CONCLUSION

5.1 Overview

This study began with an examination of the relationship between Church in Wales clergy and their church; firstly with regard to employment law, and then in the related context of vicarious liability. The conclusion of this analysis was that the Church in Wales would almost certainly be vicariously liable for the tortious conduct of individual clergy acting in their ministerial capacity. On the basis of this, the study then went on to examine the scope for liability in tort to arise out of the performance of clerical duties, firstly in connection with trespass to the person and secondly in connection with negligence.

As the chapters unfolded a common and consistent theme emerged: namely that determining the scope of ministerial duties is deeply problematic, but also an unavoidable necessity in establishing the potential and limits of civil liability for the wider church.

The Church in Wales will be liable for the actions of its priests, deacons and bishops when they are functioning as priests, deacons and bishops and therefore furthering its organisational aims. This is challenging as the Anglican theology of Holy Orders does not allow for individuals who are ordained to divide their time into sacred and secular moments; priesthood is about being rather than doing, and being is a constant state. Therefore in some sense Anglican clergy can never be said to be acting in a purely personal and private capacity.

Nevertheless, if some alternative way of analysing the situation is not found, courts will be faced with a stark choice between:

- 1) finding that the church is liable for the torts of its clergy in all circumstances;
- 2) finding that the church is never liable for the torts of its clergy; and
- 3) finding that they church is liable for the torts of its clergy in some circumstances but not others, and drawing arbitrary distinctions between cases.

Clearly none of the options above can be described as satisfactory. The first would be placing an unduly onerous burden on the church. It would be impossible to justify in relation to enterprise risk and the other theoretical explanations for vicarious liability discussed at length in Chapter 3 above. How would it be fair, just and reasonable or serving the public interest to render the church in its capacity of quasi-employer liable for torts committed by clergy in their leisure time against claimants utterly unaware of their clerical status?

Furthermore potential ECHR Article 9 based objections could be raised against state courts imposing blanket liability on an organisation in this way; the Church in Wales would be being subject to exceptional and disadvantageous treatment on the basis of the religious convictions of its membership. Secular employers and quasi-employers are not vicariously liable for the torts of their paid workforce unless the tortious conduct is related to the working relationship.

If paid workers of the Church in Wales were treated differently because of their religious convictions, then an action based on Article 9 could be brought, possibly in conjunction with

Article 14. The church and its members would be being subjected to burdens by the state courts, not imposed on other citizens, by virtue of their faith.

The second option is no more acceptable; it would simply give rise to an opposite and equal injustice. There is no reason why the Church in Wales should be granted complete immunity, or why potential claimants should suffer the accompanying hardship of being denied any remedy for injury and harm suffered.

Neither is the third option any better. It is not in the interests of justice for the process of litigation to function in an arbitrary or inconsistent fashion. Neither is it easy for parties to reach satisfactory pre-trial settlements when they do not have a clear legal framework within which to conduct negotiations.

Therefore, an alternative approach to the situation is required. It is proposed that if courts consider clerical ministry in terms of tasks, expertise and undertakings, rather than in terms of the all encompassing priestly role, it is possible to draw meaningful and helpful distinctions. On this basis, courts will be able to distinguish cases in a way which is logical and justifiable. Inevitably borderline cases will always arise and certain grey areas will always remain, but at least consistent principles can be applied to the chaotic problems generated by human life and litigation.

It is submitted that this approach dovetails well with the way in which both employment and tort law operate. With regard to employment law, courts have for sometime been prepared to adopt a flexible approach. The same individual may be an employee for some legislative purposes but not for others, and contractual intent to create legal relations may be found to exist for some aspects of a working relationship but not for others. In the

complex world of contemporary labour law, a black and white, all or nothing approach has long since given way to something more toned and nuanced. If courts are capable of making distinctions in this arena, then they should equally be capable of doing so in relation to the law of tort.

With regard to tort, an approach with focuses on tasks, expertise and undertakings is useful in relation to both trespass to the person and negligence. This emphasis poses the joint questions:

- i) what was the cleric required to do in the relevant situation?; and
- ii) what did the cleric bring or purport to bring to the relevant situation in terms of professional expertise and undertakings upon which third parties reasonably relied?

These questions are helpful in relation to trespass to the person, because they give a clear indication as to whether or not the physical contact was necessary and within the scope of the particular task he or she was engaged in. Was consent required and obtained? Did the touching exceed the bounds of the consent given?

Equally, the same questions are useful where negligence is concerned, because they reveal what the cleric was attempting and promising to do, and what reliance third parties may have placed upon this. What were the reasonably foreseeable risks of the activity? What duties of care was the cleric undertaking in embarking on this activity?

This approach would provide greater clarity for a court attempting to look, in a very general way, at the role of a priest within the denomination in question (in this instance the Church in Wales) in order to extrapolate whether or not liability flowed from that. Some of the

dangers of this all encompassing approach can be seen in *dicta* from recent cases in the UK and wider Common Law world, which have appeared to point towards almost open ended liability for the church in its capacity as quasi-employer.

Furthermore, it would also help to avoid the worrying tendency of certain judges and commentators to confuse vicarious liability and ordinary claims in negligence. If a church is negligent in placing a person in a position of trust amongst vulnerable people, giving him or her status and opportunity to abuse that status, when they were or should have been aware that they posed a danger, then direct rather than vicarious liability is the appropriate claim to be made and addressed. Stretching and distorting vicarious liability, which is a form of tortious strict liability, is not an appropriate response to perceived culpability on the part of an employer or quasi employer in a particular set of circumstances.

The discussion in this chapter therefore considers first the proposal of analysing the working pattern of Church in Wales clergy in relation to tasks, expertise and undertakings, rather than in terms of the all encompassing priestly role, at least when questions of tortious and vicarious liability are being addressed.

It then looks at how the alternative more general approach, which courts have lent towards in recent litigation concerning the Roman Catholic church, presents grave difficulties, particularly in relation to insurance.

Finally it uses the proposed tasks, expertise and undertakings (TEU) orientated approach to examine three hypothetical case studies, demonstrating how this would work in practice, before reaching some general conclusions.

5.2 Analysing the working arrangements of Church in Wales clergy for the purposes of tort: the all-encompassing priestly state *versus* TEU

It is uncontroversial that Anglican doctrine and law understands Holy Orders to be indelible; an ordination cannot be repeated and the ontological change is permanent.⁸⁵³ In discussing the nature of ordination and ordained life from a spiritual perspective, many Anglican writers are keen to emphasise that the essence of priesthood is about *being* rather than doing.⁸⁵⁴ Ordained ministers cannot and do not step in and out of their ministerial role. But it is neither necessary, nor, appropriate, nor desirable to challenge this spiritual belief in order to analyse the clerical role differently in relation to tort.

Just because it is not possible to reduce the essence of priesthood as it is understood within the Anglican tradition down to a list of tasks, does not mean that it is impossible to compile a list of the tasks which are performed by Anglican priests fulfilling their ministerial functions. In fact, the spiritual and theological authors addressing this topic often make such lists, precisely to illustrate that it is easier to describe what a priest does than what a priest is.⁸⁵⁵

Furthermore, the reality that it is possible to analyse the role and work of clergy in these terms has been reflected in the growing body of case law on clergy contracts of

⁸⁵³ PCL Principle 32:16: 'An ordination cannot be repeated; orders are indelible'.

⁸⁵⁴ See for example, George Guiver CR, *The Fire and the Clay* (SPCK: London 1999) Third edition, 44-45: 'More than just doing things.....But at the same time the caricature does suggest that there is a certain inappropriateness in tackling the question 'What is priesthood today?' using only the tools that would be used to analyse much secular employment. The same sense of unease is generated even by a simple list of what a priest does. The priest baptizes, presides at the communion, absolves; visits the sick and the dying; perhaps does assemblies or a little teaching in the local schools; preaches and so on. But how much has that actually told us?...a simple list of what a priest does (or even of what only a priest can do) seems somehow to miss the essence of priesthood'.

⁸⁵⁵ See *ibid*, Chapters 2-3; also Kenneth Mason, *Priesthood & Society* (Canterbury Press: Norwich 2002), 3-22.

employment.⁸⁵⁶ Intent to create legal relations within secular contract and employment law does not preclude a religious group from having an understanding of ministry which goes beyond the civil law obligations enshrined in such contracts; this point was effectively acknowledged in the *Percy* case when the court declared it uncontroversial that there was intent to create legal relations with regard to payment for services, even though there was scope for debate about intent to create legal relations with regard to other aspects of Ms Percy's working life.⁸⁵⁷ The possibility of having some but not all elements of the relationship articulated and enforced by a secular contract was acknowledged, and in order to be valid terms of secular contracts must be sufficiently certain.⁸⁵⁸ Consequently, for clergy contracts of service to exist for any purposes, it must be possible to outline what services clergy are to perform pursuant to those contracts.

A similar pragmatic approach is taken with the CTS produced by the Church in Wales itself. This is illustrated well in a theological statement annexed to the CTS, which expressly contrasts the open-ended, and 'unrestricted' duty placed on clergy by ordination, with their

⁸⁵⁶ *Percy v Church of Scotland Board of National Mission (respondents)* [2005] UKHL 73; *New Testament Church of God v Stewart* [2008] IRLR 134 and [2010] All ER (D) 265 (Mar) *Macdonald v Free Presbyterian Church of Scotland*.

⁸⁵⁷ *Percy v Church of Scotland National Board of Mission* [2006] IRLR 195 para 137 per Lord Scott: 'If the board had withheld or reduced her salary the civil courts would surely have had jurisdiction to entertain an action for payment.'

⁸⁵⁸ *Brown v Gould and others* [1972] Ch 50, 61-62 per Megarry J: 'Furthermore, it does not seem to me that Mr. Scamell has been able to demonstrate that this is a case of uncertainty in either of the two main ways in which that can be done. A provision may be void for uncertainty because it is devoid of any meaning. As some critics of certain modern writings might testify, there may be an unintelligible collocation of ordinary English words, or there may be mere gibberish, such as the phrase "Fustum funnidos tantaraboo" cited in *Fawcett Properties Ltd. v. Buckingham County Council* [1961] A.C. 636, 647. The present case manifestly does not fall under this head. The other main head is where there is a variety of meanings which can fairly be put on the provision, and it is impossible to say which of them was intended. Mere ambiguities may sometimes be resolved by the application of legal presumptions, and so on: but where the language used is equally consistent with a wide range of different meanings, it may be impossible to discern the concept which the provision was intended to enshrine. If a case is to be brought under this head, the attack will usually start with the demonstration of a diversity of meanings which are consistent with the language used; and if this is not done, the attack will usually fail. In the present case, there has been no demonstration of this kind which has brought me anywhere near to the point of saying that the clause is void for uncertainty'.

exercise of a professional role, defined in terms of duties and relationships and requiring standards of accountability.⁸⁵⁹ The general, spiritual duty to love and care which clergy have is carefully acknowledged and honoured. The darker side and dangers of such a boundless duty are also noted:

*'In this area of tension between the demands of duty and the claims of love clergy are especially vulnerable. Their ordination vows lay upon them grave and apparently unrestricted responsibilities to care for all alike, young and old, strong and weak, rich and poor. There are no clear limits to the duty of care with which they are charged, and because they fall short of what they take to be their God given pastoral duty, they are peculiarly vulnerable to self-condemnation and self-deception. In striving to carry out their ministerial duty, they may neglect the duties which their more immediate commitments, such as those of family and friends, lay on them.'*⁸⁶⁰

This statement recognises that the struggle of integrating their priestly duties within a human life and network of human commitments is an ongoing personal and spiritual challenge which all clergy face. It also prepares the way for differentiating between these overarching *spiritual* duties, and the *professional* duties and standards which documents like the CTS seek to set out:

'The Church is also an institution. It has its own organisation and structures of authority, its own constitution and rules of procedure, its own statements of intent and practice, all of which are directed towards the Church's worship, ministry and mission. Within this

⁸⁵⁹ CTS, Annex 1 *Introduction to The Cure of Souls* (1996).

