Vicarious Liability and Historical Abuse: A Critical Analysis of *Hickey v McGowan*

I. Introduction

Until 2017, Irish law regarding vicarious liability was at odds with a broad trend throughout the common law world. In recent years, alternative approaches have imposed liability where wrongful conduct had a "close connection" with, or constituted~~,~~ an "enterprise risk" to, the defendant employer.[1] In addition, vicarious liability has now expanded abroad beyond the employment context, to impose liability in situations "akin to employment" or for members of unincorporated associations, such as religious orders.[2] In February 2017, in *Hickey v McGowan* the Irish Supreme Court held the Marist Order of Brothers, an unincorporated association, vicariously liable for the sexual abuse perpetrated by a member of the Order in the context of primary education.[3] In doing so, O'Donnell J. not only endorsed the "close connection" test to vicarious liability in Irish law, but also adopted a distinctive approach to extending vicarious liability beyond an employment context. This note evaluates the trend abroad and the recent Supreme Court decision in *McGowan* on the expanded test of vicarious liability and its application beyond the employment context.

II. Vicarious Liability: The Trend Abroad

Under the traditional "course of employment" test, an employer could be held vicariously liable both for employee acts authorised by the employer and for unauthorised acts that were so connected with authorised acts that they could be regarded as improper modes of performing authorised acts.[4] This approach, strictly understood, excluded liability for sexual abuse, as such conduct could never be authorised by an employer.[5] In *Bazley v Curry*, the Canadian Supreme Court concluded that the defendant was vicariously liable for the sexual abuse by its employee owing to the opportunity for intimate private control and a quasi-parental relationship created by his terms of employment.[6] This approach was broadly adopted in the United Kingdom in *Lister v Hall*, where the House of Lords held that the sexual abuse of boys resident in a boarding school was sufficiently connected with the work of the perpetrator to constitute its being done in the course of employment.[7] This "close connection" approach, which considers the connection between the wrongdoing and the purpose for

[1] *Bazley v Curry*- (1999) 144 D.L.R. (4th) 45; *Lister v Hesley Hall Ltd* [2002] 1 A.C. 215.
[2] *John Doe v Bennett* [2004] 1 S.C.R. 436; *JGE v The Trustees of the Portsmouth Roman Catholic Diocesan Trust* [2013] Q.B. 722; [2012] EWCA Civ. 938; *Hickey v McGowan* [2017] IESC 6; [2017] I.L.R.M. 293.
[3] *Hickey v McGowan* [2017] IESC 6; [2017] I.L.R.M. 293.
[4] J.W. Salmond, R.F.V. Heuston and R.A. Buckley, *Salmond and Heuston on the Law of Torts*, 19th edn (London: Sweet and Maxwell, 1987), pp.521–522; *Canadian Pacific Railway Co v Lockhart* [1942] A.C. 591 at 599.
[5] *S.T. v North Yorkshire County Council* [1999] I.R.L.R. 98; *Health Board v BC* [1994] E.L.R. 27.
[6] *Bazley v Curry*- (1999) 144 D.L.R. (4th) 45.
[7] *Lister v Hesley Hall Ltd* [2002] 1 A.C. 215.

which the defendant organisation engaged the perpetrator, has not proved uncontroversial,[8] but is now considered in contexts outside that of historical institutional abuse.[9] Laura Hoyano notes that the Canadian approach signals both *when* and *why* vicarious liability should be imposed for intentional torts,[10] while subsequent UK cases have affirmed the emphasis of the "enterprise risk" justification for vicarious liability.[11]

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Until 2017, the Irish Supreme Court had refused to impose vicarious liability on the basis of this "close connection" approach.[12] In *Delahunty v South Eastern Health Board*, vicarious liability was rejected where a young boy visiting a residential school was sexually abused by a house parent. The court concluded that the defendant had no control over the perpetrator and lacked the requisite degree of connection between his employment and the sexual assault.[13] In *O'Keeffe v Hickey* the Irish Supreme Court declined to impose vicarious liability and demonstrated a division in the court between the approaches of Hardiman J., and Fennelly and Geoghegan JJ.[14] The plaintiff, who had suffered child sexual abuse in a national primary school, claimed inter alia that the State was vicariously liable.[15] Hardiman J. ruled that, having regard to the limited State control and management of schools owned and operated by religious dioceses, Ireland was not vicariously liable.[16] He viewed the approaches in Canada, the United Kingdom and Australia as utterly useless as predictive tools and as paying too much heed to the need to find a source of compensation.[17] He was also concerned about the "chilling effect" on enterprise posed by the expansion abroad and associated risks of unpredictable liability and increased insurance costs.[18] He rejected the "enterprise risk" justification for vicarious liability: "I do not accept that the State, in performing its constitutional duty to provide for free primary education is creating a risk". Hardiman J. observed that the sexual abuse of a pupil was not within the scope of a teacher's employment but "was an unusual act, little discussed, and certainly not regarded as an ordinary foreseeable risk of attending at a school". He concluded that, in the absence of direct State control and management of schools, Ireland was not vicariously liable.[19]

