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ANALYSING INSTITUTIONAL LIABILITY FOR CHILD SEXUAL ABUSE IN ENGLAND AND WALES AND AUSTRALIA: VICARIOUS LIABILITY, NON-DELEGABLE DUTIES AND STATUTORY INTERVENTION

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ABSTRACT. *This paper will argue that, in the light of recent case law in the UK and Australia, a new approach is needed when dealing with claims for vicarious liability and non-delegable duties in the law of tort. It will submit that lessons can be learnt from a comparative study of these jurisdictions, notably by reflecting on the courts' treatment of claims of institutional liability for child sexual abuse. In parallel to decisions of their highest courts, public enquiries in Australia and England and Wales, established to report on historic child sexual abuse and how to engage in best practice, are now reporting their findings which include proposals for victim reparation: see Royal Commission into Institutional Responses to Child Sexual Abuse (Australia, 2017) including its Redress and Civil Litigation Report (2015); Independent Inquiry into Child Sexual Abuse (Interim report, England and Wales, 2018). The Australian reports suggest reforms not only to state practice, but also to private law. This article will critically examine the operation of vicarious liability and non-delegable duties in England and Wales and Australia and proposals for statutory intervention. It will submit that a more cautious incremental approach is needed to control the ever-expanding doctrine of vicarious liability in UK law and to develop more fully its more restrictive Australian counterpart.*

KEYWORDS: *tort law, institutional child sexual abuse, vicarious liability, non-delegable duties.*

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I. Introduction

This article will argue that a new approach is needed for dealing with claims for vicarious liability and non-delegable duties in the law of tort. It will submit that lessons can be learnt from a comparative study of UK and Australian law, notably by reflecting on the courts' recent treatment of claims of institutional liability for child sexual abuse in *Various Claimants v Catholic Child Welfare Society*[1] and *Armes v Nottinghamshire CC*[2] (UK Supreme Court) and in *Prince Alfred College v ADC*[3] (High Court of Australia). In all three cases it was alleged that institutions should be vicariously liable for the abuse in question and that the current requirements for vicarious liability should be applied more flexibly to meet the claimants' demands for compensation. Arguments based on non-delegable duties were either not pursued or rejected. In revising once again the rules of vicarious liability, the courts in both jurisdictions have highlighted the tension which exists in private law between vicarious liability and non-delegable duties and the question of their correct application in private law.

This paper will also consider the possibility of statutory intervention. Parallel to the activity of the courts dealing with claims of abuse in contexts varying from children's homes and schools to foster care, public enquiries in England and Wales and Australia, established to report on historic cases of child sexual abuse, are now reporting their findings. These include recommendations for changes to private law. In England and Wales, the *Independent Inquiry into Child Sexual Abuse* (IICSA) has, since 2014, been examining allegations of past and ongoing failures of institutions to protect children in schools, residential homes, secure accommodation and local authority care[4]; the intention is to make "substantial progress by 2020".[5] The IICSA is actively examining the civil litigation experience of victims of abuse and analysing data from the Criminal Injuries Compensation Authority to understand what amounts are currently paid to victims of child sexual abuse. While unlikely to report before 2021, the IICSA is identifying problems arising from the civil litigation process in UK courts. The Australian *Royal Commission into Institutional Responses to Child Sexual Abuse* (Royal Commission), established in 2013, has made greater progress. In December 2017, it published the result of its five year investigation into how institutions such as schools, churches, sports clubs and government organisations in Australia have responded to

[1] *Various Claimants v Catholic Child Welfare Society* [2012] UKSC 56, [2013] 2 A.C. 1.
[2] *Armes v Nottinghamshire CC* [2017] UKSC 60, [2018] A.C. 355.
[3] *Prince Alfred College v ADC* [2016] HCA 37, (2016) 258 C.L.R. 134.
[4] For its terms of reference, see <https://www.iicsa.org.uk/terms-reference>. The Chair is supported by a panel of three independent experts, a Victims and Survivors Consultative Panel, and other expert advisers. See generally, IICSA, *Report of the Internal Review* (December 2016) which examined the Inquiry's ways of working and how it could deliver its work in a timely, inclusive and transparent way.
[5] IICSA, *Report of the Internal Review*, p. 4. See also IICSA, *Interim Report of the Independent Inquiry into Child Sexual Abuse* (April 2018).