⁸⁶⁰ *Ibid*, 18.

*institution the clergy exercise a professional role, defined in terms of special duties and relationships, calling for special competence and care’.*⁸⁶¹

Effectively, two parallel and complementary understandings of the clerical role co-exist within the Church in Wales. One is the spiritual and theological vision of priesthood (as well as the diaconate and episcopate) enshrined in the doctrinal and liturgical life of the church, whilst the other is a professional function which can, and should, be subject to objective standards of practice, contractual terms, review and accountability. For example, the generic job description for an incumbent sets out the principal tasks and duties which go with that job.⁸⁶²

Furthermore, in the Statement of Terms of Service for clergy appointments the impossibility of defining the ministry of a bishop, priest or deacon as one defines work is recognised, but it is none the less stated that a cleric’s ministry has to be *‘worked out in the everyday world of employment practices and directives’*.⁸⁶³ Clergy are required to take adequate time off, and it is stated that in a normal week must include a *‘stated regular free day of twenty-four hours’*.⁸⁶⁴

Ultimately, it is possible to analyse the agreed working arrangements of Church in Wales clergy in a similar matter to that of other professionals with a high degree of autonomy and discretion in managing their workload. This requires differentiating between the church’s spiritual understanding of the ordained life and vocation from the church’s self-stated

⁸⁶¹ Ibid, 18.

⁸⁶² Ibid, Generic Job Description, Incumbent, 31.

⁸⁶³ Ibid, *Statement of Terms of Service, Clergy Appointments*, 33: **‘Work/Life Balance and Hours of Work: The calling of clergy by God is at the core of their being and clergy will want to respond with all of their heart to this vocation. Because being a deacon, priest or bishop has to do with “being” and identity, as well as function, it is impossible to define ministry as one defines work. Nevertheless, a cleric’s ministry has to be worked out in the everyday world of employment practices and directives’.**

⁸⁶⁴ Ibid: *‘They [the cleric] should ensure adequate time off and that the normal ministerial week must include one stated regular free day of twenty-four hours’*.

professional standards and expectations required of clergy. Given that the latter has been generated by the Church in Wales, applying it in the secular courts cannot be construed as infringing the religious freedom of the members of that church. Furthermore, it does not conflict with the spiritual understanding of priesthood as a state of being rather than a job; it is parallel understanding which operates in a different forum for a different purpose.

If secular courts focus on the tasks which clergy are required to perform by the CTS, and also the expertise which the same document requires them to have and maintain, they will be upholding rather than disregarding the church's own understanding of the role of its ministers. This will also avoid the dangers of the open-ended approach to liability which flows from the more general understanding of priestly ministry adopted by courts in recent Roman Catholic cases.

For example, consider the statement of Lord Neuberger MR in the *Maga* case, that a priest is '*never off duty*'.⁸⁶⁵ The factors which he cited to support this assertion could apply to a Church in Wales priest as much as to a Roman Catholic one. The wearing of clerical '*uniform*' when in public and not merely when in church,⁸⁶⁶ and the adoption of a special title and mode of address,⁸⁶⁷ were flagged up as factors and apply equally in an Anglican context.

⁸⁶⁵ Per Lord Neuberger MR para 45: '*First, Father Clonan was normally dressed in clerical garb, and was so dressed, when he first met the Claimant. At the very least, this factor at least sets the scene. 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.*'

⁸⁶⁶ CTS 2.14: '*The dress of clergy should be suitable to their office; and, except for purposes of recreation and other justifiable reasons, should be such as to be a sign and mark of their holy calling and ministry.*'

⁸⁶⁷ The Church in Wales, '*How to address a cleric*' http://www.churchinwales.org.uk/rb/address_cleric.php

Taking this reasoning to its logical conclusion, the church to which the priest belonged could therefore be held accountable for any tortious actions on his or her part, on the basis that there was never a moment when he or she was not effectively acting as an agent of the church. This logic leads to the problems outlined above, leaving courts to choose between making a stark all or nothing choice about vicarious liability, or drawing arbitrary distinctions between cases.

For this reason it is submitted that asking ‘Was a cleric on duty?’ or ‘Was a cleric being a priest?’ at the time when the tort occurred is unhelpful. It is far more constructive to ask ‘Was the cleric performing one of his or her identifiable clerical duties when the tort occurred?’ This is not to say that there will not still be borderline cases or grey areas, but the fundamental approach is very different.

A good illustration of this is to be found in relation to driving and riding bicycles. In the case *JGE* the Court of Appeal used as an example the case of a priest injuring a third party in a road traffic accident, submitting that this was an uncontroversial example of a tort for which the relevant church authority should properly be vicariously liable.⁸⁶⁸ Admittedly in this hypothetical case Ward LJ did specify that the priest was riding to minister to a dying parishioner, but the impression was more that this detail was added to give colour to the scene than because it was a necessary element in establishing liability. If the holistic, general view of the priestly role is adopted in the context of tort, then logically the church should equally be liable if the priest had been travelling to meet his sister for tea.

That conclusion is what follows from the analysis adopted in *Maga* above. A priest visiting his sister might well still be wearing clerical dress, and would certainly still be known in the

⁸⁶⁸ *JGE v English Province of Our Lady of Charity and another* [2012] EWCA Civ 938 per Ward LJ para 83.

community, potentially greeted with his title by anyone who saw him and seen as an agent of the church out and about in his parish.

A similar approach was adopted in relation to members of a brotherhood in the *Various Claimants* case.⁸⁶⁹ In this case it was made explicit that the brother in question would have to be acting for the common purpose of the order at the time that the accident took place. However, this analysis presents real difficulties where priests are concerned, if priesthood is understood for the purposes of tort in terms of *being* rather than *doing*. Just how problematic this would be can be seen if the question of insurance is briefly considered.

5.3 Insurance

The Church in Wales is insured by the Ecclesiastical Insurance Group (EIG) for all matters including employers' liability insurance.⁸⁷⁰ If all torts committed by clerics, *and* all injuries suffered by clerics were construed as being 'in the course of employment', then EIG would be exposed to enormous risk.

Ordinarily, in determining whether an incident has occurred in the course of employment for insurance purposes relating to employers' liability insurance, courts consider whether activity in which the employee was engaged at the relevant time was reasonably incidental to his or her contract of employment.⁸⁷¹ If the position of clergy was considered in global

⁸⁶⁹ *Various Claimants v The Catholic Society Welfare and Others* [2012] UKSC 56 per Lord Phillips para 61: '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 action by 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'.

⁸⁷⁰ The Church in Wales, <http://www.churchinwales.org.uk/resources/reference/pah/printer-friendly.php?chapter=2&subsec=10&request=section>.

⁸⁷¹ Digby C Jess, *The Insurance of Commercial Risks: Law and Practice* (Sweet & Maxwell: London 2001), 154-154 para 5.57. See also *R v Commissioners Industrial Injuries ex p Amalgamated Engineering Union (No 2)*

terms in relation to clerical status rather than duties and tasks being performed, then the church and consequently its insurers would potentially be liable for *any* incident which occurred during the life of a serving cleric. It is submitted that if this position were accepted the EIG, and any other commercial insurer, would be unlikely to consider this level of exposure and acceptable business risk.

By contrast if reference is made to the tasks and duties outlined in the CTS, then the 'course of employment' for clerics becomes far more comparable to that of other professionals, and the risks for their employing church and its insurers far easier to manage and access.

5.4 Case Studies

It is submitted that not only does analysing the position of Church in Wales clergy in terms of tasks, duties and expertise make sense in relation to assessing and managing exposure to liability, it is a useful approach to considering potential claims. Two questions which are likely to be key in claims of both trespass and negligence are:

- i) What was the tortfeasor doing?
- ii) And what was the tortfeasor undertaking or purporting to do?

Consequently, examining the cleric's role in relation to TEU is a helpful and appropriate way of analysing the situation. This point is addressed by considering the legal issues raised in the hypothetical case studies set out below.

[1966] 2 QB 31 and *R v National Insurance Commissioners ex p Michael* [1976] 1 All ER 566; affirmed [1977] 1 WLR 109 CA.

The given incidents described are fictional. However, as the relevant footnotes demonstrate, the circumstances described do reflect issues and situations which occur for clergy ministering in the contemporary United Kingdom.

5.4 (1) Trespass to the person

Fr Algernon is currently working as an incumbent in a parish within the Church in Wales.

One of his parishioners, a lively middle-aged lady named Bonnie, asked him to visit her at home for a chat. He arranged to call round one summer afternoon; as it was a sunny day they sat in the garden, along with Bonnie's eighteen month old granddaughter Celia.

Bonnie persuaded Algernon to drink several large glasses of Pimms, and consumed a similar amount of alcohol herself.

Bonnie explained that she was very anxious because little Celia had not been baptised. Her daughter Deborah had wanted to have her baby christened, but her husband Ellis was an outspoken atheist, and was adamant that no child of his was going to be subjected to the indignity of a religious ritual which was the official beginning of the indoctrination process. Bonnie found herself worrying about what would happen if Celia were to suddenly die unbaptised.

Algernon attempted to reassure her that God would not reject a helpless child on the basis of her parents' choices. But Celia refused to be comforted, arguing that for hundreds of years lots of Christians had believed that un-baptised children were not allowed into Heaven, and what if they were right? Even if it was a very small risk, the idea of taking any risk with Celia's immortal soul was too horrible to contemplate. Bonnie begged Algernon to

baptise Celia quickly and quietly right there in the garden, then it would be done and nobody could do anything about it.⁸⁷²

Worn down by her persistence and with his judgement clouded by Pimms, Algernon capitulated. Bonnie fetched a basin of water from the kitchen, and Algernon baptised a happy and cooperative Celia, who sat on Algernon's knee and chuckled with delight each time some water was dropped onto her hair.

Not long after this was done, Deborah and Ellis arrived. Bonnie announced what had happened, and a heated argument ensued. Deborah defended her mother and said that she was actually quite glad to have Celia baptised, but Ellis was livid. He hurled various personal insults at Algernon, who eventually decided that he had had enough and tipped the remainder of the jug of Pimms all over the screaming Ellis.

