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Précis Paper

Institutional Responses to Child Sexual Abuse: Part I

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

- Limitation periods
- Vicarious liability
- *Bazley v Curry* [1999] 2 SCR 534
- *New South Wales v Lepore* [2003] HCA 4; 212 CLR 511

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Institutional Responses to Child Sexual Abuse: Part I

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.

2. Both Richard and Andrew were counsel in the case of *Ellis v Pell* [2006] NSWSC 109. The case was instrumental in the commencement of the Royal Commission into Institutional Responses to Child Sexual Abuse.

3. This discussion will concern:
    - responses to the decisions & findings of the Royal Commission
    - issues that have been highlighted by the Royal Commission, and which have caused problems for the legal profession (including limitation periods & vicarious liability)

<u>Limitation periods</u>

4. There has been a reasonably adequate response from the various states to the issue of limitation problems. Until only recently, if a person wanted to litigate in a child sexual abuse matter, he or she faced a limitation period of three years, with a requirement in all states to pass a fairly significant bar, which proved impossible in a vast number of cases.

5. Since then, the states have introduced limitation amendments to deal with the problem. The limitation periods and their enforcement throughout Australia have been, and remain, incredibly varied.

6. In line with the recommendations of the Royal Commission, Victoria and NSW removed all limitation periods in respect of sexual and physical abuse, and associated psychological abuse.

7. In NSW, physical abuse has to be *significant*, but the distinction is without any great consequence. The NSW amendment is contained in s 6A of the *Limitation Act*, and reads as follows:

> An action for damages that relates to the death of or personal injury to a person resulting from an act or omission that constitutes child abuse of the person may be brought at any time and is not subject to any limitation period under this Act despite any other provision of this Act.

8. In this section, child abuse is defined as:

> Any of the following perpetrated against a person when the person is under 18 years of age:
> (a) sexual abuse
> (b) serious physical abuse
> (c) any other abuse ("connected abuse") perpetrated in connection with sexual abuse or serious physical abuse of the person

9. In Queensland, the amendments were limited to sexual abuse (i.e. did not include reference to physical/associated psychological abuse). In South Australia, the amendments were also limited to sexual abuse, *but only in respect of institutions*. Western Australia has legislation under consideration, and debate is ongoing. Tasmania has taken no action. Both the ACT and NT have adopted the NSW approach.

10. The process is slow and painful, but at least the majority of Australians now have access to a common law action.

11. The Commonwealth has issued a directive, which is limited to a period leading up to 30 April 2019, whereby time-barred actions for child sexual abuse do not require pleadings. The directive is troubling, especially given the Royal Commission's finding that the average time (out of the 6000 or so cases it examined) from abuse to first reporting was 22 years. An Anglican Church survey in Queensland produced a remarkably similar figure of 23 years. So placing a limit of 30 April 2019 on actions in effect against the Commonwealth really is unacceptably short. A lot of victims, and recent victims of the last couple of decades, will not yet have found the courage or capacity to have come forward.

12. There are defences available to s 6A and other limitation amendments, particularly where a case is very difficult to run, and the defendant is in an impossibly prejudiced position. In the recent Victorian Court of Appeal decision in *Connellan v Murphy* [2017], a stay was granted on the basis that it was pretty well impossible to run a fair trial. The Court did emphasise that a result like this would be very rare. (The stay is possible in Victoria, NSW and QLD.)

13. The onus is very clearly upon the institution seeking to obtain the stay. The Victorian Court of Appeal made it very clear that the threshold is not whether *any* prejudice has occurred, but instead whether the case is an extreme case, before justice to the victim is going to be denied. (*Connellan v Murphy* [2017] was one such extreme case.) So stays are not going stop many cases.

14. The various states' responses to the Royal Commission of amending the limitation period has been more or less satisfactory. The issue that was first identified was the delay (up to 22 years on average) before people became aware of the relevant abuse, which created the limitation problem. This now seems to have been addressed reasonably well.

15. The changes operate with retrospective effect, as they have to if they are intended to provide any measure of justice.

Vicarious liability

16. A problem which has always existed is the question that arises when a perpetrator of abuse, who probably carried out a criminal offence in the sexual abuse, are either dead or have no financial means to satisfy any judgment or redress for the victim. So the alternative was to look at any institution who either employed or engaged the perpetrator.

17. Two principles that may apply to render an institution liable arise where there is question over:
    - whether the institution had a non-delegable duty of care towards the victim
    - whether the principle of vicarious liability for actions of the victim can apply

18. The real problem with vicarious liability became particularly apparent following the decision in *Ellis v Pell*. John Ellis was abused by a Benedictine father who was appointed as a parish priest by the Archbishop of Sydney a considerable time ago. The Church, very late in the proceedings, raised two defences:
    - the first of which was that the Church does not exist as a legal entity, and as an unincorporated association, its membership is so uncertain that the ordinary orders that could be sought against the leaders of an unincorporated association could not be made
    - the second of which was that the Church, even if it does exist as a legal entity, does not employ priests, nor does the Archbishop and/or trustees who hold all the assets of the Church

19. It was argued that in these circumstances there can be no vicarious liability, which the Court of Appeal upheld. This problem is not a new one – it has been raised before. The commencement of consideration of these issues arose in the cases of *Bazley v Curry* [1999] & *Jacobi v Griffiths* [1999]. These cases established the close connection test for vicarious liability, and were followed by the House of Lords in *Lister v Hesley Hall Ltd* [2001].

