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Précis Paper

Institutional Responses to Child Sexual Abuse: Part II

A discussion of the Cardinal George Pell case, the Royal Commission into Institutional Responses to Child Sexual Abuse, questions of law raised as a result, and action that has been taken by both governments and institutions in response

Discussion Includes

- *Prince Alfred College Incorporated v ADC* [2016] HCA 37
- *Armes (Appellant) v Nottinghamshire County Council (Respondent)* [2017] UKSC 60
- Statutory response to the question of vicarious liability
- The National Redress Scheme

Précis Paper

Institutional Responses to Child Sexual Abuse: Part II

1. In this edition of BenchTV, Andrew Morrison RFD SC (Barrister, Wardell Chambers, Sydney) and Richard Royle (Barrister, Sir Owen Dixon Chambers, Sydney) discuss the Cardinal George Pell case in which they were both involved, the Royal Commission into Institutional Responses to Child Sexual Abuse, questions of law raised as a result, and action that has been taken by both governments and institutions in response.

Prince Alfred College Incorporated v ADC [2016] HCA 37

2. In this case, the close connection test was established as the appropriate test for vicarious liability in Australia. Gleeson J in *Lepore* had adopted the close connection test largely as stated in *Lister v Hesley Hall Ltd* in the House of Lords. In the Prince Alfred College case, problems arose from the way in which it was run.

3. At first instance, Vanstone J found that the abuse did not give rise to the close connection test, on the basis that there was nothing special in the relationship between a housemaster and a boy who was a boarder in that house. A finding like this could only have come about from a sad failure to adduce the obvious evidence that in the early 1960s the authority of a housemaster was exactly the same authority that exists and is exercised today by housemasters. In reality, the housemaster-boarder relationship is an *in loco parentis* type scenario, which has now been accepted as a reason for vicarious liability.

4. Vanstone J found that time should not be extended under the *Limitation of Actions Act 1936* (SA) (this was before any amendments were made). The Full Court of the Supreme Court of South Australia unanimously upheld an appeal in relation to the close connection test, saying that the close connection test had been met.

5. In the appeal to the High Court, it was ultimately found that there was insufficient evidence to show that the close connection test was established on the facts, and therefore, there should be no extension of time. So the case ultimately failed on extension of time, but, by way of dicta in the High Court, the Court unanimously said that the close connection test is the common law in Australia.

6. The decision also dismissed the suggestion advanced by the minority in *Lepore* that criminality precludes vicarious liability.

Armes (Appellant) v Nottinghamshire County Council (Respondent) [2017] UKSC 60

7. This was a case in which the Nottinghamshire County Council was found liable for the abuse perpetrated by foster parents in whose care the Council had placed a child.

8. In the past it had been thought that the relationship between Council and foster parents was so distant that it would be inappropriate to make the Council vicariously liable for any abuse which took place. This was the argument made out, and accepted, in the Court of Appeal.

9. But on appeal to the Supreme Court, it was held that for children who are in care, any responsibility remains very significantly with the Council, in that Council in theory, even if not in practice, continued to exercise powers of supervision over the foster care parents, and in looking at who was best able to meet the loss that was suffered by the child, there was only one real possibility: the county council who appointed the foster parents who did the damage.

10. In these circumstances, the appropriate place for vicarious liability to lie was with the county council. The close connection argument in foster care arrangements is available because children are utterly in the power of the county council.

11. The plaintiffs ultimately succeeded in this case, and the High Court ruling was essentially consistent with *Armes*, because the plaintiffs were girls who had been, albeit briefly, taken into care, and were under notice of the relevant department. So many institutions, in particular schools and local authorities, are now being found either vicariously liable or liable in negligence for the actions of their employees or agents.

12. One of the consequences of the decision in the Prince Alfred College case is that the close connection test, and vicarious liability consequent upon it, has always been the law in Australia – that is, it is retrospective in its effect.

Statutory response to the question of vicarious liability

13. Following the Royal Commission, Victoria has led the way. It has introduced the *Wrongs Amendment (Organisational Child Abuse) Act 2017* (Vic), which provides some statutory ground for vicarious liability, *but only prospectively* (not retrospectively).

14. The Act deals with the issue of whether a non-employee can be vicariously liable (only prospectively though) – non-employees being those who may work in an organisation's name but are not paid by it - like for example priests of the Catholic Church, volunteers, etc. The issue of its current application as non-retrospective remains to be dealt with in Australia

at common law. Other action taken by Victoria includes the introduction of the *Legal Identity of Defendants (Organisational Child Abuse) Bill 2018*.

15. The bill proposes a rather clumsy system for proposed defendants to be asked to provide a nominated defendant, and for the courts to be able to subsequently make an order if no defendant is appointed. The system is clumsy, time-consuming, and all in all, not very satisfactory. But at least it provides some sort of a remedy.

16. In NSW, legislative changes are being discussed, particularly in relation to statutory requirements for vicarious liability. But nothing has quite yet reached the Bill stage. There have been very good public discussion papers published in NSW on the topic, which have accepted the Australian Lawyers Alliance's submission that a non-delegable duty is not a satisfactory solution.

17. One recommendation of the Royal Commission was to reverse the onus of proof (so that defendants bear the onus). But of course the onus referred to is the legal one, and as soon as the defendant submits some evidence, for practical purposes, the evidentiary onus shifts back to the plaintiff. For this reason, the proposed reversal of onus appears to be unsatisfactory.

18. The NSW Department, in its findings as a result of hearing submissions, has recommended adoption of their wording of the close connection test. The wording is almost identical to that of Gleeson CJ in *Lepore*.