Clergy Terms of Service

In visiting Bonnie at her request it is clear that Algernon was carrying out the pastoral duties of a priest in accordance with the CTS, responding to a parishioner who was asking for contact and support.⁸⁷³ There is nothing in the guidance which suggests that meeting her in her home was necessarily inappropriate. Ministers are instructed to consider carefully the arrangement of the furniture and lighting during pastoral visits.⁸⁷⁴ However, a garden on a

⁸⁷² Instances of grandparents and other family members attempting to engineer a child's baptism contrary to parental wishes are comparatively common. This is demonstrated by the Church in Wales having specifically produced a guidance note for clergy on Baptism and Parental Consent (See Appendix A). See further for instance the public discussion on the Roman Catholic website '*Catholic Answers*', '*Grandma baptized the children behind their parents' back, what now?*' (accessed 10/12/2012) <http://forums.catholic.com/showthread.php?t=586342&page=3>. Also a similar public discussion from the perspective of the objecting parent on the UK based consumer website '*Legal Beagle*' <http://www.legalbeagles.info/forums/showthread.php?22630-Daughter-being-christened-without-my-consent> (accessed 10/12/2012).

⁸⁷³ CTS 2.

⁸⁷⁴ CTS 2.8.

summer afternoon appears to be a relatively low risk setting for a domestic pastoral visit.

The venue is well lit, likely to be comparatively easily overlooked by neighbours, not claustrophobic for either party and not sexually suggestive in any way.

Similarly, the fact that Algernon visited Bonnie alone (or alone except for Celia, a witness far too young to give any coherent version of events) is not automatically an issue; the CTS require clerics to carefully assess the appropriateness of visiting or being visited alone.⁸⁷⁵ This injunction clearly implies that although ministers should proceed with caution, there will be times when making a visit alone will be the appropriate course of action.

However, the decision to drink several large glasses of Pimms is more problematic. The CTS state that clergy should not undertake any professional duties '*when under the influence of alcohol or drugs*'.⁸⁷⁶ The drafting here is somewhat ambiguous; clergy are of course obliged to drink alcohol when they celebrate the Eucharist.⁸⁷⁷ Even a small amount of alcohol can have an unpredictable short term effect, so clergy may find themselves conscious of the effects of alcohol whilst performing their sacramental duties and engaging in pastoral discussions immediately following the Eucharist. Therefore, 'under the influence' in this term cannot be understood to mean having some alcohol in the bloodstream, or even being aware of its effects.

The clause in the CTS following 10.8 expressly forbids 'alcohol abuse or drunkenness'.⁸⁷⁸

This however appears to be different from 10.8 in that it seems to cover the behaviour of

⁸⁷⁵ CTS 2.8.

⁸⁷⁶ CTS 10.8.

⁸⁷⁷ CTS 6. See also BCP (1984) 22, General Directions, 2: the wine used at the Eucharist must be pure grape wine, to which a little water may be added.

⁸⁷⁸ CTS 10.9.

clergy at all times, and not simply when undertaking professional duties.⁸⁷⁹ Nevertheless the fact that in this instance Algernon consumed enough alcohol to ‘cloud this judgement’, and therefore presumably to impair his ability to carry out his professional duties, would appear to be a problem in relation to the CTS and therefore a possible basis for disciplinary sanctions by the Church in Wales.

Arguably more serious, however, is Algernon’s decision to capitulate and baptise Celia in the garden without consulting either of her parents first. The CTS reiterate that clergy must carry out their duties in accordance with the law and also with the Constitution of the Church in Wales.⁸⁸⁰ Canon law expressly forbids the private baptism of infants except in the case of emergency.⁸⁸¹ In this case despite her grandmother’s fears little Celia was evidently healthy and safe; it would not be open for Algernon even to argue that the emergency exception to the general rule should be applied.

Furthermore, in baptising the child without making effort to ascertain the views, much less obtain the consent of those with parental responsibility, Algernon is clearly in breach of the Church in Wales’ guidance on baptism and parental consent with which the CTS requires him to comply.⁸⁸² The guidance requires that except in emergency circumstances a cleric should respond to a request for baptism initially by asking who has parental responsibility for the child in question.⁸⁸³ Furthermore, if possible the cleric should contact all such

⁸⁷⁹ Ibid: ‘Clergy must be aware that their personal conduct reflects not only upon their ministry but also on the reputation and integrity of the Church and in particular the Church in Wales. The following behaviour is not acceptable: Use of illegal non-prescription drugs; alcohol abuse or drunkenness; use of language that is blasphemous, malicious or likely to offend; violent or indecent behaviour’.

⁸⁸⁰ CTS 1.3.

⁸⁸¹ BCP (1984), 664.

⁸⁸² CTS 1.3.

⁸⁸³ Guidance on Baptism 2 b): ‘Unless there is a need for an emergency baptism, the person who applies for the baptism of a child, should be asked who has the parental responsibility for the child. The Diocesan Registrar is always available to assist in advising who may have parental responsibility.’

persons and explain to them the nature of baptism.⁸⁸⁴ In the event that any of the individuals with parental responsibility cannot be contacted, the baptism should be postponed in all but emergency circumstances and it is recommended that the bishop be consulted.⁸⁸⁵ In the event that any person with parental responsibility does not consent to the baptism, the service should not go ahead until the bishop has been consulted.⁸⁸⁶

In this instance, assuming that Deborah and Ellis were married at the time of Celia's birth, they would both have parental responsibility for her.⁸⁸⁷ Not only did Algernon baptise their daughter without discussing the matter with them first he did so knowing that it was likely that at least one of them had a strong objection to this course of action. Not only was this in breach of the Church in Wales Guidance on Baptism, it was also in breach of various other terms of the CTS. In particular the requirement that baptism be carried out in the context of suitable preparation was completely disregarded.⁸⁸⁸ Celia's parents and primary carers received no instruction or preparation, and even Bonnie only had the benefit of an *ad hoc* discussion whilst she was under the influence of alcohol.

Furthermore, in baptising a child irrespective of parental wishes, Algernon was failing to honour the injunction in the CTS to respect individual autonomy, and to allow other parties

⁸⁸⁴ Guidance on Baptism 2 c): *'As far as possible, the applicant for the child's baptism should contact the person(s) having the parental responsibility for the child. The nature of baptism should be explained to those having such parental responsibility, if they can be ascertained.'*

⁸⁸⁵ Guidance on Baptism 2 d): *'If necessary it is advisable to postpone the baptism (except in an emergency) while all reasonable enquiries are made as to the whereabouts of such person(s). If, after such enquiry, any person having parental responsibility cannot be located, while the baptism can proceed, it is recommended that the Diocesan Bishop should be first be consulted.'*

⁸⁸⁶ Guidance on Baptism 2 e): *'If any other person who has parental responsibility does not agree to the baptism, the Bishop should be consulted and, in the meantime, the baptism should not proceed.'*

⁸⁸⁷ Children Act 1989, s. 2 (1).

⁸⁸⁸ CTS 4.5: *'Suitable preparation for Baptism, Confirmation and Marriage is a primary responsibility for clergy. The importance of children, young people and all who are new to the Christian faith should be a priority for the Church and for its clergy.'*

to make free choices, whether or not he personally regarded these are correct.⁸⁸⁹ He was also arguably using his power inappropriately in presiding at Celia's baptism, knowing as he did that baptism was indelible and what he did could not be undone, regardless of its irregularity.⁸⁹⁰

In addition to the baptism, Algernon's action in physically responding to Ellis' verbal abuse was also a breach of CTS. It is likely that throwing the Pimms at Ellis would constitute 'violent or indecent' and therefore prohibited behaviour.⁸⁹¹ It is also difficult to reconcile this behaviour with the requirement to act as an agent of 'healing and reconciliation'.⁸⁹² The only possible defence in any church disciplinary process would be that Algernon genuinely feared an imminent physical attack, and was attempting to defend himself or somewhat clumsily diffuse the situation.

Secular law

Baptism of Celia

As discussed at length in Chapter 4 above, touching of a minor with not constitute a trespass to the person if a party with parental responsibility gives consent, or the child is *Gillick* competent to decide about the matter in question and gives his or her own informed consent.⁸⁹³

⁸⁸⁹ CTS 3.7: 'Pastoral care should never seek to remove the autonomy of the individual. In pastoral situations the other party should be allowed the freedom to make decisions even if clergy consider that decision to be incorrect.'

⁸⁹⁰ CTS 3.8: 'In leadership, teaching, preaching and presiding at worship, clergy should resist all temptation to exercise power inappropriately'. For in the indelibility of baptism PCL Principle 61:10.

⁸⁹¹ CTS 10.9.

⁸⁹² CTS 11.3.

⁸⁹³ *Gillick v West Norfolk and Wisbech Area Health Authority* [1985] 3 All ER 402.

In this case although Celia was happy enough with the physical element of her baptism, she was in no position to have any understanding of the wider social and religious implications of the act. As a baby of eighteen months she could not comprehend the impact which it might have on family relationships or her own developing sense of identity. Consequently, Celia was manifestly not Gillick competent to decide whether or not to be baptised and to give or withhold her consent. Neither party with parental responsibility gave consent on her behalf; in fact they were not even approached to do so. Therefore the act of baptism was a trespass to the person, and in theory a claim could be brought in Celia's name. Pecuniary damages could be awarded to a successful claimant in an action for trespass against Fr Algernon. Would the church also be liable were this to happen?

The lengthy discussion of vicarious liability and the Church in Wales in Chapter 2 concluded that the nexus between a Church in Wales bishop and a priest or deacon in his diocese *is* sufficiently close to that of an employer/employee relationship to justify the imposition of vicarious liability in some circumstances. This does however leave open the question of which circumstances and when? And it is submitted that examining the CTS is key to answering this question.

These help to determine when a cleric is carrying out tasks and duties which are part of his or her professional responsibilities, arising from a contractual (or quasi-contractual) relationship with the church. Or put slightly differently, when is a priest engaged in carrying out the functions of the Church in Wales?

As was discussed in relation to the clergy sexual assault cases, the fact that an act is a gross breach of an employer's trust, contrary to an employee's instructions and even the very opposite of what his or her role requires, does not mean that vicarious liability will not

attach.⁸⁹⁴ In relation to the baptism it is highly likely that the Church in Wales would be vicariously liable,⁸⁹⁵ despite the numerous provisions above which demonstrate that Algernon was acting in breach of both the CTS and the law of the church.

In visiting Bonnie, Algernon was performing his duty to provide pastoral care.⁸⁹⁶ In baptising Celia he was engaged in the task providing sacramental ministry, and arguably also promoting the Church in Wales' understanding of God's mission including evangelism.⁸⁹⁷ When he committed the trespass he was acting in his professional capacity. Although the law of vicarious liability has evolved a great deal since the classic case of *Rose v Plenty* it has effectively been settled law since at least that time that the mere fact that an employee is doing his or her job in a delinquent and improper manner will not absolve an employer from vicarious liability for his or her conduct.⁸⁹⁸

However, the position as to the assault with the Pimms is more complex and nuanced.