allegations and instances of child sexual abuse.[6] Its 17-volume Final Report covers a broad range of interrelated issues including how to understand the nature, cause and impact of child sexual abuse in institutional contexts, how to support institutions to be child safe, how to treat children with harmful sexual behaviours and how the state can promote the need for advocacy, support and therapeutic treatment services.[7] Significantly, both reports to date have highlighted the importance of risk management strategies which focus on preventing, identifying and mitigating risks to children.[8] The Final Report of the Royal Commission recommends the introduction of a national redress scheme which would make it easier for victims/survivors of child sexual abuse to obtain reparation for the abuse committed against them. Similarly, the IICSA's interim report of April 2018 recommends a redress scheme for surviving child migrants. The Commission's separate *Redress and Civil Litigation Report*[9] does, however, argue that any state-based redress scheme must be supplemented by changes to private law. The option chosen by the Royal Commission is the introduction of a statutory non-delegable duty, supported by a reversed burden of proof for abuse victims.[10]

This article will critically assess how private law has engaged with historic child sexual abuse claims committed by individuals employed by or associated with the operations of institutions and the degree to which the approach adopted has destabilised core tort law principle. While the inquiries have raised the possibility of state-based redress schemes, neither system has suggested that they should replace private law provision. There seems no appetite, therefore, for a system based solely on social solidarity. The question, then, is how private law should respond. Intervention, as we will see, has focused primarily on *institutional liability* – institutions being the natural target for claims relating to historic abuse where the perpetrators are likely to have disappeared, passed away or, even if traceable, lack funds. Three options exist: institutional negligence, vicarious (strict) liability for the torts of others, and a non-delegable duty (statutory/common law) to protect victims against sexual abuse. It will be argued that the UK's approach, favouring the option of vicarious liability, has gone too far. This is particularly important given that the UK Supreme Court is now applying this approach, evolved to respond to cases of institutional child sexual

[6] For its terms of reference, see <https://www.childabuseroyalcommission.gov.au/about-us/terms-of-reference>.

[7] Royal Commission, *Final Report: Preface and Executive Summary* (Commonwealth of Australia 2017), submitted to the Governor-General of Australia on 15 December 2017.

[8] See e.g. *Australian Final Report*, ibid., Recommendation 6.6; IICSA, *Interim Report*, para. 6.3: "Clearly, it is crucial that institutions do all they can to ensure that those working or volunteering within them are suitable for the work they do and do not represent a risk to children."

[9] Royal Commission, *Redress and Civil Litigation Report* (Commonwealth of Australia 2015) (2015 Report).

[10] See Recommendations 89 and 91.

abuse, to tort law generally including cases involving basic negligence and non-sexual intentional torts.[11] In contrast, the Australian approach has been more cautious. While not without its own faults, notably an overly restrictive notion of the employment relationship, it will be argued that its more considered incremental approach is capable of providing a basis for greater certainty and coherence in this area of law. Fundamentally, this paper will argue that the current legal position in both jurisdictions is unsatisfactory and change is needed. Claims of historic institutional child sexual abuse have challenged the ability of the law of tort to respond to social injustice. In reacting, however, it is important not to forget the need to provide litigants with a law of tort which is coherent, principled and just. In particular, this article will consider whether vicarious liability should, as the English Court of Appeal remarked in July 2018, remain "on the move"[12] or whether a more controlled, incremental approach is needed to respond to the extraordinary extension of this doctrine in UK law since 2001.

II. Why Is a Private Law Response Needed for Institutional Child Sexual Abuse?

Despite the existence of statutory redress schemes such as the UK Criminal Injuries Compensation Scheme (CICS) and the Australian Redress Scheme for survivors of institutional child sexual abuse, claimants continue to bring claims in private law for compensation arising from sexual abuse. The limitations of the CICS are well known.[13] While claims may be made up to a capped amount of £500,000 for injuries resulting from a criminal act, time limits exist[14] and other restrictions apply; for example, awards may be withheld or reduced because of the applicant's character.[15] A BBC investigation in 2015, based on a freedom of information request, found that compensation had been reduced for more than 400 sexual abuse victims in Britain who had subsequently committed criminal

[11] *Cox v Ministry of Justice* [2016] UKSC 10, [2016] A.C. 660 (negligent dropping of kitchen supplies) and *Mohamud v WM Morrison Supermarkets Plc.* [2016] UKSC 11, [2016] A.C. 677 (racist assault on a supermarket customer).

[12] *Barclays Bank Plc. v Various Claimants* [2018] EWCA Civ 1670, at [41], per Irwin L.J.

