O'Keeffe v Ireland : The Liability of States for Failure to Provide an Effective System for the Detection and Prevention of Child Sexual Abuse in Education

Abstract:

In *O'Keeffe v Ireland*, the Grand Chamber of the European Court of Human Rights found that Ireland failed to protect the applicant from sexual abuse suffered as a child in an Irish National School in 1973 and violated her rights under article 3 (prohibition of inhuman and degrading treatment) and article 13 (right to an effective remedy) of the European Convention on Human Rights (the Convention). This note argues that the decision is important in expanding the Court's jurisprudence regarding positive obligations under Article 3 of the Convention to child sexual abuse in a non-State setting where there was no knowledge of a "real and immediate" risk to the applicant. It is also argues that the case raises concerns about the Court's methodology for the historical application of the Convention and about the interaction of Article 3 positive obligations with vicarious liability in common law tort regimes.

Keywords: Vicarious liability, Article 3 positive obligations, methodology, inter temporal law

Introduction

In *O'Keeffe v Ireland*, the European Court of Human Rights considered whether Ireland should have been aware of the risk of child sexual abuse in schools owned and managed by the Catholic Church and whether, given the State's limited role of financial support, there was effective legislative and policy protection.[1] In holding Ireland liable for a system that subjected children to the risk of sexual abuse in an educational context, the Court expanded its jurisprudence on the positive obligations under Article 3 of the Convention. This note argues that the case also raises concerns about the Court's methodology for the historical application of the Convention and about the interaction of Article 3 positive obligations with vicarious liability in common law tort regimes.

Facts of the Case

From 1968 the applicant Louise O'Keeffe attended Dunderrow National School, which was staffed primarily with lay teachers, but managed by the local priest and owned by the local Catholic Bishop. She and her parents were unaware that the school manager had received a complaint in 1971 alleging that a teacher, LH, had sexually abused a child, but had not acted upon that complaint. In 1973 the applicant was subjected to approximately 20 sexual assaults by LH in his classroom. Following a meeting of parents with school authorities in 1973, alleging sexual abuse of

[1] *O'Keeffe v Ireland 35810/09 Judgment 28 January 2014*

several children, LH resigned but was later employed in another school until his retirement. In 1996, police contacted the applicant after complaints against LH by another former pupil. LH was charged with 386 criminal offences of sexual abuse involving 21 former pupils over a period of 10 years. In 1998, he pleaded guilty to 21 sample charges and was imprisoned.

In 1998 the applicant was awarded €53,962.24 by the Criminal Injuries Compensation Tribunal which administers *ex gratia* compensation for criminally inflicted personal injuries. The applicant also commenced civil proceedings against LH and Ireland. She claimed Ireland was: (i) negligent in its failure to prevent ongoing abuse by LH; (ii) vicariously liable for the acts of LH based on its relationship with LH; and (iii) liable as the educational provider under article 42 of the Irish Constitution. LH did not defend the civil action and the applicant was awarded €305,104 in damages. Ireland applied to strike out the case, arguing it had no *prima facie* liability.

The High Court accepted Ireland's application, being "satisfied that the plaintiff had not established a case in negligence".[2] It subsequently held that Ireland was not vicariously liable for the abuse by LH.[3] De Valera J concluded that Ireland did not exercise management functions regarding education, which were exercised instead by the church authorities.[4] The applicant challenged the vicarious liability finding in the Irish Supreme Court.[5] Hardiman J noted that Ireland financed a system of education "but did not manage it or administer it at the point of delivery".[6] The constitutional obligation in Article 42(4) on Ireland to "provide for" free primary education reflected a largely State funded, but entirely clerically administered, system of education.[7] At the time of the abuse, education was regulated by the 1965 Rules for National Schools and by Ministerial letters, circulars and notes. Such rules were general in nature and did not enable direct State control of schools because "there was interposed between the State and the child the manager or the committee or board of management".[8] Hardiman J observed that the sexual abuse of a pupil was the negation of a teacher's employment but that in 1973 it "was an unusual act, little discussed, and certainly not regarded as an ordinary foreseeable risk of attending at a