19. Although NSW has provided that a defendant must be nominated, which is to be done retrospectively (unlike Victoria), the close connection test is still only prospective. This is very troubling because:
    - if what is being provided is *in addition to* the common law, then it is redundant (because it only applies to the future)
    - if what is being provided *is in substitution for* the common law, then it takes away an existing right (for those who have already been abused)

20. The Australian Lawyers Alliance and the Law Society have made further submissions to the Department pointing this out in very vigorous terms. There has been no response yet from the rest of the states and territories. Victoria and NSW have led the way in taking any useful action. The Victorian solution in Andrew's opinion is wholly inadequate.

21. The NSW's solution appears to have just the one flaw - that is its retrospectivity. If, however, it is worded correctly - that is, if it is worded such that it does not take away any common law rights - then the High Court decision in the Prince Alfred College case will provide the retrospectivity in any event.

22. Over the last few years, with the imposition of amendments to the *Limitation Act* allowing child abuse victims (those under the age of 18) to proceed without any limitation hurdle, and a clarification of the position in relation to vicarious liability of institutions for abuse by perpetrators, there are now good prospects of being able to establish a case against an institution, prospects which perhaps did not exist before.

23. A big problem that presents itself in these matters of course is that many victims do not want to litigate. Litigation is a very stressful, turgid, and painful process for victims. Institutions take full advantage of this in driving a very hard bargain, which is why the Royal Commission has recommended the National Redress Scheme.

The National Redress Scheme

24. There has been a diversity of responses to this scheme by institutions - some good, others bad. It really depends on the goodwill of the particular institution. But at the end of the day, this is something that simply cannot be left to the goodwill of institutions, especially given:
    - it is *their* money at stake
    - most of them have a long history of protecting their assets rather than protecting the children under their care, and
    - they are no longer under the critical eye of the Royal Commission

25. There was a National Redress Scheme in Ireland which provided up to around $500,000 for a compensation claim – the Royal Commission recommended $200,000, and the Commonwealth Government has come up with $150,000 as a maximum, of which most victims would only get some portion, which is a fairly miserable response, and it may result in significantly more civil litigation than should be the case.

26. There are always going to be cases, like John Ellis's, where the sort of amounts involved in a redress scheme would never be satisfactory for a person who has for example lost their job because of psychological injury resulting from the abuse.

27. The Commonwealth Government has set aside $33,400,000 for the scheme, for which NSW, Victoria and the ACT are on board. Initial indications from the Catholic and Anglican Churches are that they will support the scheme. The Catholic Church is now having second thoughts.

28. It is likely, however, that they will ultimately come to the conclusion that it is a very cheap solution for them - far cheaper than the cost of damages they would have to pay at common law. But nothing yet has been done in respect of any penalty for organisations that fail to voluntarily agree to be part of the redress scheme.

29. So far, the other states and territories are still thinking about their position, which is a real concern. It seems as if the Commonwealth really only has one way of forcing institutions to

agree to the scheme – that is, by way of appeal to the definition of charity, as set out by the 'Statute of Elizabeth criteria'.

30. The definition of charity is such that almost all of these organisations are not liable to pay local, state, and federal government taxes, and if a bill were to pass removing the charitable status in respect of any organisation that failed to enter the scheme, a massive incentive to enter would be thus created. In turn, the pressure that these organisations would put on their respective state/territory governments to get on board would be enormous.

31. So there is still this one remaining power which the Commonwealth has not yet threatened to exercise. It is Andrew's view that it is now time that the Commonwealth threatened to produce this sort of legislation. For practitioners with clients who are victims of sexual abuse and reluctant to litigate, it is still open for them to approach the relevant institution. In Richard's experience, many institutions are generally willing to mediate.

32. Two (very troubling) exclusions from the National Redress Scheme are being pondered:
    - in respect of **those who have committed serious criminal offences** – which is troubling in that victims of abuse are more likely than the average person to end up committing crime/s, but *only as a very result of the abuse suffered by them*
    - in respect of **those who are abused in immigration detention or who do not hold visas** (with some proposed exceptions) – the Commonwealth has a non-delegable duty of care to those it places in detention – i.e. to the children who have been abused on Manus Island, Nauru, and Woomera - children who have committed no criminal offence of any kind. To deny these children a remedy is a disgrace. The only justification for the exclusion as cited by its proponents is that the Commonwealth would save money.

33. There are a significant number of issues that have to be determined before we get a scheme underway. The Commonwealth has set out a fairly tight time limit for the scheme to get underway, and has put pressure on the states and territories to get on board.

34. But the way things are going, it seems that unless the Commonwealth wields its power over the definition of charity, it will struggle to get governments and institutions on board as they should be.

BIOGRAPHY

Andrew Morrison RFD SC

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Dr Andrew Morrison RFD SC has practised as a barrister in NSW since 1976, and was appointed Senior Counsel in 1993. He has since been appointed as Queens Counsel in Tasmania and Western Australia. Andrew has been on the Board of the Motor Accident Authority, and has been Supreme and District Court Arbitrator. He has held a commission, and sat as an acting District Court judge. Andrew is the co-author of the Personal Injury Law Manual NSW, published by the Law Book Company.

Richard Royle

Barrister, Sir Owen Dixon Chambers, Sydney

Richard Royle was originally admitted to practice in the UK, but has been based in NSW for 25 years. He is a former NSW state president of the Australian Lawyers Alliance (the largest national lawyers' group in Australia) and current committee member of the ALA and the Personal Injuries Common Law Committee of the NSW Bar Association. Richard is admitted to practice in England, Wales, most states of Australia and Western Samoa. He has chambers both in Sydney and London.

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