Assault of Ellis

Self defence can be a defence to trespass to the person.⁸⁹⁹ Therefore, if Algernon could demonstrate that he believed that he was in imminent danger of being struck by Ellis, he might be able to escape liability. In the event that this was unsuccessful however, and

Algernon was found to have committed a trespass, would the Church in Wales be vicariously

⁸⁹⁴ *Maga v Trustees of the Birmingham Diocese of the Roman Catholic Church* [2010] EWCA 256; *JGE v Trustees of the Portsmouth Roman Catholic Diocese* [2012] EWCA Civ 938; *Various Claimants v The Catholic Society Welfare and Others* [2012] UKSC 56 See also *Lister v Hesley Hall* [2001] UKHL 22 per Lord Steyn para 74.

⁸⁹⁵ As discussed above in Chapter 2, there are several possible options as to which legal entity within the Church in Wales might be the appropriate defendant in such an action. The Representative Body or a Diocesan Board of Finance would be the most likely options, see further footnote 235.

⁸⁹⁶ CTS 2.

⁸⁹⁷ CTS 4.3.

⁸⁹⁸ *Rose v Plenty* [1976] 1 All ER 97: the employing dairy company expressly forbade milkmen from using child workers to assist in delivering milk and giving them rides on the milk float. Despite this prohibition one of their milkmen did exactly that, and succeeded in injuring his young assistant by negligently driving the milk float. The fact that the employee was acting contrary to his employers commandments was not sufficient to allow the dairy to escape vicarious liability.

⁸⁹⁹ *Bird v Jones* (1845) 115 ER 668.

liable? It is submitted that despite the willingness of courts to find churches liable for deliberate and criminal trespasses in the context of sexual abuse, this case is by no means clear cut.

Furthermore, in this regard, the way in which the court elected to interpret the ministry and status of the cleric would be key to the outcome of the case. If a very general, global approach was taken, then vicarious liability would be far more likely to ensue than if an analysis focuses on tasks and duties was adopted. It is submitted that the latter approach is legally more correct, and also preferable in practical terms.

The starting point for this conclusion comes with *Aldred v Nacanco*.⁹⁰⁰ The decision was handed down by the Court of Appeal in 1987, and obviously considerably predates the *Lister v Hesley Hall* line of authority on deliberate acts of trespass in an employment setting.⁹⁰¹ Nevertheless, the case remains good law, and it is argued that some of the *dicta* within it are extremely instructive.

The facts concerned some unfortunate horseplay which took place in the ladies washroom in the defendant's factory. The plaintiff was an employee of the defendant. She had problems with her back, and at the time when the critical incident took place, she had been back at work for only six weeks after a prolonged period of sick leave for this very reason.⁹⁰²

The defendant and her female colleagues had use of a washroom with unusual basins shaped like miniature fountains and positioned down the centre of the room, rather than against a wall in a more conventional way. All but one of the basins was held in place by clips attached to the floor. Although it was unclear from the evidence exactly how long the

⁹⁰⁰ *Aldred v Nacanco* [1987] IRLR 292.

⁹⁰¹ *Lister v Hesley Hall* [2001] UKHL 22.

⁹⁰² *Ibid* per Lord Sir Frederick Lawton para 4.

one clip-less basin had been in that state, it was apparently a matter of at least some months. The lack of clips made the basin unstable, but only slightly.⁹⁰³

One afternoon whilst the plaintiff was in the washroom in deep conversation with a colleague, another fellow worker came in and decided that it would be funny to make her jump. She therefore pushed the wobbly basin so that it struck the plaintiff's thigh.

Although the knock was so gentle that it did not even leave a bruise, it did have the intended effect of startling the plaintiff. She spun round to find out what was going on, and in doing so twisted and injured her back.⁹⁰⁴

The Court of Appeal agreed that the trial judge was correct to reject any direct liability in negligence on the facts as he found them. It was not reasonably foreseeable that a slightly wobbly but basically secure basin would cause any injury; or that a reasonable employer would anticipate somebody pushing it in the way that the prankster employee chose to do.⁹⁰⁵ The Court of Appeal also agreed that the trial judge, Mr Justice Turner was right to find that there no vicarious liability either.

Sir Frederick Lawton found that the judge could have placed more emphasis on the point that the fact that the employee's delinquent action had nothing whatever to do with her employer's business was only one of many factors to be taken into account when considering whether the action was outside the scope of her employment.⁹⁰⁶ Nevertheless his conclusion was correct.⁹⁰⁷

⁹⁰³ Ibid, para 6.

⁹⁰⁴ Ibid, para 9.

⁹⁰⁵ Ibid, para 13.

⁹⁰⁶ Ibid, para 16.

⁹⁰⁷ Ibid, para 16 per Lord Sir Frederick Lawton: '*what she did was a deliberate act which had nothing whatever to do with what she was employed to do*'.

Glidewell LJ and Donaldson MR agreed, and the latter shed some further light on the question of vicarious liability. Counsel for the plaintiff argued that because the employee who pushed the basin was in the washroom in the ordinary context of her employment, her employer was inevitably vicariously liable for her action.⁹⁰⁸ Lord Donaldson firmly rejected this assertion, and gave very persuasive reasons for doing so:

'Mr Sedley [counsel for the plaintiff] is driven to say that arguably, on his interpretation of that test, if instead of rocking the basin she had knifed the plaintiff that would have given rise to vicarious liability. With all respect to Mr Sedley, I regard that as so extreme a proposition as to betray that there must be something wrong in the test if it is correctly applied'

It is submitted that this reasoning is correct, and still holds good. Otherwise an employer will be vicariously liable for *any* tortious action of an employee which takes place during working time. This would lead to arbitrary conclusions even with regard to workers in conventional and uncomplicated employment relationships. Suppose for instance one factory worker discovered during his shift that his boyfriend or girlfriend had had an affair with a colleague, sought out said colleague on the factory floor and punched him. If the line proposed by counsel for the plaintiff in *Aldred v Nancanco* had been taken, then their employer would be vicariously liable for an assault stemming from a private grudge. If the aggrieved lover had made the same discovery and responded in the same way after the shift had ended, there would be no possibility of liability ensuing.

Given the elastic and complex understanding of working time in relation to clergy, such an interpretation could again give rise to effectively open-ended liability. But as was discussed

⁹⁰⁸ Ibid per Lord Donaldson MR para 22.

at length in Chapter 2, there must be a nexus between the working relationship and the tort. In light of the highly complex working relationship where clergy are concerned, it is critical to address the connection between the working relationship and tort in terms of duties and tasks. Otherwise almost any activity could be found to have some connection with the cleric's working relationship, because if this is understood in relation to ministry in general terms, then it relates to the cleric's entire existence.

In the example under consideration, a reasonable argument can be made that there is a proper and legitimate connection. Algernon was actively engaged in the task of providing pastoral care and administering sacraments.⁹⁰⁹ As is discussed above, the fact that he was going about this in an improper and unauthorised manner is not directly relevant. The argument and the trespass which ensued in the course of it could be interpreted as part of the necessary dialogue which a priest would have with relatives of a baptismal candidate and also individuals posing challenging questions about the faith.

But the matter is certainly not clear cut. In the old but relevant Australian case of *Deaton v Flew*⁹¹⁰ an employer was found not to be vicariously liable for the action of a barmaid who responded to an allegedly rude and aggressive customer by throwing beer in his face and then aiming the glass at him. Her action was interpreted by the court as one of personal vindictiveness.

Similarly, it is submitted that if Algernon happened to have an altercation with Ellis in Bonnie's garden over a manner unrelated to some specific task which he was performing in relation to his professional, ministerial duties enshrined in the CTS, the mere fact that he was wearing clerical dress and in the presence of a parishioner would be insufficient for a

⁹⁰⁹ CTS 3.

⁹¹⁰ *Deatons Pty Ltd v Flew* [1949] HCA 60; (1949) 79 CLR 370 (12 December 1949).

finding of vicarious liability. If Ellis had happened to call him fat, or ugly or stupid for reasons unconnected with his dog-collar, and Algernon had responded with violence, there is no justifiable reason in law to automatically fasten the Church in Wales with vicarious liability, even if the incident took place in Bonnie's garden, any more than an employing bank would be liable if one bank clerk failed to see the funny side of a joke at his expense and assaulted a colleague for it.

5.4 (2) Negligence - Case Study A

The unfortunate Algernon receives a call from Brian, another parishioner who is very concerned about his son Charlie. Charlie has recently moved out of the parental home, to a different address but still in Algernon's parish. According to Brian, Charlie has reported hearing voices telling him to kill himself. Brian's wife Dora is concerned that their son might be mentally ill, but Brian rejects this possibility and says that he believes Charlie has a demon.⁹¹¹

Algernon assures Brian that he need not worry, and that he will take care of things. He visits Charlie, has a long talk and concludes that Brian is correct. Without consulting any clergy colleagues Algernon attempts to exorcise Charlie, before departing and promising to call later in the week. If in the meantime Charlie harms himself or a third party, is Algernon potentially liable in negligence and is the Church in Wales potentially vicarious liable for this?

⁹¹¹ Priests involved in deliverance ministry report that individuals seeking help sometimes seek to construe a disturbing problem in exclusively spiritual terms, as this is deemed to be more palatable than confronting the possibility of mental illness or other factors. For example, Dominic Walker, *The Ministry to Deliverance* (Dartman, Longman & Todd: London 1997): '*Some people are resistant to answering personal questions about their lives, perhaps because it is too painful or because they simply want some Christian 'magic' to happen so that they can return to their old ways. They reject any advice they don't want to hear or any explanation for what is happening apart from their own. They usually have an understanding that people can be neatly categorised into body, mind and spirit, with doctor, counsellor and priest treating the relevant parts. Deliverance ministry however requires a holistic approach.*'

Clergy Terms of Service

In taking Brian's call and visiting Charlie, Algernon was carrying out his duty to provide appropriate pastoral care in accordance with the CTS.⁹¹² However, the way in which he chose to do this was problematic in several respects. Firstly his assurance to Brian that there was no need to worry and that he could take care of things presents a number of issues.

Without having seen or spoken to Charlie about the matter in question, Algernon was in no position to ascertain what the problem with him actually was, much less to judge whether it was in fact something which he could deal with himself. Church in Wales clergy are required to know the limitations of the competence and knowledge base.⁹¹³ They also have a duty to communicate this to the people with whom they are dealing in pastoral situations.⁹¹⁴ Algernon should have been aware that Charlie's symptoms might have been the result of a medical condition, and should have explained to Brian that the situation might be one which required assistance from a doctor or other appropriate expert. Promising to take care of it all was rash and in breach of the CTS.

Algernon's promise also overlooked Charlie's own right to make choices in the situation; as an adult he might well not have wished to have had any dealings with Algernon, and if this was the case his view should have been respected.⁹¹⁵ Although not absolutely necessary at

⁹¹² CTS 3.

⁹¹³ CTS 2.5: '*Clergy should discern and make clear their own limitations of time, competence and skill. At times they will need to seek support, help and appropriate training.*'

⁹¹⁴ Ibid.

⁹¹⁵ CTS 3.7: '*Pastoral care should never seek to remove the autonomy of the individual. In pastoral situations the other party should be allowed the freedom to make decisions even if clergy consider that decision to be incorrect.*'

this stage, it might have been sensible for Algernon to have mentioned to Brian that he would have to respect any confidences which Charlie chose to share with him, unless there was a grave threat to his wellbeing or that of third parties.⁹¹⁶ Making the situation clear at this point would potentially have saved any danger of conflict with Brian at a later stage should he wish to know what had passed between Charlie and Algernon.