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[2] ibid, at [26]
[3] L.O'K v L.H. & Ors [2006] IEHC 13
[4] Reliance was placed on Delahunty v. South Eastern Health Board [2003] IEHC 132.
[5] O'Keeffe v. Hickey, [2008] IESC 72 [2009] 2 IR 302
[6] [2009] 2 IR 310
[7] [2009] 2 IR 312
[8] [2009] 2 IR 316

school".[9] He concluded that, having regard to the limited State control and management of schools, Ireland was not vicariously liable.[10] Fennelly J considered that a test of close connection between the abuse and the work which LH was required to perform, drawn from comparative case-law on vicarious liability, was appropriate and involved a highly contextual factual determination of liability.[11] He nonetheless concluded that Ireland was not vicariously liable as the local priest as school manager, not Ireland, employed LH.[12] Geoghegan J dissented, accepting that Ireland had no knowledge of the abuse, but that most primary education in Ireland took the form of a joint enterprise of Church and State and that Ireland should be vicariously liable for wrongs which, if discovered, would have rendered LH unsuitable to be retained.[13]

The Decision of the European Court of Human Rights

The applicant appealed to the European Court of Human Rights arguing that Ireland failed to protect her from sexual abuse by LH and left her without an effective remedy.[14] She relied upon Articles 3, 8, 13 and 14 of the Convention and Article 2 of Protocol 1. A majority of the Court dismissed Ireland's preliminary objections as unfounded, found Ireland in breach of its positive obligations under Article 3 to prevent torture, inhuman and degrading treatment and in breach of its obligations under Article 13 to provide an effective remedy and dismissed the other claims. Judge Ziemele concurred, but criticised the Court's methodology. A joint dissenting opinion criticised not only the majority's methodology, but also its "ideological" conclusions regarding Ireland's approach to education. These concerns are expanded in the dissenting opinion of Judge Charleton.

Article 3: Liability of Ireland for the Sexual Abuse by a Lay Teacher

The applicant claimed that Ireland had failed, in violation of its positive obligation under Article 3, to put in place an adequate legal framework of protection of children from a known or

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[9] [2009] 2 IR 328
[10] [2009] 2 IR 343
[11] [2009] 2 IR 373-8
[12] [2009] 2 IR 379-80
[13] [2009] 2 IR 348
[14] In 2012, the case was relinquished from a Chamber of the Court to the Grand Chamber. In the original chamber, Angelika Nußberger, substitute judge, replaced Ganna Yudkivska who was unable to take part in the further consideration of the case relinquished jurisdiction in favour of the Grand Chamber, neither of the parties having objected to relinquishment.

foreseeable risk of sexual abuse. It is notable that this claim is broader than Ireland's vicarious liability in tort. The Court considered that Ireland's responsibility should be assessed on the facts and standards of 1973, the year of the abuse, and should disregard "the awareness in society today of the risk of sexual abuse of minors in an educational context, which knowledge is the result of recent public controversies on the subject, including in Ireland."[15] This raises questions about the Court's methodology in considering this historical application of Convention standards, to be discussed below.

The applicant claimed that the policy applicable in 1973, the 1965 Rules for National Schools, was not effective as there was no reference to sexual abuse, no complaints procedure and no requirement to monitor, investigate or to report abuse to a State authority. A system of school inspectors operated to provide the Minister for Education with information regarding compliance with the 1965 Rules. The applicant argued that this system could have, but did not, protect children from abuse as its purpose was to ensure the quality of teaching and not to control the conduct of teachers or to receive complaints of abuse. While the sexual abuse of children was also prohibited in Irish criminal law in 1973, complaints regarding teachers' conduct were expressly channeled in policy to the non-State denominational Manager by a Guidance Note of 6 May 1970.[16] Ireland responded that it neither was aware nor should have been aware of any complaint about LH's behaviour or of a risk of sexual abuse by teachers in National Schools in the 1970s, when it claimed awareness of any such risk of child abuse was almost non-existent.[17]

The Court affirmed that Article 3 creates a positive obligation on States to ensure protection against torture, cruel inhuman and degrading treatment, which was applicable in 1973.[18] The Court noted that this positive obligation should not impose an excessive burden on States, but should at least provide effective protection of children and other vulnerable persons, especially in the provision of public services such as education, and should include reasonable steps to prevent ill-treatment of which States had or ought to have had knowledge.[19] The Court had to assess

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[15] *O'Keeffe v Ireland* (n1) at [143]

[16]ibid at [163]

[17] ibid at [132-133]

[18] ibid at [144]