[8] Paula Giliker, "Rough Justice in an Unjust World" (2002) 65 *Modern Law Review* 269.
[9] *Mohamud v Wm Morrison Supermarkets Plc* [2016] UKSC 11; [2016] 2 W.L.R. 821.
[10] Laura Hoyano, "Ecclesiastical Responsibility for Clerical Wrongdoing" (2010) 18 Tort L. Rev. 154 at 163.
[11] *Mutua v Foreign and Commonwealth Office* [2012] EWHC 2678; *A v Trustees of the Watchtower Bible & Tract Society* [2015] EWHC 1722 (QB).
[12] Desmond Ryan, "Close Connection" and "Akin to Employment": Perspectives on 50 Years of Radical Developments in Vicarious Liability" (2016) 56 *The Irish Jurist*, 239–260 at 243.
[13] *Delahunty v South Eastern Health Board* [2003] 4 I.R. 361.
[14] *O'Keeffe v Hickey* [2009] 2 I.R. 302; *Reilly v Deveraux* [2009] IESC 22.
[15] *O'Keeffe v Hickey* [2009] 2 I.R. 302.
[16] [2009] 2 I.R. 302 at 343.
[17] [2009] 2 I.R. 302 at 339–340.
[18] [2009] 2 I.R. 302 at 321.
[19] [2009] 2 I.R. 302 at 328, 343.

Fennelly J. noted that, while *Bazley* explored policy considerations and *Lister* adopted an incremental approach to the common law, both shared a common test: "the closeness of the connection between the abuse and the work which the employee was engaged to carry out".[20] He viewed the close connection test as well established in authority and considered that it was fair and just to impose liability for criminal acts intrinsically not authorised by an employer. He viewed the close connection test as one that did not provide for automatic liability, noting in this regard the requirement in *Bazely* to provide intimate physical care and the need for a case-specific contextual determination.[21] However, he concluded that Ireland was not vicariously liable, as, acting as school manager, the local priest, not Ireland, employed the perpetrator. He determined that an employment relationship was required in close connection cases. A similar approach was adopted in *Reilly v Devereux*, where the plaintiff alleged he had been sexually assaulted by a superior officer while serving as a member of the defence forces. Kearns P. excluded vicarious liability because of a lack of intimacy or quasi-parental role or responsibility in the relationship between perpetrator and victim plaintiff, while also recognising that there was a supervisory and disciplinary role.[22] The judgments in *O'Keeffe* and *Reilly* placed Irish claimants in a far weaker position than similar claimants under English, Canadian and Australian law.

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In addition, a second expansionary trend to vicarious liability emerged, imposing liability beyond the context of employment, but also in situations "akin to employment".[23] In *Doe v Bennett*, the Canadian Supreme Court held that the non-employment relationship between priest and bishop was sufficiently close to impose vicarious liability since a bishop exercises significant control over a priest.[24] In *JGE v The Portsmouth Roman Catholic Diocesan Trust*, the English Court of Appeal agreed with MacDuff J., at first instance, that a priest was appointed to carry out the work of a church and that, despite the absence of a contract of employment, his use of church premises, of clerical robes and of authority as representative of the church created a relationship between the priest and the bishop that was "akin to employment" sufficient to impose vicarious liability for child sexual abuse.[25] Subsequently, in *CCWS*, the UK Supreme Court held the defendant organisation vicariously liable for alleged acts of sexual and physical abuse of children by its members at a

[20] [2009] 2 I.R. 302 at 375.
[21] [2009] 2 I.R. 302 at 378.
[22] *Reilly v Devereaux* [2009] IESC 22.
[23] Elizabeth-Anne Gumbel, "Developments in vicarious liability: a practitioner's perspective" (2015) 31(4) *Professional Negligence* 218–234.
[24] *Doe v Bennett* 2004 SCC 17.
[25] *JGE v Portsmouth Roman Catholic Diocesan Trust* [2012] EWCA Civ. 938; [2013] 2 W.L.R. 958.