Worse, however, was his unilateral diagnosis of possession and decision to attempt to exorcise Charlie. The CTS do not expressly deal with the ministry of deliverance, but they do expressly reiterate the duty of Church in Wales clergy to comply with the law of the Church.⁹¹⁷ The Book of Common Prayer states that clergy should undertake the ministry of deliverance (including exorcism) *only* with the knowledge and authority of the diocesan bishop.⁹¹⁸ Clergy should not undertake this type of ministry unless they have appropriate training and supervision.⁹¹⁹ In attempting an exorcism without consultation or receiving authority, Algernon was acting in breach of the guidance and therefore the CTS.

Furthermore, it is also at least arguable that Algernon was in breach of the CTS in not encouraging Charlie to seek medical attention; he should have been aware that he lacked the training and expertise to diagnose whether Charlie was ill, or to assess whether he posed a risk to himself or others.⁹²⁰ In order to comply with the CTS requirement of understanding the limits of their own professional competence, clergy do need to be aware

⁹¹⁶ CTS 7.4.

⁹¹⁷ CTS 1.3.

⁹¹⁸ BCP (1984), 770: *'the priest should exercise great care to ensure that he acts only with the knowledge and authority of the diocesan bishop and, whenever possible, with the cooperation of the medical profession'*; The Ministry of Deliverance: General Guidelines for Clergy and Parishes (2002), issued by the Council for Mission and Ministry should also be complied with, as should the Guidelines on Healing Ministry (including deliverance) approved by the Bench of Bishops in 2001.

⁹¹⁹ Bishops Handbook, Section 5, *'The Ministry of Deliverance'* Guidelines para 4: *'Clergy and lay people involved in this ministry should have suitable training and supervision'*.

⁹²⁰ CTS 2.5.

of symptoms which may indicate mental illness or disturbance, and which ideally need further investigation. Hearing voices would be one such symptom.⁹²¹

In noting that it was likely that Charlie was suffering from some mental illness or impairment, Algernon should also have realised that he was therefore at least potentially dealing with a vulnerable adult, and been aware that he may have had particular needs as such.⁹²² Clergy cannot hope to comply with the Church in Wales policy on Vulnerable Adults, which the CTS requires them to adhere to, if they are unable to recognise when they are potentially confronted with a vulnerable adult.⁹²³

Secular Law

Was Algernon liable in negligence, and was the Church in Wales therefore potentially vicariously liable? There are three (not necessarily mutually exclusive) ways in which Algernon's conduct might give rise to liability in negligence:

- 1) If his attempted exorcism of Charlie *caused* demonstrable physical or mental harm, or;
- 2) If he owed Charlie a duty of care, and in failing to seek medical attention for him he failed in this duty to *prevent* him from suffering harm, or;
- 3) If he owed third parties who might be at risk from Charlie a duty of care, and in failing to seek medical attention for Charlie, warn such third parties or take other steps to safeguard them, he failed in this duty to *prevent* them from suffering harm.

⁹²¹ See for example some of the NHS guidance available on mental health issues, 'First Steps: Self help for a healthy mind': hearing voices and disturbing beliefs <http://www.firststeps-surrey.nhs.uk/hearingvoices&disturbingbeliefs.html> (accessed 6/1/2013).

⁹²² CTS 3.3.

⁹²³ Church in Wales, *Ministry with Vulnerable Adults: Recommended Policy and Good Practice Guidelines*.

Causing harm to Charlie

If the exorcism did anything to exacerbate Charlie's condition and caused harm which could be medically diagnosed and assessed, Algernon would be liable for this if: it could be proven that the harm was reasonably foreseeable; *and* the causal relationship between the exorcism and the harm could also be proven.

Anglican writers on deliverance do acknowledge the potential for ill advised or inappropriate efforts in this area to damage individuals.⁹²⁴ However, there is a difference between emotional and even spiritual harm, and the kind of harm required to bring an action for personal injury. Commentators acknowledge that proving causation and actionable damage is much harder with psychological than with physical injuries.⁹²⁵ Given that in this case it is probable that Charlie was already suffering from some form of mental illness, proving that Algernon's exorcism actually caused any further harm suffered would be extremely difficult. Therefore, liability for causing harm in this case is remote.

Failing to protect Charlie from harm

In this context, the importance of the questions 'what was the tortfeasor doing' and 'what was the tortfeasor purporting to do' can be seen. Algernon was making a pastoral visit to Charlie in his capacity as a priest, pursuant to the CTS.⁹²⁶ He was not purporting to have any

⁹²⁴ John Woolmer, *Healing and Deliverance* (Monarch Books: London 1999), 269: 'Prayer for deliverance from non-existent evil spirits will do much harm, and tends to leave people frightened, perplexed and dependent on those who have ministered to them. Certain types of deliverance ministries are potentially very dangerous. At a recent conference, an Anglican bishop spoke of the danger of so called 'interior ministries'. This is a process of anointing which anoints all of the potential exists from the body which a demon might use. This is a peculiarly horrible and totally unscriptural approach which has apparently led to legal action in some cases. Prayer for healing can also do harm if it leaves the patient feeling guilty that he/she hasn't been healed.'

⁹²⁵ Tony Weir, *An Introduction to Tort Law* (Oxford: Oxford University Press, 2006), 49: 'it is at present clear that those who, without being exposed to physical danger, seek compensation for psychiatric harm they suffer owing to the negligence of the defendant'.

⁹²⁶ CTS 3.

specialist knowledge to diagnose and treat mental illness. Neither did he make any promises directly to Charlie to safeguard his welfare. The only undertaking given was to Brian, who himself had no legal duty to protect his now adult son.

And it would be difficult to argue on the facts that Algernon's remarks to Brian were what prevented Brian from seeking any medical attention for Charlie, given that Charlie was extremely resistant to the idea that his son's problems might have a clinical rather than a spiritual explanation. Therefore, it would be difficult to construe Algernon's actions as having placed Charlie in danger, or having foreseeably deprived him of a chance of rescue. Algernon simply failed to help an individual whom he had no duty in secular law to help in the first place.

It is submitted that Algernon's words and actions were not sufficient to give rise to a duty of care between himself and Charlie. And it is further submitted that nothing in the CTS provides the foundation for such a duty. It is true that, on the basis of the discussion above, Algernon spectacularly failed to comply with his duties as outlined by the CTS. But that is different from asserting that those same duties were meant to generate any secular legal duties towards or secular legal rights vested in third parties like Charlie.

Consider the analogy of a secular business operating in a service industry. A company operating restaurants, hotels or theme parks might well have terms in its employment contracts requiring its employees to behave in a friendly, welcoming and courteous way towards customers, and to attempt to ensure that they had everything which they needed to ensure that they had a pleasant and enjoyable experience. Employees of the company who failed in these requirements and were rude, indifferent or unhelpful towards customers might well be properly subject to discipline and ultimately dismissal.

However, that position as between the employer and employee would not automatically give rise to any potential claims in contract or tort from third party customers. For instance, if someone checking into a hotel arrived appearing ill or uncomfortable, it might well be good practice and company policy for the person at the reception desk to ask if they needed anything, including the number of a doctor or room service. But this does not mean that a duty of care was owed and that the customer would have a right of action if the offer was not made, and the unfortunate person had a heart attack or slips into a diabetic coma.

Similarly the very general, spiritual relationship which priests in the Church in Wales have with the church requires them to demonstrate love and care to the people around them. The specific professional duties which they have outlined in the CTS generate obligations and standards which apply between them and the church. But neither of these factors provides the foundation for claims in negligence by third parties if priests fail to give the level of care required.

Clearly it follows that if Algernon is not liable in negligence, there is no possibility of the Church in Wales being vicariously liable.

Failing to protect third parties from harm

All of the above arguments apply with even more force to third parties who may suffer harm through Charlie's actions. As was discussed at length in Chapter 5, Anglican priests do not have the technical ability to assess when a person may be a danger to the wider community, neither do they have any special powers to detain or restrain individuals, so it would be difficult to assert that any duty of care can be owed to the world at large.

Furthermore, in *Maga* the court reject the idea of finding that unbounded a duty of care could be owed to the world in general, even though it was prepared to find a duty of care towards the young boys with whom the potentially abusive priest came into contact.⁹²⁷ But in this scenario, even a duty of care towards the individuals with whom Charlie came into contact would be a bridge too far. On the facts of *Maga*, the defendant diocese was vicariously liable for the trespasses committed by the errant priest. It was not controversial that he had committed the torts in question.

In this instance, there is no question of the church being vicariously liable for Charlie as an employee or quasi employee. It could only be vicariously liable if Algernon was negligent. If Algernon was not negligent, then there could be no question of vicarious liability, and therefore no need to explore any possible nexus between Charlie's victims and Algernon's church. This seems morally as well as legally justifiable, given that the church had no power to monitor or control Charlie in any way.

5.4 (3) Negligence - Case Study B

Algernon's parish holds a regular charismatic healing service, which has given rise to two unfortunate incidents. It was common for individuals receiving prayer ministry to collapse backwards; according to Algernon and the people in question this was the work of the Holy Spirit. However, in order to ensure that nobody was injured, the church ensured that people were staying by to catch and support the recipients of prayer ministry should this become necessary. Regrettably the system broke down when a tall and somewhat obese

⁹²⁷ *Maga v Trustees of the Birmingham Diocese of the Roman Catholic Church* [2010] EWCA 256, para 72.

gentleman name Bob tipped over. The appointed catchers did not feel able to cope with Bob's falling bulk, and jumped out of the way, leaving Bob to hit his head on the floor.⁹²⁸

Furthermore, Cerys asked for prayer in respect of her epilepsy. She returned home believing that she was healed and decided to stop taking her medication.⁹²⁹ The following week she was hospitalised after having a serious fit while in the passenger seat of her husband Dave's car. This caused Dave to veer off the road, injuring Edgar who was walking along the pavement at the time.

Bob

Clergy Terms of Service

In conducting a healing service Algernon was carrying out his duty to lead worship.⁹³⁰ He was also carrying out his pastoral duty to care for all with particular concern for the sick.⁹³¹

The Church in Wales makes liturgical provision for prayers of healing.⁹³² This includes the laying on of hands⁹³³ and anointing.⁹³⁴ The Church in Wales has also issued a public statement on the ministry of healing via its website, and directs anyone seeking this ministry to contact their parish priest to find out what is available in their locality.⁹³⁵ Therefore, the

⁹²⁸ An incident with similar facts occurred in the United States, and proceedings were issued. WATE.Com Knoxville, Tennessee, 'Man sues church over prayer session injuries' www.wate.com/story/8651392 (accessed 21 June 2011).

⁹²⁹ There have been reports in the UK press of individuals attending Christian churches and healing services, and abandoning their medication only to suffer further ill health and even death. Andy Dangerfield, BBC News 'Church HIV prayer cure claims 'cause three deaths' <http://www.bbc.co.uk/news/uk-england-london-14406818> (accessed 5/1/2013).

⁹³⁰ CTS 6.