[13] See generally D. Miers, "Compensating Deserving Victims of Violent Crime: The Criminal Injuries Compensation Scheme" (2014) 34 L.S. 242.

[14] Claimants are expected to apply for compensation as soon as it is reasonably practicable for them to do so, normally not later than two years after the crime occurred. While special provision is made for abuse cases, Sugarman reports that the time limit for bringing applications continues to be a hurdle in cases involving historic sexual abuse: N. Sugarman, "The Criminal Injuries Compensation Scheme 2012 and Its Impact on Victims of Crime" [2016] JPI Law 231, at 233.

[15] See Ministry of Justice, *The Criminal Injuries Compensation* Scheme 2012 (London 2012), paras. 25–27. This is a real problem for victims of abuse whose suffering may have led them to seek solace in drugs or into other criminal activities. See P. Lewis, *Delayed Prosecution for Childhood Sexual Abuse* (Oxford 2006), 24, who notes evidence that sexually abused children typically suffer from higher rates of serious medical, psychological and social problems during adulthood than adults who were not abused as children.

offences.[16] The Government's 2014 guide to the scheme also expressly advises that it is intended to be a matter of last resort: "Where the opportunity exists for you to pursue compensation elsewhere you should do so."[17] The Australian Scheme, which opened in July 2018 and will run for 10 years (with an option to extend), is also limited in scope. While the Australian Government committed $33.4 million in the 2017–18 Budget to establish the Scheme,[18] in its original form it was confined to survivors of child sexual abuse in *Commonwealth* institutional settings who were sexually abused before 1 July 2018.[19] Other bodies could opt in and it was only after considerable deliberation that all states and territories, ultimately signed up to the scheme – a late signature being the Catholic Church.[20] Redress is capped (as is the norm in such schemes) with eligible survivors provided with redress in the form of a monetary payment of up to $150,000, with the opportunity to receive support through trauma-informed and culturally appropriate counselling.[21] Such sums have been criticised for being considerably less than that provided, for example, by the Irish Redress Scheme[22] which put a cap of €300,000 in place, which could be exceeded if the assessors felt this was appropriate.[23] The cost of the Commonwealth redress scheme has been nevertheless estimated at between $570 million and $770 million over 10 years.

The limits on such schemes (notably in Australia excluding future victims of abuse) signifies that victims in both jurisdictions will continue to turn to private law to seek compensation for the abuse they have suffered.[24] Indeed, Goudkamp and Plunkett have argued that public inquiries, in unearthing historic instances of abuse, render it more likely that such cases will come before the courts.[25] Civil litigation, despite its stresses

[16] See <www.bbc.co.uk/news/uk-33707529>. See also Macleod, who comments on the use of blamelessness and behaviour as eligibility criteria: S. Macleod, "Criminal Injuries Compensation Scheme" in S. Macleod and C. Hodges (eds.), *Redress Schemes for Personal Injuries* (Oxford 2017) 508.

[17] CICA and Ministry of Justice, *Criminal Injuries Compensation: A Guide* (March 2014).

[18] The number of potential claimants in the 2015 Report was estimated at 60,000: Royal Commission, 2015 Report, p. 33.

[19] This includes situations where the Commonwealth employed minors, delivered activities for children, delivered state functions in the Australian Capital Territory and the Northern Territory before self-government, held children in detention or was a guardian. In addition to this cut-off date, applicants must be born before 30 June 2010, an Australian citizen or permanent resident and not already received a court-ordered payment from the institution: <https://www.nationalredress.gov.au/applying/who-can-apply>.

[20] See BBC News, "Catholic Church Joins Sex Abuse Compensation Scheme", 30 May 2018, available at <https://www.bbc.co.uk/news/world-australia-44298275>.

[21] If they wish, survivors will also have the opportunity to tell their personal story about their experience to a senior representative of the responsible agency, and to receive direct personal acknowledgement and response

[22] See <http://www.rirb.ie/>. The total awards made up to 31 December 2016 amount to €969.9 million. The average value of award is €62,250, the largest award being €300,500: *RIRB Annual Report* (2016).

[23] $150,000 is also less than the $200,000 cap recommended by the Royal Commission in its 2015 Report (see Royal Commission, 2015 Report, Recommendation 19).