[19] *X and Y v. the Netherlands* judgment of 26 March 1985, Series A no. 91, §§ 21–27; *A. v. the United Kingdom*, 23 September 1998, *Reports* 1998VI, § 22; *Z and Others v. the United Kingdom*, [GC], no. 29392/95 ECHR 2001- V, §§ 74-75; *Grzelak v. Poland*, no. 7710/02, § 87, 15 June 2010; and *Ilbeyi Kemaloğlu and Meriye Kemaloğlu v. Turkey*, no. 19986/06, § 35, 10 April 2012); *Juppala v. Finland*, no. 18620/03, § 42, 2 December 2008

whether Ireland's legal and policy framework provided this effective protection for children in education against the risk of sexual abuse and whether Ireland had, or ought to have had, knowledge of this risk in 1973.

The Court accepted that that there was no evidence before the Court of an operational failure to protect the applicant.[20] Until complaints about LH were brought to the attention of Ireland in 1995, it neither knew nor ought to have known that LH posed any risk. However, the Court determined that Ireland must have been aware of the risk of sexual abuse of children in 1973, citing pre-1970s government reports that revealed prosecution rates in Ireland for sexual offences against children.[21] The Court also relied on post-1973 reports to justify this conclusion.[22] The Court considered that when relinquishing control of the education of children to non-State actors, Ireland should have been aware, given its inherent obligation to protect children, of potential risks to their safety if there was no appropriate framework of protection, including effective mechanisms for the detection and reporting of any ill-treatment.[23] The Court concluded that the mechanisms in place did not provide sufficient protection to children in 1973 and therefore Ireland failed to fulfil its positive obligation under Article 3 of the Convention to protect the applicant from sexual abuse.

Article 13: The Effectiveness of the Remedies in Irish Law

The applicant argued that she did not have an effective remedy against Ireland for its failure to protect her from sexual abuse.[24] Ireland argued that the applicant should have sued the past and/or current Bishop as Patron of the school, his diocese, the Manager and/or the *de facto* Manager or their successors or estates. The applicant noted that the Patron and Manager had died and the present Bishop could not be sued in succession. Ireland also argued the applicant should have appealed to the Supreme Court regarding her constitutional right to bodily integrity and her claim in negligence that the State failed to structure the primary education system so as to protect her from abuse.

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[20] Osman v. the United Kingdom, 28 October 1998, Reports 1998- VIII at [115-16]

[21] *O'Keeffe v Ireland* (n1) at [69-74]

[22] ibid at [75-88], discussing the Ryan Report 2005, the Ferns Report 2005, the Murphy Report 2009; and the Cloynes Report 2011

[23] ibid at [162]; *E. and Others v. the United Kingdom*, no. 33218/96, § 112, 26 November 2002 at [99].

[24] *Z and Others v. the United Kingdom*, (n24) at [109]

The Court considered that an effective remedy should exist regardless of criminal remedies and compensation against LH, the limited civil remedies against church authorities or the applicant's inability to prove Ireland's vicarious liability. It noted that the Supreme Court rejected Ireland's vicarious liability for the acts of LH and would be unlikely to accept its vicarious liability for church authorities. Secondly, a claim against Ireland in negligence would require the recognition of a duty of care on its part to the applicant.[25] However, the exclusion of State control in National Schools would preclude any such duty.[26] The Court also concluded that Ireland had not demonstrated how it could be held responsible for a breach of the right to bodily integrity, noting that Hardiman J in the Supreme Court rejected this argument *obiter*.[27] The Court concluded that there was a violation of Article 13.

The *O'Keeffe* case provides an important acknowledgment of State responsibility for child sexual abuse suffered by Ms. O'Keeffe in the context of the Irish education system. However, the decision also raises concerns regarding the Court's approach to the positive obligations under Article 3, the Court's methodology for the historical application of the Convention and the relationship of its effective remedy jurisprudence to vicarious liability in tort law.