residential school.[26] Lord Phillips found that the relationship between the organisation and its members had all of the essential elements of an employer/employee relationship and was capable of giving rise to vicarious liability.[27] This question of vicarious liability outside the employment context was not addressed directly in *O'Keeffe*, but it is in the context of these two expansionary trends that we can examine the impact of the decision in *Hickey v McGowan.*

III. *Hickey v McGowan*

In *Hickey v McGowan*, the plaintiff alleged that he was sexually abused by a Marist Brother teacher at a national school and alleged that the head of the Marist Brothers in Ireland, an unincorporated association, was vicariously liable. The High Court concluded that the perpetrator, as a member of the Order, was subject to its authority, orders and discipline and that the Order had control of the school on a day-to-day basis.[28] Surprisingly, given the disagreement in the Supreme Court in *O'Keeffe* regarding the appropriate test for vicarious liability, O'Neill J. stated that "the majority of the Supreme Court in the *O'Keeffe* case held that the 'close connection' test is now firmly embedded in our jurisprudence on vicarious liability",[29] and applied this test to hold the Order vicariously liable, drawing extensively from the UK *CCWS* case.[30]

On appeal, the Supreme Court ~~relied on this case as providing an~~took the opportunity to clarify its decision in *O'Keeffe.* It concluded that Fennelly J.'s view, accepting a "close connection" test, represented the majority decision on vicarious liability, but that Hardiman J.'s judgment was "very useful in identifying the critical issues", although he adhered to a strict "unauthorised mode of performance of the task" test. O'Donnell J., writing for the majority, stated that the "close connection" test should now be taken to represent the law in Ireland on vicarious liability and that, despite the absence of a residential component to the school and the fact that the children were not particularly vulnerable, this test was met in *Hickey*.[31] He suggested that, as the abuse took place "during the very act of teaching in the classroom", there was no question as to whether the close connection test had been met. The situation can be distinguished from *O'Keeffe*, where the State defendant lacked effective control over the perpetrator.

O'Donnell J. considered the policy justifications for vicarious liability and the close connection test. He noted that liability without fault arose where a "defendant creates, or permits and often benefits

[26] *Various Claimants v The Catholic Child Welfare Society* [2012] UKSC 56; [2012] 3 W.L.R. 1319.
[27] [2012] UKSC 56 at para.56.
[28] *Hickey v McGowan*, judgment of the High Court (O'Neill J.), [2014] IEHC 19 at paras 38–42.
[29] [2014] IEHC 19, *per* O'Neill J. at para.44.
[30] [2014] IEHC 19 at paras 58–69.
[31] [2017] IESC 6 at para.26.

from, a situation which carries with it the risk of injury or the wrongdoing by others". On this account, it is fair to impose liability on those who choose a general activity of value to them, which creates or exacerbates attendant risks.[32] In doing so, he rejected the "deep pockets" justification, that vicarious liability is designed to provide compensation through identification of suitably wealthy defendants.[33] This important clarification aligns Ireland broadly with the trend in other common law jurisdictions. It reflects the clarification of the UK Supreme Court in *Cox v Ministry of Justice*, where Lord Reed concluded that "the essential idea is that the defendant should be liable for torts that may fairly be regarded as risks of his business activities".[34] He clarified the point that "business activity" did not require the defendant to be a business or enterprise with a commercial motivation.[35]

However, while a welcome clarification of the test and justification for vicarious liability, the approach in *Hickey* may be open to the same criticisms as in the UK, namely, that an emphasis on risk creation may be conceptually open-ended.[36] Paula Giliker argues that a focus on risk does not address why vicarious liability is the best means to address this issue, nor why the employer is liable only for the risks of tortious harm and is not liable for all inherent risks of the workplace.[37] O'Donnell J.'s judgment limits the potential expansion of the risk creation justification in its consideration of how the Marist Order, as an unincorporated association, could be understood to be vicariously liable for the actions of the perpetrator. The Supreme Court noted that in *CCWS* the UK Supreme Court treated "the individually named defendants as if they were a single corporate body able to own property and possess substantial assets".[38] O'Donnell J. took the view that UK cases which held that an unincorporated association can be vicariously liable for the acts of its members are in fact cases about trade unions and partnerships, which have statutory recognition and status for the purposes of legal proceedings.[39] In refusing to treat the Marist Order like an incorporated association, O'Donnell J. decided that the court must address the liability of members of an