⁹³¹ CTS 2.2: 'Clergy have particular responsibility to minister sensitively and effectively to those who are sick, dying and bereaved'.

⁹³² BCP (1984) 756-73.

⁹³³ Ibid, 765-767.

⁹³⁴ Ibid, 767-770.

⁹³⁵ The Church in Wales, 'Healing' <http://www.churchinwales.org.uk/faith/healing/> (accessed 5/1/2013).

healing service itself appears to have been clearly within Algernon's proper duties according to the CTS and the wider law of the Church in Wales.

There is scope for arguing that the manner in which the service was arranged may have failed to comply with the terms of the CTS however. The failure of the helpers to catch Bob may have been the result of a lack of proper training and preparation, and therefore be indicative of the service not having been 'thoughtfully prepared'.⁹³⁶ There is also an express requirement that lay people involved in worship be provided with the training and preparation necessary to support them.⁹³⁷ Furthermore, individuals should not be excluded from worship by reason of 'disability or disadvantage'.⁹³⁸ Consequently it could be argued that it should have been ensured that there were sufficient numbers of appropriately strong people on catching duty to allow larger members of the congregation to fall to the floor as safely as their more sleek brethren.

However, the unfortunate response to the people appointed to catch Bob does not in itself prove that Algernon did not comply with these duties; sometimes well-prepared and ordinarily responsible individuals make mistakes, especially in a moment of crisis. The volunteers may have been quite capable of catching Bob had they not panicked for some reason. (This of course raises interesting questions about the potential vicarious liability of the wider church if the volunteer catchers were negligent but Algernon was not, however such issues are beyond the scope of this study.)

⁹³⁶ CTS 6.4: 'Clergy should ensure that services are thoughtfully prepared, sensitive to the need and culture of the parish or institution and the tradition of the Church in Wales'.

⁹³⁷ CTS 6.5.

⁹³⁸ CTS 6.6.

Secular Law

The ordinary principles of the law of negligence, as it has developed from *Donoghue v Stevenson*, would apply to this situation.⁹³⁹ A defendant will only be liable in negligence if it can be established that he, she or it owed the claimant a duty of care.⁹⁴⁰ In this case it might be argued that Algernon did not owe Bob a duty of care to prevent him from choosing to fall backwards. He was an adult, presumably of full mental capacity and not obviously under the influence of drugs or alcohol. Nobody physically pushed him or caused him to trip, his action was autonomous.

However, given that Bob presumably collapsed into empty space believing that there were people poised to catch him, it seems reasonable to assert that if Algernon's words or conduct had induced this belief, then he had a duty of care towards third parties like Bob, who were foreseeably going to put themselves in danger were the belief to prove to be misguided.

Again, whether or not there was a breach of that duty of care is a question of fact, but it appears likely that there was. If the catchers were uncertain of their ability to cope with Bob's size and weight, then he should have been warned of this before he placed himself in jeopardy. Whether any negligence on their part was a result of failings by Algernon to be rigorous enough in selecting, training and supervising others would again be a matter of fact to be determined. Certainly this part of the scenario is potentially capable of giving rise to a successful claim in negligence.

⁹³⁹ *Donoghue v Stevenson* [1932] AC 562.

⁹⁴⁰ *D v East Berks Community NHS Trust* [2005] UKHL 23.

Cerys

Clergy Terms of Service

As detailed above, in arranging and conducting a healing service Algernon could be properly shown to be performing his duties pursuant to the CTS and law of the Church in Wales.

However, there is again scope to question whether the manner in which he performed these tasks was in keeping with the terms of the CTS. In determining this, the critical questions must be: what message did Algernon actually attempt to convey in his teaching; and was the manner in which he did so clear and responsible in view of his audience and context?

Clergy are enjoined to administer pastoral care in a way which is sensitive and effective, and the sick are one group whose needs should receive particular attention.⁹⁴¹ Given the context of a healing service, it is particularly likely that some people present would be have mental and physical health issues which might make them especially vulnerable to perceived promises of healing and release from pain. The injunction to be 'sensitive' could be read as requiring clerics to be aware of the potential vulnerabilities of those present.

This point is emphasised again by CTS 3.3, which requires clergy to be remain aware of the needs of the people to whom they are ministering and the situation in which they are placed at all times; vulnerable adults are highlighted as one category of persons towards whom the clergy should be especially vigilant in this regard.⁹⁴²

⁹⁴¹ CTS 2.2.

⁹⁴² CTS 3.3: '*In pastoral and caring relationships the clergy should be open to God and to the needs of the other person. It is important for clergy to be sensitive to the situations in which they are placed, especially with regard to the pastoral care of children, young people and vulnerable adults*'.

The dangers of exploitation and manipulation are referred to in CTS 3.5.⁹⁴³ Individuals with medical problems causing them distress or anxiety are arguably at particular risk of exploitation and manipulation, as their ability to critically question what is being presented to them may be impaired by their temporary or ongoing vulnerability. Therefore, the CTS effectively require clergy to exercise caution in the messages which are conveyed to such people.

Clergy also have a duty to preach and teach, and to keep their professional skills updated, including those related to effective communication.⁹⁴⁴ Failing to find ways of communicating which are clear, unambiguous and suitable to the probable recipients is also therefore a potential breach of the CTS requirements.

It is not apparent from the scenario whether or not Algernon deliberately gave Cerys the message that she should stop taking her medication. If he did, it is submitted that this is problematic in relation to the CTS and the wider law of the Church. The CTS require clergy to comply with the Constitution of the Church in Wales.⁹⁴⁵ The Constitution provides that the Disciplinary Tribunal of the Church in Wales shall have power to hear complaints against clerics:

*'teaching, preaching, publishing or professing doctrine or belief incompatible with that of the Church in Wales'.*⁹⁴⁶

or guilty of conduct:

⁹⁴³ CTS 3.5 *'It is always wrong to exploit or manipulate'.*

⁹⁴⁴ CTS 5, and in particular 5.1, 5.2 and 5.3.

⁹⁴⁵ CTS 1.3.

⁹⁴⁶ Const Chapter IX, Part III 9 (a): *'There shall be a Disciplinary Tribunal of the Church in Wales which shall have power to hear and determine a complaint against any Cleric of the Church in Wales, any Churchwarden or Subwarden and any Lay Member of the Church in Wales who holds a Licence or Permission to Officiate from a Diocesan Bishop of: a) 'teaching, preaching, publishing or professing doctrine or belief incompatible with that of the Church in Wales'.*

*'giving just cause for scandal or offence.'*⁹⁴⁷

Promising miraculous healing and encouraging people to stop taking prescribed medication is not unambiguously contrary to the doctrine of the Church in Wales (although a case could be made that harming the weak and vulnerable is contrary to the fundamental principles of love and compassion which are at the heart of Christian doctrine).⁹⁴⁸ However, it is clearly contrary to the belief of the Church as expressed in its public statement the ministry of healing; this states that:

We believe that God loves us and wills the very best for us in his kingdom. But we also know that suffering and death are conditions which we cannot escape from in this life. God is not distant from us in that. In Jesus Christ he shared in this life's suffering and death on the cross, and he can draw close to us in times such as these.

However, his resurrection in the power of the Holy Spirit gives us hope that we might have a foretaste of his kingdom here and now and that through the Church's ministry we shall receive his love, strength and healing touch.

What form that healing will take we cannot tell. It may be:

- *Help to carry us through a prolonged illness or disability*
- *A recovery more rapid than expected*
- *Experiencing our fear of death being driven out by God's love*

⁹⁴⁷ Const. Chapter IX, Part III 9 (c).

⁹⁴⁸ N Doe, *The Law of the Church in Wales* (University of Wales Press: Cardiff 2002), 211: 'Anglican churches are not confessional denominations with formal legal statements of their beliefs. Instead, their laws simply point to doctrinal documents, extrinsic to the law, accepted as normative of the faith. It is only in this oblique sense that law is used to define doctrine. Three broad approaches are used. First, legal approval is given to doctrine located in the trilogy of documents of the post-Reformation Church of England; the Thirty Nine Articles 1571, the Book of Common Prayer 1662 and the Ordinal. Secondly canonical approval is given to doctrine located in holy scripture, the Creeds and the pronouncements of the early councils. Thirdly, the most common approach is the principle of repetition: canon law approves doctrinal sources which have been received by the church; these may include canonical scriptures (being the ultimate rule and standard of faith in the church), the faith of Christ as preached by the apostles, and the doctrine, sacraments and discipline set forth in the 1662 Prayer Book'.

- *A healing which is so unexpected that we want to call it a “miracle”*
- *A growing awareness of inner peace and wholeness.*⁹⁴⁹

This teaching expressly provides that it is impossible to know what form the healing power of God may take in any given situation; promises of healing and assurances that it is safe and appropriate to cease taking medication are incompatible with this stance. It also overtly makes the point that healing may involve providing help to bear an ongoing illness or disability, an acceptance of death and an increasing, spiritual awareness of peace and wholeness which transcends bodily failings and weaknesses. Again a view point not compatible with guarantees of miracle cures. Therefore if Algernon gave such guarantees, he is clearly in breach of the CTS and the Church in Wales Constitution.

The situation would be more complicated however if Algernon did not intend to promise any sort of miracle cure, but Cerys misinterpreted his words. If this was the case, then it is submitted that whether he was in breach of the terms of the CTS would depend upon whether what he had said was objectively reasonable and responsible given the context in which he was operating. As discussed above, it was likely that there would be emotionally vulnerable people present at the healing service, and Algernon had a duty to be aware of this and alive to the possible dangers of misinterpretation.

Making claims that could easily be misunderstood in such a setting could be sufficiently careless and insensitive to constitute a breach of the CTS. At the other end of the spectrum of possibilities, however, is that nothing which Algernon said or did could have been predicted to provoke the response which it did in Cerys. Cerys might even have decided for

⁹⁴⁹ The Church in Wales, ‘Healing’ <http://www.churchinwales.org.uk/faith/healing/>

her own reasons that she was going to stop taking the drugs which she had been prescribed, and only afterwards attributed it to the healing service. The circumstances would have to be investigated to determine whether Algernon in fact make any unwise or irresponsible representations.

Secular Law

Cases have been reported in the secular press of UK churches allegedly encouraging people with serious illnesses to believe that divine intervention had made conventional medicine unnecessary, and of individuals suffering from serious medical complications and even death as a result. One of the most notorious was that of the Synagogue Church of All Nations in London.⁹⁵⁰ Following advice from an Evangelical pastor various HIV positive patients discontinued their drug regime, at a least three people died prematurely in consequence of this.