The Court's Methodology in the Historical Application of the Convention

The judgments of the Court disagreed on the appropriate method to apply Convention standards to the Irish legal system in 1973. Judge Ziemele agreed with the majority that the abuse suffered by the applicant was contrary to Article 3 in 1973, concluding that since 1958 the rights of children were identified as in need of special attention.[28] However, he noted that the arguments of the majority concerning Ireland's obligations in 1973 do not align well with accepted approaches to the evolution of legal standards in international law. For example, although both the International Covenant on Civil and Political Rights ("ICCPR") and the International Covenant on Economic, Social and Cultural Rights ("ICESC") were adopted in 1966, Ireland only ratified them in 1989. Moreover, both Judge Ziemele and the joint dissent were concerned that case-law

[25] *O'Keeffe v Ireland* (n1) at [66]
[26] ibid at [185]
[27] [2009] 2 IR 344
[28] Concurring opinion of Judge Ziemele at [8] ; *O'Keeffe v Ireland* (n1) at [93]

referred to was adopted subsequent to 1973.[29] Judge Ziemele suggested the judgment should refer to post-1973 developments only to demonstrate that underlying human rights principles have since given rise to a detailed set of proposals as to how to ensure the rights of children.

The joint dissenting judgment also criticised the majority's methodology, emphasising that Ireland's obligations should be assessed in the light of the facts and the Convention as understood in 1973 and as then in force. It concluded that there was no relevant case law in 1973 to support the majority's view of the positive obligation to protect, and prevent the ill-treatment of, children at school as requiring "an appropriate framework of regulations *encouraging* complaints".[30] The joint dissent noted: "[i]t is Kafkaesque to blame the Irish authorities for not complying at the time with requirements and standards developed gradually by the case-law of the Court only in subsequent decades."[31] Similarly, Charleton J concluded that in 1973, no one would have suspected that a teacher could be a source of sexual violence to his pupils.[32] He concluded that "counsels of perfection in retrospect are not to replace the fundamental requirements that a finding under Article 3 is only to be made in circumstances of grave moral failure by a State."[33]

The historical interpretation of the Convention by the majority in this case did not rigorously delineate the law applicable in 1973 and subsequent developments and reveals a loose approach to the intertemporal application of the ECHR. It is well established that generally a treaty should be interpreted as understood at the time of its conclusion.[34] In the *Palmas Arbitration* case, CJ Huber stated that "a juridical fact must be appreciated in the light of the law contemporary with it and not of the law in force at the time when a dispute in regard to it arises or falls to be settled."[35] The Strasbourg court has applied this principle to deny claims relating to periods when the ECHR was not in force for the State concerned.[36] In contrast, the Court takes an evolutionary approach over time to the substantive rights of the Convention, which operates as an exception to the

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[29] *O'Keeffe v Ireland* (n1) at [147]; Joint partly dissenting opinion of Judges Zupančič, Gyulumyan, Kalaydjieva, De Gaetano and Wojtyczek at [8]
[30] Joint partly dissenting opinion of Judges Zupančič, Gyulumyan, Kalaydjieva, De Gaetano and Wojtyczek at [8]
[31] ibid at [9]
[32] Partly dissenting Opinion of Charleton J at [19]
[33] ibid at [21]
[34] T.O. Elias, 'The Doctrine of Intertemporal Law', 74 (1980) AJIL (1980) 285; G. Fitzmaurice, 'The Law and Procedure of the International Court of Justice: General Principles and Sources of Law', 30 (1953) BYIL 1
[35] Island of Palmas Arbitration, Award of 4 April 1928, 2 U.N. Rep. Intl. Arb. Awards 829
[36] X v. Germany, application No. 1151/61, Council of Europe, European Commission of Human Rights, Recueil des décisions, No. 7 (March 1962), p. 119 (1961)

intertemporal principle.[37] In *Tyrer v UK*, the Court concluded that ECHR is a living instrument and is to be interpreted in light of present day conditions.[38] The Court has justified this approach by concluding when "interpreting the Convention regard must be had to its special character as a treaty for the collective enforcement of human rights and fundamental freedoms".[39] Beyond this character, the Court has provided little justification of the "living instrument" doctrine and generally eschews abstract theorising.[40] A specific expansion of the doctrine to consider retrospective temporal questions was not argued in *O'Keeffe.*

The general interpretive methodology of the court regarding the application of its evolutionary approach to historical cases thus remains unresolved. It is possible to agree with Charleton J that "the standards of today based on experience up to today are not necessarily how conduct in the past is fairly to be judged."[41] However it does not necessarily follow that "the Irish authorities could not reasonably have anticipated that the origin of such behaviour would be a head teacher with a mandated duty to protect children under his care."[42] It is submitted that the triangular system between school, church and State provided no meaningful State oversight of children in church-run schools and presumed a high level of trust of church authorities and teachers. Charleton J's judgment neglects to acknowledge that the need for potential State intervention was envisaged by the system of school inspectors, but this was not directed at all to the issue of abuse by a teacher towards his pupils. Even granting historical ignorance of the prevalence of such abuse in the 1970s, it seems unreasonable for Ireland to ignore oversight and regulation of the *possibility* of physical or sexual abuse by teachers of pupils.