[32] [2017] IESC 6 at para.41.
[33] [2017] IESC 6 at para.43.
[34] *Cox v Ministry of Justice* [2016] UKSC 10 at para.23.
[35] [2016] UKSC 10 at para.29.
[36] Des Ryan, "Making Connections: New Approaches to Vicarious Liability in Comparative Perspective" (2008) 30 *Dublin University Law Journal* 1; C. Mclvor, "The Use and Abuse of the Doctrine of Vicarious Liability" (2006) 35 Comm L. World Rev. 268; David Tan, "A sufficiently close relationship akin to employment" (2013) 129 *Law Quarterly Review* 30.
[37] Paula Giliker, "Vicarious Liability 'On the Move': The English Supreme Court and Enterprise Liability" (2013) 4 (3) *Journal of European Tort Law* at 306–313, 309–10.
[38] [2017] IESC 6 at paras 27–33.
[39] [2017] IESC 6 at para.49.

unincorporated association.[40] He ascertained whether the appropriate comparison for a religious order was that of an employer/employee relationship:

> "There is … something slightly absurd in seeking to draw comparisons between the case of religious orders and businesses. Furthermore, the tests and language applicable when considering the case of employment and analogous relationships, such as "enterprise" and "risk" are not easily applicable in the case of religious orders. Indeed, to apply tests drawn from the relatively modern world of commerce and industry to religious organisations which have existed for centuries is in my view, to miss the sheer scale and impact of religious institutions on peoples' daily lives, particularly in the Ireland of the first three-quarters of the 20th century. The relationship between members of an order and his or her fellow members and indeed the order itself was much more intense, constant and all pervasive than the relationship between an employer and an employee, or in the old language of the late Victorian cases, a master and his servant. Everything in the organisation of religious orders is directed towards emphasising the collective. The vow of obedience involves subjugation of individual will to that of the superior. The vow of poverty has the effect of making the member dependent upon the order's collective resources. The vow of celibacy emphasises the focus of the member on relationships with the order and with God. The objective of teaching young people is not merely incidental to the work of an order, it is indeed the manner in which the order seeks to achieve its object. For a member of the order, teaching was not merely a job it was a religious vocation."[41]

This dictum represents a critical insight into the distinctive application of the principles of control, risk creation and enterprise to an environment that is not primarily understood as commercial in nature and acknowledges the particular nature of institutional responsibility concerning religious organisations. O'Donnell J. noted that the relationship between members and the Order, and the importance to the Order of the members as teachers of young people are matters which have no direct comparators in the secular world.[42] He observed that "once it is accepted there can be vicarious liability of acts of abuse, a religious order (or its members) may be vicariously liable for acts of abuse which are sufficiently closely connected to the object and mission of the order".[43]

In so doing, O'Donnell J. reframed the "enterprise risk" justification of the "close connection" test to use non-commercial language and sought to position this approach within the "cautious and incremental approach outlined by Fennelly J. in *O'Keeffe*". The decision in *Hickey* may extend vicarious liability principally to unincorporated religious orders, whose degree of control and obedience is far more than what is required in an employment context, but may exclude other voluntary unincorporated associations. O'Donnell J. stressed that "the mere fact of voluntary association may not create the type of intense relationship that justifies imposing vicarious liability

[40] [2017] IESC 6 at para.52.
[41] [2017] IESC 6 at para.37.
[42] [2017] IESC 6 at para.38.
[43] [2017] IESC 6 at para.38.

in the case of a religious order".[44] This approach differs from both the United Kingdom and Canadian approaches, and has the effect of more accurately reflecting the legal status of unincorporated groups as a broad and diverse category, with the intense structure and control of religious organisations only one expression of this legal category; one which warrants vicarious liability where sufficient levels of control over members exist. However, this approach may also have the practical effect of limiting the extent of a remedy for victim-survivors, despite the presence of such control. In *Hickey*, O'Donnell J. ruled that current members of the association were not vicariously liable for acts of a member prior to the defendant's becoming a member of the association. The members *at the time the act is committed* were liable, rather than the members, for example, at the time the proceedings are commenced.[45] In instances of historical abuse involving unincorporated religious congregations, other members at the time of the commission of abuse may be deceased and the implications for suit at a diocesan level against a bishop, who may be the actor with effective control over alleged abusers, remain unclear.[46]

These uncertainties are compounded by O'Donnell J.'s acknowledgement that such claims are typically seeking to draw compensation indirectly from a defendant's insurance policy which may impact historical claims. In this regard he wrote that "(t)he resulting cost would not be spread over those few policies which might still exist, and which could be said to cover abuse which occurred nearly 50 years ago. Instead the cost will be borne by the insurance company and sought to be recouped by increased premiums from future policy holders, not responsible for the abuse and perhaps not religious orders".[47] This concern is not unique to Ireland. Paula Giliker notes that vicarious liability may only be understood by recognising the influence not only of the conflicting policies of corrective and distributive justice, but of background factors such as insurance, the lobbying power of other stakeholders, and alternative compensatory mechanisms.[48] O'Donnell J. considered the impact of multiple claims on religious organisations:

> " … the potential range and number of claims brought in respect of historic sexual abuse raise the prospect of very extensive potential liabilities which in other countries have led to the bankruptcy of parishes, dioceses or institutions, and may threaten their capacity to continue to undertake valuable work in the community with marginalised and vulnerable people, which, it should be recognised, is work that was carried out by members of

[44] [2017] IESC 6 at para.39.
[45] [2017] IESC 6 at para.56.
[46] [2017] IESC 6 at para.71.
[47] [2017] IESC 6 at para.45.
[48] Paula Giliker, "Vicarious Liability or Liability for the Acts of Others in Tort: A Comparative Perspective" (2011) 2 *Journal of European Tort Law* 31 at 56.

religious orders—themselves not merely blameless for the particular wrongdoing but who are admirable for their selfless devotion to charitable works."[49]

While it is possible to agree with O'Donnell J. that appropriately redressing historical abuse may be "beyond the reach of inter-party litigation and any possible development of the common law",[50] there is a peculiar irony that the court had regard to the potential hardship, or empty pockets, on religious congregations arising from historical abuse litigation, while in both *O'Keeffe* and *Hickey* rejecting a deep-pockets justification in favour of plaintiffs. If the court is to speculate on policy questions, it should not do so selectively. A holistic view would instead have regard to the extent to which church institutions and religious orders engaged with State-run investigations and redress schemes, and with those who allege historical abuse in the first instance.[51] Discussions of policy implications should not be considered from the perspective of one party to a dispute alone.

Although dissenting, Charleton J. agreed with the majority in a number of respects. First, he agreed that the relationship between persons in religious orders is more demanding than in employment.[52] Second, he accepted that child sexual abuse perpetrated by an individual engaged in the present context demonstrated a "close connection" to the teaching role devolved to the wrongdoer.[53] Third, he agreed with O'Donnell J. in rejecting the *CCWS* approach, suggesting instead that "members of a group responsible at the time for the negligent organisation of an event share liability".[54] Charleton J. emphasised that "rights and liabilities do not continue despite people calling themselves the same name. When they are gone, the liability is not passed on", owing to the lack of incorporation, but with a possible exception for continual liability for the head of the religious order as a corporation sole.[55] Charleton J. concluded that a retrial was necessary on the question of the continuation of the concept of corporation sole in Irish law and its applicability to the head of a religious order, but the majority felt that this was unwarranted.

IV. Conclusion

Hickey v McGowan provides an important clarification on the Irish law of vicarious liability. By adopting the "close connection" test, the Supreme Court has enabled greater use of vicarious liability for sexual abuse and other acts of intentional wrongdoing. It also aligned Irish

[49] [2017] IESC 6 at para.48.
[50] [2017] IESC 6 at para.43.
[51] Comptroller and Auditor General, Cost of Child Abuse Inquiry and Redress, Special Report No. 96, December 2016.
[52] [2017] IESC 6. Judgment of Charleton J. at paras 19, 27.
[53] [2017] IESC 6 at para.36.
[54] [2017] IESC 6 at para.48.
[55] [2017] IESC 6 at paras 54–60.

jurisprudence with other common law jurisdictions in enabling, albeit in a limited fashion, vicarious liability for unincorporated associations. However, the decision also leaves some questions unanswered. O'Donnell J. sought to restrict application of his approach to religious organisations. It remains to be seen what other forms of unincorporated association, if any, can be held vicariously liable. Second, it remains for Irish courts to clarify the relationship between different forms of institutional liability: secondary liability, such as vicarious liability considered here, may overlap with the non-delegable duty on State and certain private institutions to ensure that care is taken.[56] Courts in both Canada and the United Kingdom have been faced with the task of clarifying the relationship between these forms of liability.[57] Finally, and relatedly, *Hickey* provides further evidence that the best tactic for potential plaintiffs in this context remains to join suit against church, State and individual defendants who were members of a religious order at the time of the commission of the offence with potential liability for historical abuse. The question of a corporation sole may need to be revisited as ongoing challenges regarding historical abuse emerge.

[56] *Woodland v Essex County Council* [2013] UKSC 66; [2014] A.C. 537.
[57] Jonathan Morgan, "Liability for Independent Contractors in Contract and Tort: Duties to Ensure that Care is Taken" (2015) 74(1) *Cambridge Law Journal* 109–139; Paula Giliker, "Vicarious liability, non-delegable duties and teachers: can you outsource liability for lessons?" (2015) 31(4) *Professional Negligence* 259–275.

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