[24] See S. Degeling and K. Barker, "Private Law and Grave Historical Injustice: The Role of the Common Law" (2015) 41 Monash U.L.Rev. 377, at 395–397, who argue that such schemes can learn much from the common law.

and costs, does offer an alternative means to obtain compensation, assessed, of course, at the more advantageous tortious basis. It should also not be dismissed as simply a money game. In theory at least, a court hearing may provide claimants with a public forum in which the perpetrators of abuse and the institutions they view as indirectly responsible may be held to account. The mechanism of the civil trial may also provide an outlet for the anger and frustration of victims, particularly in the face of denials of liability by defendants,[26] and allow for a public dissection of the wrongful conduct.[27] While the realities of the litigation process often diminish the force of such arguments, notably the fact that most tort cases are settled before trial,[28] an award of compensation, even if based on a settlement, is likely to have significance to a victim of abuse beyond the monetary. As Case has observed:

> a compensation award does more than provide financial recompense for the economic disadvantages which abuse and psychiatric injury have inflicted, it also performs a subset of functions; damages have symbolic force as, inter alia, an expression of the wrong done to the claimant and a vindication of the claimant's character.[29]

For claimants suing in private law, institutional liability is most likely to provide the best source of compensation. Any action against the perpetrator of the abuse faces the hurdle of having to trace any abuser who has not been identified by the police for criminal prosecution. In many cases we know that the institution was sued because the abuser in question was dead or untraceable.[30] Further, abusers even if traced may lack sufficient means to compensate.[31] It is not, therefore, accidental that latent claims against abusers tend to be in the criminal courts rather than in the pursuit of a compensation claim the perpetrator is unlikely to be able to meet. Hall argues

[25] J. Goudkamp and J. Plunkett, "Vicarious Liability in Australia: On the Move?" (2017) 17 O.U.C.L.J. 162, at 166.

[26] A. Simanowitz, "Accountability" in C. Vincent, M. Ennis and R.J. Audley (eds.), *Medical Accidents* (Oxford 1993), ch. 14.

[27] See D. Priel, "A Public Role for the Intentional Torts" in K. Barker and D. Jensen (eds.), *Private Law: Key Encounters with Public Law* (Cambridge 2013).

[28] See R. Lewis, "Strategies and Tactics in Litigating Personal Injury Claims: Tort Law in Action" [2018] JPI Law 113.

[29] P. Case, *Compensating Child Abuse in England and Wales* (Cambridge 2007), 37, who stresses the therapeutic and compensatory capacities of tort litigation for the abused claimant.

[30] See e.g. *JGE v English Province of Our Lady of Charity* [2012] EWCA Civ 938, [2013] 1 Q.B. 722 (priest deceased); *Maga v Trustees of the Portsmouth Roman Catholic Diocesan Trust* [2010] EWCA Civ 256, [2010] 1 W.L.R. 1441 (priest disappeared presumed deceased); *A. v Trustees of the Watchtower Bible and Tract Society* [2015] EWHC 1722 (QB) (ministerial servant deceased).

[31] A good example may be found in the leading Irish case of *O'Keeffe v Hickey* [2009] IESC 39. Here, prior to the vicarious liability claim, the abuse victim had instituted civil assault proceedings against Hickey (the school principal who had abused her). She was awarded more than €300,000 in compensation, but, as the Irish Supreme Court noted in *Hickey*, she had been unable to recover much, if any, of the award from the now retired teacher. See C. O'Mahony, "State Liability for Abuse in Primary Schools: Systemic Failure and *O'Keeffe v. Hickey*" (2009) 28 Irish Educational Studies 315.

that given the cost of redress schemes, *realistically* they can only be seen as alternatives, not replacements, for legal actions.[32] The question, then, is how private law responds. As will be seen below, three options exist which will be examined in turn.

III. The Options: Fault, Vicarious Liability, Non-Delegable Duties

In view of the difficulties experienced by victims of child sexual abuse in bringing claims against the perpetrators of historic abuse outlined above, it is not surprising that both England and Wales and Australia have faced arguments of institutional liability based on fault, attributed fault (non-delegable duties) and strict liability (vicarious liability). The choices made in each jurisdiction towards these options give us an insight into private law legal development and the extent to which "difficult cases" of historic child sexual abuse have changed private law generally.