The Court has rarely addressed the retrospective application of the Convention to historical cases to date. In *K.U. v Finland,*[43] a 2008 case involving child internet pornography, the Court concluded that in 1999, when the facts of the case occurred, "it was well known that the Internet, precisely

[37] Legal Consequences for States of the Continued Presence of South Africa in Namibia (South West Africa) Notwithstanding Security Council Resolution 276 (1970), Advisory Opinion of 21 June 1971, ICJ Reports (1971) 31-32; Ulf Linderfalk, "Doing the Right Thing for the Right Reason: Why Dynamic or Static Approaches Should be Taken in the Interpretation of Treaties" (2008) 10 Int. Comm. LR 109-141
[38] Tyrer v United Kingdom App 5856/72 (1978), para 31
[39] Soering v United Kingdom (1989) 11 EHRR 439 at para. 87
[40] Plattform "Artze fur das Leben' v Austria A 139 (1988); (1991) 13 EHRR 204 at para. 31
[41] Partly dissenting Opinion of Charleton J at [36]
[42] ibid
[43] *K.U. v Finland* [Application no. 2872/02, Judgment of 2 December 2008]

because of its anonymous character, could be used for criminal purposes".[44] In the absence of sociological data, this form of assertion remains questionable at best. In *Varnava and Others v. Turkey,* the Court observed that interpretation of the content of the obligations binding Contracting States under the Convention cannot be equated to a retroactive imposition of liability and concluded its case-law is a means of clarifying pre-existing texts to which the principle of non-retroactivity does not apply in the same manner as to legislative enactments.[45] *O'Keeffe* represented a missed opportunity for the Court to elaborate on these views and distinguish its interpretive approach from the retrospective imposition of liability.

One interpretive approach not considered in *O'Keeffe* is the application of Convention rights in ways that are of 'practical and effective' use to complainants. The Court has emphasised in using this approach that States cannot fulfil their Convention obligations by simply remaining passive but may require positive actions.[46] In *O'Keeffe* all judgments accepted that child sexual abuse was contrary to Article 3. The dissent asserted that if allegations had been brought by parents and examined by State authorities it would have resulted in appropriate and sufficient measures envisaged by the law at the time.[47] It is unclear, without more, how either the majority or dissenting judgments can make credible claims on these counterfactual scenarios. Rather, this note argues that It would have been preferable to emphasise that that use of the contemporary provisions of the criminal law in Ireland may have been rendered "theoretical and illusory" by an express policy of channeling complaints about teachers' conduct to non-state authorities. Though the "practical and effective" approach emerged after 1973, it arguably represents a less contentious basis for liability in this case.

As the Strasbourg court remains under considerable pressure from the UK courts and politicians regarding perceived judicial activism, a more explicit methodology may have been appropriate. While, the court was unlikely to articulate a comprehensive interpretive methodology some broader guidance is welcome to avoid suggestions of ad-hoc and ideological judicial activism.[48] In *O'Keeffe,* Judge Ziemele correctly concluded "it is indeed high time that the Court acknowledged

[44] ibid at [48]

[45] *Varnava and Others v. Turkey* [GC], nos. 16064/90, 16065/90, 16066/90, 16068/90, 16069/90, 16070, 16071/90, 16072/90 and 16073/90 ECHR 2009, para 140

[46] *Marckx v Belgium* A 31 (1979); (1979–80) 2 EHRR 330; Airey A 32 (1979); (1979–80) 2 EHRR 305.