No civil legal actions have been reported following these events, and the church continues to make dramatic but ambiguous promises about healing:

‘Divine healing is the supernatural power of God bringing health to the human flesh. Thousands who come oppressed with sickness and disease receive their healing at The SCOAN as the very life of God changes their situations and moves their impossible mountains. Truly, there is never a sickness Jesus cannot heal.’⁹⁵¹

Stating that God *can* heal any disease is subtly but significantly different from stating that he necessarily will perform a healing miracle in any given case. The reported response of the

⁹⁵⁰ Andy Dangerfield, BBC News *‘Church HIV prayer cure claims ‘cause three deaths’*
<http://www.bbc.co.uk/news/uk-england-london-14406818> (accessed 12/3/2013)

⁹⁵¹ Synagogue Church of All Nations, <http://www.scoan.org/media/healing/> (accessed 12/3/2013)

church to press criticism was an affirmation of a belief that God could cure HIV, but a denial that individuals were told to stop taking their medication.⁹⁵²

Although there are no reported domestic cases dealing with tortious liability arising from such claims, there is case law which indicates that making public claims about supernatural healing is not an unlawful activity, even if done in a context which is commercial as well as religious. In *Creflo Dollar Ministries*,⁹⁵³ the VAT and Duties Tribunal considered the activities of (the somewhat ironically named) Pastor Dollar, who ran a church based in Atlanta, Georgia. The appellant organisation, Creflo Dollar Ministries, was a registered charity and a company limited by guarantee operating from premises in Birmingham. It served as the regional distribution centre for Pastor Dollar, sending his audio and video tapes and books all over the Europe and the Middle East.

The office manager of Creflo Dollar Ministries organised religious convention in the UK with Pastor Dollar, with the stated intention of boosting sales. In the publicity for this convention, some dramatic claims were made about what attendees to could expect to experience. For example:

'The boy never walked a day in his life. Hoping for a miracle, the man pushed his wheelchair-bound son to the altar. They lined up and patiently waited for prayer. As Dr Creflo A Dollar Jr began singing, something happened to the young boy's legs. They received strength and he stood on his own for the very first time. The crowd loudly praised God as they witnessed a move of His Spirit in their midst.'

⁹⁵² Andy Dangerfield, BBC News 'Church HIV prayer cure claims 'cause three deaths'
<http://www.bbc.co.uk/news/uk-england-london-14406818> (accessed 12/3/2013)

⁹⁵³ 17705: *Creflo Dollar Ministries* 13 May 2002.

*Healing and deliverance are commonplace at Changing Your World conventions. From Oakland to New York to London and stops in between, burdens are being removed and yokes destroyed. The continual stream of testimonies demonstrate the God's power is making a mark that cannot be erased. This year, Creflo Dollar Ministries will further its life-changing course as it brings the good news to Australia and New Zealand. Its April convention in South Africa was a remarkable success. Tens of thousands were in attendance nightly and many souls were saved.*⁹⁵⁴

The legal issues in the case concerned whether the convention had been held for business purposes, as this was critical for tax purposes. The tribunal found that the purpose of the convention was partly to provide a forum for Pastor Dollar to preach the gospel, partly to allow a professional-quality video of his preaching to be produced so that he could reach a wider audience and partly so that the UK based company could increase its sales.⁹⁵⁵

Consequently the input tax which was at the centre of the case fell to be apportioned.

Because the tax issues required the tribunal to establish the purpose of the convention, the activities of Pastor Dollar were considered in detail. At no point was there any suggestion that there were potential legal or public policy concerns about the pastor and his organisation making statements to potentially vulnerable people about healing miracles or encouraging and expectation of the same. In fact the tribunal made positive comments

⁹⁵⁴ Ibid, para 6.

⁹⁵⁵ Ibid, para 34: *'In summary we accept the evidence put to us that the purpose of the Convention was in part to enable Pastor Dollar to preach the Gospel to those that attended; in part for the production of the video to enable his word to reach a wider audience and in part a general marketing exercise to increase awareness of Pastor Dollar and his works and to generate sales of his existing works. As such it appears to us that the expenditure incurred by the Appellant in the staging of the Convention was incurred partly for the purposes of a business and partly for other purposes and in accordance with section 24(5), its input tax thereby falls to be apportioned.'*

about the likely experience of individuals attending the convention.⁹⁵⁶ Whilst the case was not concerned with tortious liability for harm caused to attendees, it is evidence that UK courts have treated charismatic, healing gatherings as acceptable and unproblematic activities, even where the motivation has in part been to generate income. The adults choosing to attend were not regarded as placing themselves at risk, or being placed at risk by the organisers of the event. They were free to buy videos and tapes or not as they chose, in much the same way as people attending a concert, lecture or non-religious campaigning event.

Another case which demonstrates the UK courts inclination to treat mentally competent adults as responsible for their own welfare in religious matters is *R (on the application of Jenkins) v H M Coroner for Portsmouth and South East Hampshire*.⁹⁵⁷ This decision also indicates that the fact that an individual may be emotionally vulnerable due to the pain, fear and stress of illness will not in and of itself generate any additional duty of care on the part of the individuals surrounding them. It is important to consider the facts in detail, because there is significance in the similarities and the differences between this case and the circumstances of the case study.

The case concerned a challenge to the finding of a coroner; the claimant argued that his narrative verdict had been perverse, and that the only rational verdict would have been one of unlawful killing. The claimant maintained that the foundation of a verdict of unlawful killing arose from gross negligence manslaughter by the deceased's partner, who failed to seek appropriate medical attention for him.

⁹⁵⁶ Ibid, para 33 '*The Convention was, we are sure, a life-enhancing experience for all who were able to attend*'.

⁹⁵⁷ *R (on the application of Jenkins) v H M Coroner for Portsmouth and South East Hampshire* [2009] EWHC 3229 (Admin).

The deceased, Russell Jenkins, had developed a distrust for conventional medicine and a strong interest in alternative therapies and what a variety of what might loosely be termed 'New Age' practices. In 1996 Mr Jenkins had been diagnosed with diabetes, and attended his GP practice from time to time to receive check-ups and advice.⁹⁵⁸ Mr Jenkins did not tell his family about his diabetes, either then or at later stage. Furthermore, from 2001 he ceased to make use of conventional NHS services, and failed to attend the surgery despite being sent reminders.

Nevertheless, in the course of 2001 he had been warned by his GP (Dr Dale) of the dangers of diabetic neuropathy (damage to the nerves resulting from high blood sugar levels), especially as in the feet. He also was explicitly told that ulcers and any breaking of the skin could be dangerous if ignored, but would be effectively dealt with by antibiotics. He was advised that any break in the skin should therefore be treated promptly.

The GP practice was aware of Mr Jenkins' interest in alternative medicine, and Dr Dale had visited Mr Jenkins at his clinic at The Quiet Mind Centre. The deceased had offered treatments of Reiki, aromatherapy and reflexology, as well as teaching meditation at other venues. During the inquest, various individuals who were friends of Mr Jenkins and who had been involved with his alternative therapies and spiritualities gave evidence about his state of mind.

One, Mr Cooter, testified that Mr Jenkins believed that bodily ailments were the result of emotional turmoil, and therapies attempted healing by addressing this root cause; furthermore he believed that it was important to consult his inner spiritual being before

⁹⁵⁸ Ibid, para 7.

taking important decisions, and could sometimes be seen moving his fingers as he engaged in this inner communion.⁹⁵⁹

Mr Jenkins partner Ms Cameron had worked as nurse for twelve years before abandoning conventional medicine in 2004 to concentrate on alternative therapies.⁹⁶⁰ She believed Mr Jenkins to be a clairvoyant and a psychic, and confirmed his belief in 'checking' decisions with his inner being.

Mr Jenkins disclosed to Ms Cameron that he was a '*borderline diabetic*'.⁹⁶¹ He injured his foot digging a pet's grave in 2005; when it became numb and infected Ms Cameron recognised what appeared to be diabetic neuropathy.⁹⁶² He refused all convention medicine, treated the infection with magnesium sulphate, and despite becoming black and ulcerated it did eventually heal. From this time onwards Mr Jenkins continued to suffer from ulcers on his feet but still adamantly refused to see a doctor.

In December 2006 Mr Jenkins stepped on a plug, and sustained an injury to his foot which became infected. Over several months he consistently declined to seek conventional medical treatment, including during a period when Ms Cameron was out of the country for several weeks.⁹⁶³ By April he was in considerable pain and displaying what Ms Cameron

⁹⁵⁹ Ibid, para 8: '*Mr Jenkins believed in personal development by concentrating upon the inner self. He believed that physical ailments were symptomatic of emotional turmoil. His treatments were intended to address spiritual well being. His spiritual life was very important to him. He developed a technique which witnesses described as 'checking' or 'dousing'. This was a state of mind induced in order to receive answers or approval from his inner being to a proposal or a course of action. A signal that he was engaged in this process was a movement of his fingers*'.

⁹⁶⁰ Ibid, para 11.

⁹⁶¹ Ibid.

⁹⁶² Ibid, par 12.

⁹⁶³ Ibid, para 14: '*In late February 2007 Ms Cameron went to the United States for two weeks. When she returned in March she went with Mrs Finn to India where Jeannette's daughter was getting married. Mr Jenkins was alone at the Quiet Mind Centre. He had a telephone in his bedroom. It is a matter of some significance to the Coroner's assessment of the evidence that during Ms Cameron's absence for a period of some two to three weeks he chose to seek no medical help.*'

believed at the time to be the symptoms of a cold, being unwell in that way herself. By the middle of the month he took to his bed to rest his foot.⁹⁶⁴

Mr Jenkins did not wish his family to know about the state of his foot, and Ms Cameron told them over the 'phone that he had a cold. He continued to refuse all medical assistance, even though Ms Cameron told him that his foot was turning gangrenous, and the smell, colour and discharge must have made the situation obvious even to a lay person. On April 17th Mr Jenkins succumbed to the infection and died; Ms Cameron called a friend and they summoned a GP who pronounced Mr Jenkins dead.

The coroner concluded that although there was some evidence that Ms Cameron had assumed a duty of care for the deceased, dressing his wound and looking after him, it was not open to him to find that she had a duty of care to call for medical assistance against his wishes when he was mentally competent.⁹⁶⁵ The coroner also concluded that based on expert evidence, it was likely that Mr Jenkins remained lucid in his final hours; and in any case if he had lost consciousness in the hours immediately prior to his dying the chances of his being successfully treated were by that stage small enough to question whether any failure to summon help materially contributed to his demise.⁹⁶⁶

The court emphasised that in reaching the conclusion which he did, the coroner was not considering whether there might be an arguable case for unlawful killing, but whether he could be sure that an unlawful killing had taken place.⁹⁶⁷

⁹⁶⁴ Ibid, para 17.

⁹⁶⁵ Ibid, para 30-32.

⁹⁶⁶ Ibid, paras 33-34.

⁹⁶⁷ Ibid, para 42: *'I appreciate why it is that Mr Jenkins' family is convinced that they have been deliberately excluded from helping their son to live. There is no question that Ms Cameron lied to them on 15 April 2007 and she admitted to Dr Cunliffe lying to them when he attended shortly after Mr Jenkins' death. However, the issue for the Coroner was not whether there was an arguable case of unlawful killing but whether he could be sure.'*

Mr Jenkins was an intelligent man with strong, if idiosyncratic views, and must have been aware of the dangers which he faced in rejected medical treatment. There was no evidence that he was dominated by Ms Cameron, the pair appeared to be well matched.⁹⁶⁸ It was probable that Mr Jenkins was mentally competent until the time of his death, but even if he was not, and at that stage Ms Cameron did have a duty to summon help, the coroner was correct to conclude that it would have had only a marginal affect upon his survival chances. Ultimately the coroner's conclusions did not fall outside of what was reasonable on the basis of the evidence, and the claimant had therefore not succeeding in proving that his verdict was perverse.⁹⁶⁹

It should be stressed that this was a judicial review case on whether a coroner was entitled to reject a finding of unlawful killing. Furthermore, a verdict of unlawful killing based on gross negligence manslaughter would relate to a criminal standard of negligence and a criminal burden of proof. Therefore, the outcome of this case does not have a direct bearing upon possible liability in tort. However, it is still extremely relevant.