A. Institutional Fault

Institutions may be found to be primarily liable where they have negligently failed to prevent the abuse taking place. For example, where the institution knew or should have appreciated that the carer in question was incompetent or untrustworthy, the employer will liable unless special precautions were undertaken.[33] Hoyano and Keenan identify four main sources of institutional liability in negligence: negligence in employing and continuing to employ staff whom the institution knew or should have known were paedophiles; failing to take reasonable steps to prevent or stop physical and sexual assaults; failing to exercise reasonable supervision and direction of employees; and failing to investigate abuse following reports by the victim.[34] They argue that, in practice, it will be far easier to establish foreseeability of the risk of abuse as a generalised risk arising from the institutional culture than in relation to a specific employee.[35] A failure, then, to take reasonable steps to provide safeguards for vulnerable children or to train staff properly may be regarded as prima facie examples of institutional fault. Further, evidence of a continued practice of turning a blind eye to credible claims of sexual abuse (if proven) could establish a basis for an institutional negligence claim.[36] Morgan has argued that the advantage of such liability

[32] M. Hall, "The Liability of Public Authorities for the Abuse of Children in Institutional Care" (2000) 14 IJLPF 281, at 298.

[33] See *D & F Estates Ltd. v Church Commissioners for England* [1989] A.C. 177, 209. Exceptionally an employer may also be found to be directly liable where the tortfeasor is the *mind and will* of the institution so that it can be said the acts of the abuser are the acts of the institution itself (doctrine of attribution): *Erlich v Leifer* [2015] VSC 499, at [91], per Rush J.

[34] L. Hoyano and C. Keenan, *Child Abuse* (Oxford 2007), 286–298.

[35] Ibid., at p. 283.

[36] See e.g. *SB v NSW* [2004] VSC 514; *S. v The Corporation of the Synod of the Diocese of Brisbane* [2001] QSC 473. It remains unclear to what extent there is also a common law duty to report abuse

is that it calls systems and higher officials to account and may also play a forensic role in satisfying the victim's need for accountability.[37]

The issue, however, is one of proving fault. Negligence requires the court to judge the conduct of the institution by the standards which prevailed at the time of the tort and not those applied today.[38] McLachlin C.J., for example, in abuse case *Blackwater v Plint*[39] commented that "by contemporary standards, the measures taken were clearly inadequate and the environment unsafe. *But by the standards of the time*, constructive knowledge of a foreseeable risk of sexual assault to the children was not established". In that case, even though the children had made complaints to adults, the adults were not found to be negligent in failing to identify sexual abuse which would have been regarded as an almost unthinkable idea at the time.[40] A similar finding was reached in the recent decision of the High Court of Australia in *Prince Alfred College v ADC*.[41] While rumours had existed in relation to the housemaster, no concrete allegations had been made prior to the accusation in question. The immediate dismissal of the housemaster when allegations were made was deemed by the lower court to indicate that the school had been unaware of the abuse.[42] By the standards of 1962, the school was not at fault.

In the absence, then, of clear evidence (or a concession by the defendant) that a reasonable employer would have identified the paedophile as a potential abuser, liability will be difficult to establish. The Australian Royal Commission further identified that defendants, often at the instigation of their insurers, have responded to claims by hiring aggressive litigation lawyers making the plaintiffs fight every step of the way to establish proof of fault. This includes charitable and religious organisations such as the Catholic church.[43] Combined with the historic nature of such claims raising problems of lost evidence, faded memories, missing witnesses with records lost, mislaid or destroyed[44] it can be very difficult for claimants to establish liability based on fault.

to the police once the institution is made aware of its existence: see *New South Wales v DC* [2017] HCA 22.

[37] P. Morgan, "Distorting Vicarious Liability" (2011) 74 MLR 932, at 945.

[38] See *Roe v Minister of Health* [1954] 2 Q.B. 66, 84.

[39] *Blackwater v Plint* [2005] SCC 58, at [15] (emphasis added).

[40] Ibid., at paras. [14]–[15].

[41] *Prince Alfred College* [2016] HCA 37, (2016) 258 C.L.R. 134.

[42] *A, DC v Prince Alfred College Inc* [2015] SASC 12, at [146], per Vanstone J.

[43] See the work of T. Foley, "Institutional Responses to Child Sexual Abuse: How a Moral Conversation with Its Lawyers Might Contribute to Cultural Change in a Faith-Based Institution" (2015) 18 Legal Ethics 164; V. Holmes, "Compounding the Abuse: Lawyers for the Catholic Church in the *Ellis* Case" (2014) 17 Legal Ethics 433; and (in the US context) T.D. Lytton, *Holding Bishops Accountable* (Cambridge MA 2008).