[47] Joint partly dissenting opinion of Judges Zupančič, Gyulumyan, Kalaydjieva, De Gaetano and Wojtyczek at at [18]

[48] Alastair Mowbray, "The Creativity of the European Court of Human Rights" (2005) 5(1) Human Rights Law Review 57-79, 71

the issue of time and took care to explain clearly its methodology as regards the application of the Convention over time."[49]

The Standard of Positive Obligations under Article 3

The majority's approach to the positive obligations under Article 3 constructed a broader connection between harm and state obligation than the standard of a "real and immediate risk" in *Osman v United Kingdom.*[50] In *Osman* the applicants complained that the State's failure to prevent a stalker targeting the applicants' family, resulting in the death of a family member, breached the UK's positive obligations under Article 2. The court concluded that a breach would arise only if it was established that the State knew or ought to have known of a real and immediate risk to the life of an identified individual from the criminal acts of a third party and failed to take measures which might have been reasonably expected to avoid that risk.[51] Prior Article 3 cases affirm the need for a positive obligation "to take all steps reasonably expected to prevent real and immediate risks to prisoners' physical integrity, of which the authorities had or ought to have had knowledge".[52] Several cases also extend the obligation to private settings, including educational settings.[53] In *Z v. United Kingdom*, the court found that sexual abuse of children in the family home clearly contravenes Article 3 which obliged the State to provide effective protection of children and to take reasonable steps to prevent ill-treatment of which the authorities had or ought to have had knowledge.[54]

The primary disagreement between the majority and minority of the Strasbourg Court in *O'Keeffe* relates to the positive obligation to "encourage complaints" under Article 3. The majority concluded that Ireland was not informed as a result of the system, which "discouraged" complaints and failed to provide for a procedure "prompting a child or parent to complain about ill-treatment directly to a State authority".[55] The dissent concluded that nothing supported the assumption that parents would have complained more vigorously if "encouraged" by further

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[49] Concurring opinion of Judge Ziemele at [1]

[50] *Osman v. the United Kingdom*, 28 October 1998, Reports 1998- VIII;

[51] ibid at [116]

[52] *D.F. v. Latvia*, no. 11160/07 § 84, 29 October 2013

[53] *Costello-Roberts v United Kingdom* 19 EHRR 112, Application no. 13134/87*; A. v. the United Kingdom*, 23 September 1998, Reports 1998- VI

[54] *Z and Others v. the United Kingdom*, (n24)

[55] *O'Keeffe v Ireland* (n1) at [163]

regulations and/or by the creation of a mechanism responsible for examining complaints.[56] The dissent views this approach as requiring a positive obligation of constant and retrospective vigilance, which it concluded was "an impossible and disproportionate burden".[57]

It is clear that the legal and policy framework did not expressly discourage complaints against teachers. However, the majority appears mindful of the fact that concerned parents had no contact with the State in its regulation of the educational system. The Irish Supreme Court position focused exclusively on Ireland's express legal and policy obligations, especially its potential vicariously liability for LH. This focus meant that despite its constitutional provision for education, the State had no legal obligation to implement child protection mechanisms in the education system and could defer to school boards of management.[58] Again, a different interpretive approach focused on the need to make Article 3 "practical and effective" may have resulted in filling this gap in protection under Article 3 in the context of the vulnerability of children and the reality of the prevalence of sexual abuse in educational institutions in Ireland over a lengthy period of time.

In the alternative, Conor O'Mahony categorised Ireland's liability in this case as arising from a systemic failure of protection, based on Ireland's constitutional and Article 3 obligations to protect in the context of education.[59] The long and intense period of abuse and subsequent 22 years of teaching by LH and lack of knowledge by the State during this period all suggest evidence of systemic failure. Such an approach remains controversial. UK case law regarding claims for systemic failure in the education system is ambivalent towards direct liability for system failure for a breach of a duty of care for local education authorities.[60] However this approach avoids stretching vicarious liability and remains particular to the educational context. It would not represent open ended form liability as the threshold of torture or 'inhuman or degrading treatment or punishment' will cover serious cases of child abuse, but leave further protection for national level child protection.[61]

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[56] Joint Partly Dissenting Opinion at [17]

[57] ibid at [15]; *Osman v. the United Kingdom* (n50) at [116]

[58] Conor O'Mahony "State liability for abuse in primary schools: systemic failure and O'Keeffe v. Hickey", (2009) 28(3) Irish Educational Studies, 315-331