Firstly, it affirms that the courts will always respect the autonomy of a mentally competent adult in making decision about medical treatment, even if those decisions are irrational and damaging⁹⁷⁰. In light of this, third parties cannot be said to have a duty to override or attempt to override such wishes. If a state court has no power to deny an individual the right to self determination, a private party certainly has no such right or power.

Secondly, the family of the deceased raised a number of arguments in an effort to demonstrate that his partner had been criminally instrumental in his death, and both the

⁹⁶⁸ Ibid, para 43-44.

⁹⁶⁹ Ibid, para 50-52.

⁹⁷⁰ See for example *Re T (Adult: Refusal of Treatment)* [1993] Fam 95 and W [2002] EWHC 901 (Fam).

coroner and the court reviewing his verdict considered the legal position very thoroughly. At no stage was it ever suggested that Ms Cameron was legally culpable for sharing and encouraging his spiritual and ideological beliefs. In the contemporary legal landscape such claims would be problematic in relation to the Article 9 right to freedom of conscience, belief and religion. Freedom to manifest this may only be subject to such limitations as are in accordance with law and necessary in a democratic society.⁹⁷¹

But even prior to the Human Rights Act, the UK courts accepted that religious groups like the Jehovah's Witnesses were entitled to exist and promote their doctrines, even these might encourage individuals to make decisions which were detrimental to their physical health and wellbeing.⁹⁷²

If courts considering negligence claims in facts similar to the case study, or those quoted about in relation to the Synagogue Church of All Nations in London were too ready to find a duty of care and liability, it would conflict with the general respect for the autonomy of individuals in both religious and medical affairs. Neither groups nor individuals would be able to express views which might encourage others to act in ways which undermined their safety or even material interests, without justifiable fear of litigation. Furthermore, the law of negligence would be moving away from its traditional territory of redress against those who harm their neighbour,⁹⁷³ towards imposing wide ranging duties on private parties to guard against inciting their neighbours to harm themselves.

⁹⁷¹ Article 9.2 ECHR.

⁹⁷² *Re T (Minors) (Custody: Religious Upbringing)* (1981) 2 FLR 239; *Re H (A minor) (Custody: Religious Upbringing)* (1981) 2 FLR 253. In both cases a court was prepared to permit a Jehovah's Witness parent to have custody of a child, raise them within this community and educate them in this faith.

⁹⁷³ *Donoghue v Stevenson* [1932] AC 562.

If a church might be liable for personal injury for having encouraged a mentally competent adult to choose to cease taking medication, why should an environmental campaign group not be liable for property damage for encouraging a mentally competent adult to take his tumble-dryer to the scrap-yard?

This is not to say that there are no conceivable circumstances in which it might be appropriate for a court to find one party liable in negligence for inciting an adult to make a detrimental decision. If there was an established duty of care and the individual being incited was unable to make a truly free choice because of their circumstances, then it is quite possible that liability might ensue. The recent case law on prison self harm and suicide provides a helpful analogy.⁹⁷⁴ Police or prison authorities may be liable in negligence for a prisoner of sound mind committing suicide, because of their unique and vulnerable circumstances. On this basis it would seem probable that negligence would be found if a prison or police officer were to taunt a person in custody and encourage them to harm themselves.

However, such a circumstance is a long way removed from an adult choosing to attend a religious service, listening to the teaching there and making choices which may or may not have been based on what was said. A further difficulty with imposing liability in a case like Algernon's would be determining causation; individuals like Cerys make self destructive decisions for a wide variety of reasons, she might have been thinking about the possibility of miracle cures for some time before going to the healing service in question. Causation would be even more problematic if Algernon had not in fact directly urged anyone to stop taking conventional drugs, but had had his words misconstrued by Cerys.

⁹⁷⁴ *Reeves v Commissioner for the Police of the Metropolis* [2000] AC 283.

Ultimately Algernon had a duty to provide spiritual teaching, and was claiming expertise in the Christian religion, not in medicine. He had not undertaken to be specially responsible for the welfare of Cerys as an individual, and had no legal power to prevent her from making choices which might harm her health, or even of monitoring her behaviour outside of church. Considering what he was claiming to be able to do, and what he was in fact able to do, imposing a duty of care on him to promote Cerys' physical welfare appears unreasonable and unduly onerous.

It is true that as discussed above, the CTS require him to be aware of the needs of individuals like Cerys, and to act in a responsible way which will not put them at unnecessary risk. However, once again this standard of best professional practice set by the Church in Wales does not readily translate into any duty owed in secular law.

5.5 Overall Conclusions

The Church in Wales introduced the CTS primarily to address concerns about the working arrangements of clergy, and in response to state pressure to ensure that they were afforded employment rights and protection akin to those available to workers in a secular sphere.

This has resulted in Church in Wales clergy being employees for many purposes in secular law. Employment law in the modern world is flexible and complicated, a given individual and a particular set of working arrangements being categorised differently for different purposes. For instance, whether that individual is covered by anti-discrimination in the labour market is a wholly separate question from whether or not that same individual may claim redundancy or unfair dismissal.

If Church in Wales clergy meet the criteria for being classified as employees or workers for a specified legal purpose, then they will be so classified. Naturally the more closely the church models its working arrangements on the secular world, the more likely it is that its clergy will be categorised in the same way the secular workers whose employment arrangements have moulded the church pattern.

In light of all of this, and the recent case law on vicarious liability and the Roman Catholic church, it seems highly likely that in most circumstances the tortious actions of clergy when carrying out their ministerial functions will give rise to vicarious liability for the Church in Wales. This however raises significant intellectual and practical challenges, due to the unique nature of the clergy role and the Anglican understanding of priesthood. Given that Church in Wales clergy are in some sense fulfilling their ministerial functions simply by existing, how can courts rationally determine which torts are committed in the course of their working lives and which are simply private matters?

How can courts steer a course between opting for an all or nothing approach to liability on the one hand, and making arbitrary distinctions on the other? Rendering the Church in Wales liable for every tort which its ministers commit is unsatisfactory, as is freeing it from vicarious liability altogether. So how can meaningful and rational distinctions be made?

It is submitted that the CTS provide a useful basis for making such distinctions. Rather than considering the position of priests, bishops and deacons in spiritual terms in relation to Anglican theology, the CTS gives a framework for considering their role in terms of professional TEU. This is appropriate and helpful when dealing with issues of vicarious liability, and the church is effectively being placed in an analogous position to a secular

employer being made responsible for the actions of a professional employee furthering its aims and interests.

The spiritual and professional ways of understanding Church in Wales clergy are not in competition, rather they coexist but in different contexts. To treat the clergy as professionals for many purposes within secular law does not prevent the church from understanding them as far more than trained professionals fulfilling a role. It need in no way interfere with the spiritual life of the church, but it gives the church a way of interacting with the secular world, and in particular with tortious liability, which is both logical and consistent.

Appendix 1

Guidance Issued by the Church in Wales on Parental Consent for the Baptism of a Child (Undated)

Numbering has been added to the document for ease of reference

PARENTAL CONSENT FOR THE BAPTISM OF A CHILD.

1) The purpose of this guidance:

- a) This guidance is to help in deciding what parental consent may be required in relation to the baptism of a child. The guidance covers two separate aspects.

2) The necessity for parental consent:

- a) It is possible for a person to apply to a court to stop the baptism of a person under the age of 16 for whom he/she has parental responsibility. This is because, although each person having parental responsibility can usually act independently, any other person having such responsibility can disagree with the decision and apply to a court asking the court to make the final decision.
- b) Unless there is a need for an emergency baptism, the person who applies for the baptism of a child, should be asked who has the parental responsibility for the child . The Diocesan Registrar is always available to assist in advising who may have parental responsibility.

- c) As far as possible, the applicant for the child's baptism should contact the person(s) having the parental responsibility for the child. The nature of baptism should be explained to those having such parental responsibility, if they can be ascertained.
- d) If necessary it is advisable to postpone the baptism (except in an emergency) while all reasonable enquiries are made as to the whereabouts of such person(s). If, after such enquiry, any person having parental responsibility cannot be located, while the baptism can proceed, it is recommended that the Diocesan Bishop should be first be consulted.
- e) If any other person who has parental responsibility does not agree to the baptism, the Bishop should be consulted and, in the meantime, the baptism should not proceed.
- f) Other than in consultation with the Bishop, no baptism can proceed if it appears that a person having parental responsibility for the child is seeking or has applied for a court order to prohibit the baptism.

3) Who has parental responsibility for the purpose of giving consent?

- a) State law determines who has parental responsibility for the child. There are a considerable variety of possibilities.

(1) Parental responsibility can arise where the child has a mother and a father in the following circumstances⁹⁷⁵:

: the child's mother and father both have parental responsibility if they are married at the time of the child's birth. Such parental responsibility does not change if the couple have separated or, since the child's birth have been divorced;

: if a couple are not married at the time of the birth, the mother alone has parental responsibility. However a father also has parental responsibility if:

⁹⁷⁵ See (2) below for occasions when persons other than a father and mother can have parental responsibility.

i) the name of the child's father appears on the child's birth certificate where the birth has been registered after 1st December 2003, or where, after that date, the registration is subsequently amended to include the father's name; or

ii) the child's father subsequently marries the mother; or

iii) the child's father has been given a parental responsibility order by a civil court (which has not been subsequently revoked); or

iii) the child's father has entered into a parental responsibility agreement with the mother (which has not been subsequently revoked); or

iv) if the child's father obtains a residence order from a court for the child to live with him.

(2) Persons other than the child's mother and father can have parental responsibility as follows:

a) if a local authority obtains a care order for a child. In this case, it shares parental responsibility with the mother, and, if he also has parental responsibility, the father;

b) if a person adopts the child by court order⁹⁷⁶. In this case, the mother, and if applicable, the father, lose parental responsibility;

c) if a person is appointed as the child's guardian by court order on the death of the person having parental responsibility (a father who does not have parental responsibility can become a guardian);

d) if a person is appointed as a special guardian by court order while the parents are alive. The parents then lose parental responsibility;

⁹⁷⁶ This can include adoption by persons of the same sex.

e) if a residence order is obtained from the court for the child to live with the person named in the order;

f) if, in the case of the child who has a stepfather or has parents who are civil partners, a parental responsibility agreement is entered into or a parental responsibility court order is made;

g) if a residence order is granted by the court. The person(s) named in the order has parental responsibility. The order lasts until the child is 16, but can be extended to the child's 18th birthday;

h) if a person is appointed a guardian under a will. Such a person automatically has parental responsibility for the child named in the will.

i) if, after the 6th of April, 2010, two persons of the same sex appear on the birth certificate by court order.

A list of current Parental Responsibility Orders is available on line.

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