20. The Catholic Church had always taken the view that its trustees were the appropriate body to be sued, and only in *Ellis v Pell* did Cardinal Pell challenge this view for the first time. It is not a view shared by the Catholic Church anywhere else in the common law world.

21. The Catholic Church has always accepted and continues to accept that the trustees are a secular arm, they hold all the property and assets, and they are the appropriate body to be sued. This was the view which had, until Cardinal Pell's intervention in this case, prevailed in Australia.

22. The Church has since indicated that it is not their intention to pursue this new approach, and that they will continue to provide a defendant. Archbishops Denis Hart of Melbourne and Anthony Fisher of Sydney have stated publicly that:

'It is the agreed position of every bishop and every leader of a religious congregation in Australia that we will not be seeking to protect our assets by avoiding responsibility in these matters, and that anyone suing should be told who is the appropriate person to sue, and ensure they are indemnified or insured, so that people will get their damages and their settlements.'

23. Unfortunately, the Bishop of Ballarat has reneged upon his own undertaking, and has pleaded in defence of actions brought against him (him being the defendant nominated by the Church) that he is not liable vicariously for the abuse by priests made out in a very large number of cases.

24. The Archdiocese of Sydney issued a statement in which they said that *Ellis v Pell* did not create new law, and the Church was entitled to take the position that it not be held vicariously liable on the basis that priests are not its employees.

25. Practically, it comes down to an exercise of discretion by every bishop as to whether or not they offer up a defendant, and whether or not they accept vicarious liability for the conduct of those who are not employed by the nominated defendant (which includes priests, teachers of parochial schools, etc.) It is a thoroughly unsatisfactory situation.

26. The priest in *Ellis v Pell* was engaged by the archdiocese, and expressly appointed by the archbishop. He was required to carry on certain duties for/on behalf of the archbishop. So in many respects he would appear to be an employee of the archbishop or archdiocese. The Church, which is not a legal entity, alleged that his payments came from the parish, which is also not a legal entity, and therefore that no one could be liable.

27. This issue has been addressed in Canada, Ireland, England and Wales, and is something the Royal Commission examined in some detail. Vicarious liability seems now to be the most effective way of being able to represent a victim of abuse and obtain some form of redress.

Bazley v Curry [1999] 2 SCR 534

28. In the Canadian decision of *Bazley v Curry* [1999], the court looked into the perpetrator's position of power, trust and intimacy such that a connection between the perpetrator and the institution may have been created.

29. The Canadian Supreme Court in this case said that in circumstances where there is:

- a disproportion in power between the abuser and the victim,

- intimacy, and
- the ability to abuse, which is in effect created by the institution (though the institution is not negligent in the supervision of the abuser)

the close connection test is established, and there should be vicarious liability.

30. This was almost the beginning of what we now call the close connection test. The House of Lords took the same view in *Lister v Hesley Hall Ltd* [2001]. The House of Lords in this case stated specifically that vicarious liability can extend in certain circumstances to criminal actions of the perpetrator.

31. The High Court in this case held that non-delegable duties of care are in fact delegable. The English Supreme Court has recently said the same thing, despite what was said in *Woodland*.

32. There has been a clear body of law on non-delegable duties since 1912. Most recently in the case of *Prince Alfred College Incorporated v ADC* [2016], the High Court unanimously confirmed that criminality does not prevent vicarious liability.

New South Wales v Lepore [2003] HCA 4; 212 CLR 511

33. The majority in this case split four ways:
    - Gleeson CJ adopted something analogous to the close connection test
    - Gaudron J said the defendant was estopped from denying liability
    - Kirby J adopted the close connection test in full
    - McHugh J accepted plaintiff's argument for non-delegable duty

34. The minority took the view that criminality precluded vicarious liability. The plaintiff was sent back to the Court of Appeal for the matter to be redetermined in respect of vicarious liability, and the NSW government then settled up the claim on terms satisfactory to the plaintiff. So, in effect, the close connection test was upheld by the majority in *Lepore.*

35. A very useful case for those who practise in this area is *Catholic Child Welfare Society and others (Appellants) v Various Claimants and The Institute of the Brothers of the Christian Schools (Respondents)* [2012] UKSC 56, otherwise known as the 'Various Claimants case'. This case analysed the decision in *Lepore*, with Lord Phillips describing the various rationales it produced as a 'bewildering display of rationale'.

36. In the 'Various Claimants' case, it was said by Lord Phillips that:

    - it is possible for an unincorporated association to be vicariously liable for the tortious acts of its members

- the defendant may be vicariously liable for the tortious act of another defendant, even though the act in question constitutes a violation of the duty owed, and even if the act in question is a criminal offence
- vicarious liability can even extend to liability for a criminal act of sexual assault (following *Lister v Hesley Hall Ltd*)
- it is possible for two different defendants to be each vicariously liable for the single tortious act of another defendant

37. The 'Various Claimants' case is the leading decision in this area. Lord Phillips in this case set out exactly what is meant by the close connection test, saying at [86]:

Vicarious liability is imposed where a defendant, whose relationship with the abuser put it in a position to use the abuser to carry on its business or to further its own interests, has done so in a manner which has created or significantly enhanced the risk that the victim or victims would suffer the relevant abuse … the essential closeness of connection between the relationship between the defendant and the tortfeasor and the acts of abuse thus involves a strong causative link. These are the criteria that establish the necessary 'close connection' between relationship and abuse.

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

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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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