[59] ibid

[60] *Carty v. London Borough of Croydon* [2004] ELR 226

[61] Margaret Hall, "Z and Others v. United Kingdom" [2001] 10 B.H.R.C. 384

Further clarification of any new conception of Article 3 positive obligations are nonetheless necessary, especially regarding the question of a system's "encouragement" of complaints and the level of knowledge or notice required to engage State liability. The approach of the Court may require clarification in the context of existing case law regarding Articles 2, 9 and 14 involving children in education.[62] The joint dissent argued that the majority confused the examination of the responsibilities of State authorities under Article 3 of the Convention to protect against ill-treatment by private parties with responsibility arising under Article 2 of Protocol No. 1 to examine "the risk of ill-treatment in the context of education".[63] It is possible that the limits of any new conception may be soon tested. Discrimination against Roma children in primary public education may involve serious instances of emotional and psychological harm engaging Article 3 protection.[64] In addition, the decision may also have implications for creating a positive obligation on states to protect against other forms of non-state Article 3 violations in the context of education, for instance bullying.[65]

In contrast, one risk that may arise regarding a State's inherent positive obligations regarding the provision of goods such as education is that the Court may impose a particular vision of its optimal provision and limit the democratic choice of Member States. The joint dissenting opinion is critical of the "ideological premises" of the majority.[66] In particular, it assumes the reasoning of the majority is based on the implicit and unsupported assumption that educational systems with a strong State role offer better protection to children. It concludes that the majority opinion calls unnecessarily into question the Irish model of education, "which is deeply rooted in the nation's history" and ventures into areas which fall within the exclusive domestic competence of States.[67] However, the alternative view could be equally ideological. In the Irish Supreme Court decision in *O'Keeffe*, Hardiman J bemoaned the decline of local voluntary community activities and continued his pattern of judicial restraint in the context of state expenditure.[68] In reality, any decision on the provision of education is ideological. It is more appropriate to assess the Court's proposed balance

[62] *Grzelak v. Poland* (Application no. 7710/02, 15 June 2010); *Ilbeyi Kemaloğlu and Meriye Kemaloğlu v. Turkey*, Application no. 19986/06, 10 April 2012

[63] Joint Partly Dissenting Opinion at [12]; *O'Keeffe v Ireland* (n1) at [162]

[64] http://echrblog.blogspot.ie/2014/02/guest-post-on-grand-chamber-judgment-in.html last visited 31 July 2014

[65] ibid

[66] Joint Partly Dissenting Opinion at [19]

[67] ibid

[68] [2009] 2 IR 343

between the democratic choice of States and the protection of dependent vulnerable children from sexual abuse. As elsewhere in the Court's jurisprudence, this assessment could reflect a balance between the "living instrument" approach to interpretation and the margin of appreciation given to States in the vindication of the rights of its citizens.

Consequences for Vicarious Liability in Common Law Jurisdictions

The approach of the Court may also impact common law jurisdictions' positions on vicarious liability which, as a form of no-fault liability, remains highly exceptional within domestic tort law.[69] Hardiman J. submitted that decisions of the Irish and UK courts conflate vicarious liability with personal liability. The Strasbourg Court may have been guilty of the same conflation. In rejecting Ireland's preliminary objections, the Court concluded that "just as the established case-law of this Court entitles an applicant to choose one feasible domestic remedy over another, the applicant was entitled to devote resources to pursue one feasible appeal (vicarious liability) over another (a claim in negligence and/or a constitutional tort)."[70] In his dissent Charleton J argued the majority merged vicarious liability with a claim in negligence of failure to foresee and take appropriate precautions against abuse.[71] The Court's view of the interchangeability of the grounds of appeal in the Irish courts reflect its broad approach to Article 3 protection, but may obscure the division between these remedies in domestic law and led to criticism of a neglect of the exhaustion of all domestic remedies in the majority opinion.[72]

The addition of a clear separate layer of protection is especially welcome as vicarious liability remains conceptually confused and complicated to predict in its application. Competing common law approaches were reviewed by the Irish Supreme Court in *O'Keeffe* and indicated a lack of consensus in Irish law regarding vicarious liability.[73] The traditional common law approach to vicarious liability provided that an employee's wrongful conduct is said to fall within the course and scope of his or her employment where it consists of either (1) acts authorised by the employer

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[69] McMahon & Binchy, The Law of Torts, (4th edition, Bloomsbury) 1554

[70] *O'Keeffe v Ireland* (n1) at [111]

[71] Joint Partly Dissenting Opinion at [10]

[72] Partly Dissenting Opinion of Judge Charleton at [3]-[11]; "Supreme Court judge says Strasbourg has 'very serious questions' over new role" *The Irish Times 5th* September 2014

[73] Lister v Hesley Hall Ltd [2002] 1 AC 215; Jacobi v Griffiths (1999) 174 DLR (4th) 71; Bazley v Currey (1999) 144 DLR (4th) 45; New South Wales v LePore [2003] HCA 4, 212 CLR 511, 195 ALR 412, 77 ALJR 558

or (2) unauthorised acts that are so connected with acts that the employer has authorised that they may rightly be regarded as modes - although improper modes - of doing what has been authorised.[74] An application of this traditional approach to vicarious liability would deny the liability for acts of sexual abuse committed by a teacher.[75] In more recent Canadian jurisprudence, vicarious liability of a teacher's employer will attach where "there is a close connection" between the teacher's duties and the offending act.[76] The connection will only be sufficiently close when the teacher is placed in a position of close intimacy with his or her pupil. It may be possible that a normal relationship between teacher and pupil in a day-school context is insufficient for this threshold.[77] A similar approach is adopted in the UK, where the House of Lords adopted a "close connection" test.[78] Hardiman J critiqued the UK position as being motivated by a perceived need to find for the plaintiffs and bemoans its lack of theoretical depth or clarity.[79] Some commentators have criticised this expansion, querying why risk creation should be the paramount consideration in vicarious liability and expressed concern that such expanded liability is conceptually open ended.[80] Moreover, the UK position seems strongly informed by "employers having a non-delegable duty to take all reasonable steps to safeguard the plaintiffs", which seems similar to the form of positive obligation to protect under Article 3, rather than a traditional non-fault vicarious liability.[81]

A clear delineation of these bases of liability remains necessary. The State's liability in international human rights or constitutional law remains conceptually distinct from its vicarious liability for the control of a particular employee in tort law. The potential benefit of the development in *O'Keeffe* may be that a human rights approach under Article 3 of the Convention provides redress where the State failed to implement sufficient measures to protect children in primary education, while the State's narrower vicarious liability remains unengaged. By providing this additional layer of protection to children in education, the decision may direct potential

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[74] Salmond and Heuston on the *Law of Torts* (19th ed., Sweet and Maxwell, 1987) 521-522; Canadian Pacific Railway Co. v Lockhart [1942] A.C. 591, 599

[75] Trotman v. North Yorkshire County Council [1999] L.G.R. 584

[76] Bazley v Currey (1999) 144 DLR (4th) 45

[77] Jacobi v Griffiths (1999) 174 DLR (4th) 71; EB v Order of Oblates of Mary [2005] 3 S.C.R. 45; 2005 SCC 60

[78] Lister v Hesley Hall Ltd [2002] 1 AC 215

[79] [2009] 2 IR 334

[80] Desmond Ryan "Making Connections: New Approaches to Vicarious Liability in Comparative Perspective" (2008) 30 Dublin University Law Journal 1; Claire McIvor, 'The Use and Abuse of the Doctrine of Vicarious Liability' (2006) 35 Comm L World Rev 268

[81] Lister v Hesley Hall Ltd [2002] 1 AC 215, 239

litigants towards a human rights remedy and facilitate a narrow use and incremental expansion of vicarious liability, which still requires significant clarification as to its theoretical foundation and practical limits.

Conclusion

The decision in *O'Keeffe* means the State has a positive duty to protect children from ill-treatment in primary education. The impact of this decision for Ireland may extend to the Magdalene laundries or other similar cases of child abuse going to Strasbourg.[82] While the context is distinguishable for those involving institutional abuse rather than open, day schools, any such applications may nevertheless involve a similar historical analysis of the application of the Convention standards, so the methodology employed by the Court and level of knowledge of harm imputed to Ireland in *O'Keeffe* will be relevant and remains in need of clarification. In addition, the scope and nature of a State's positive obligations under Article 3 remain unclear. In particular, the nature of the obligations that inhere in a State's provision of public education remains contentious, as evidenced by the division of the Grand Chamber opinions. Finally, the decision may narrow the need for vicarious liability as a form of protection of victims of abuse, especially in the context of the provision of education. This may enable a more conceptually clear development of the vicarious liability concept. It may be that the impact of *O'Keeffe* will extend beyond situations of child sexual abuse and shape the methodology and positive obligations jurisprudence of the Court.

[82] The Irish Times, "Magdalene survivors are still waiting for restorative justice" 6 February 2014