[44] In the recent vicarious liability case of *Barclays Bank Plc.* [2018] EWCA Civ 1670, for example, following the death of the alleged abuser in 2009, his son and daughter had cleared all his old paperwork from the family home and destroyed it.

Limitation is an associated problem. For very good reasons, including suppressed memories and the impact of childhood trauma, child sexual abuse claims are generally brought many years after the event. The Royal Commission noted that some victims take up to 22 years to speak publicly about the abuse they have suffered.[45] Bearing in mind the powerlessness of victims of institutional child sexual abuse, this is not surprising, but this obviously renders it more difficult for adult victims to bring claims. While the UK courts finally accepted that the s.33 Limitation Act 1980 discretion to disapply the limitation period for personal injury claims could apply to sexual abuse[46] (overturning earlier House of Lords authority in the process),[47] other jurisdictions (notably Australia) have not followed suit.[48] This does not mean that the discretion will always be exercised in the claimant's favour,[49] but at least the claimant is given the opportunity to argue their case. The Australian Royal Commission in its 2015 *Redress and Civil Litigation Report*[50] made it clear that the limitation periods in place at that time were inappropriate given the length of time that many survivors of child sexual abuse take to disclose their abuse. It recommended, therefore, that the limitation period for commencing civil litigation for personal injury related to child sexual abuse should be removed and that the removal should be retrospective in operation.[51] There has been a positive response to this recommendation. States and territories including Queensland[52] and New South Wales[53] have removed (retrospectively) the limitation period entirely for victims of abuse (subject to a right of the court to stay proceedings where it would be unfair to the defendant to

[45] Royal Commission, *Interim Report Vol 1: What We Are Learning about Responding to Child Sexual Abuse* (2014) Ch 5, 158.

[46] *A. v Hoare* [2008] UKHL 6, [2008] 1 A.C. 844. See F. Burton, "Limitation, Vicarious Liability and Historic Actions for Abuse: A Changing Legal Landscape" [2013] JPI Law 95.

[47] *Stubbings v Webb* [1993] A.C. 498.

[48] See *Trustees of Roman Catholic Church v Ellis* (2007) 70 NSWLR 565, [2007] NSWCA 117. For a comparative discussion, see A. Gray, "Extending Time Limits in Sexual Abuse Cases: A Critical Comparative Evaluation" (2009) 38 C.L.W.R. 342.

[49] See A. Inglis, "Institutional Child Abuse: Limitation After *A v Hoare*" [2009] JPI Law 284.

[50] Royal Commission, 2015 Report. Prior to the proposed changes, a child only had until they turned 21 years of age (in most cases) to make a claim for damages for personal injury as a result of sexual abuse. See also B. Mathews, "Limitation Periods and Child Sexual Abuse Cases: Law, Psychology, Time and Justice" (2003) 11 T.L.J. 218, at 221, who argued that the statutory time limits put adult survivors of abuse in an invidious position where most would be incapable of bringing their action within the time set.

[51] Ibid., at pp. 52–53; Recommendations 85–88. This will be subject to the need for a claimant to prove his or her case on admissible evidence and the court's power to stay proceedings in the event that a fair trial is not possible.

[52] Limitation of Action Act 1974 (Qld), s. 11A, as amended by the Limitation of Actions (Child Sexual Abuse) and Other Legislation Amendment Act 2016.

[53] Limitation Act 1969 (NSW), s. 6A, as amended by Limitation Amendment (Child Abuse) Act 2016 (NSW). See also Limitation of Actions Amendment (Child Abuse) Act 2015 (Vict), Justice and Community Safety Legislation Amendment Act 2016 (No 2) (ACT), the Limitation Amendment (Child Abuse) Act 2017 (NT), Limitation Amendment Act 2017 (Tas) and Civil Liability Legislation Amendment (Child Sexual Abuse Actions) Act 2018 (WA).

proceed).[54] Following the Commission's recommendation, therefore, change is being introduced is now being across the states and territories of Australia.

Yet, while the obstacle of limitation periods may, subject to the exercise of judicial discretion, be overcome, that of proving the fault of the institution on the balance of probabilities has not. It is on this basis that both jurisdictions have faced claims that further intervention is needed which is not dependent on proof of fault. This leaves two options: vicarious liability and non-delegable duties. The motivation to act is clear. In the words of Lord Hope: "Child sexual abuse is an ugly phenomenon. There is a heavy responsibility on our legal system to deal as fairly and justly as it can with the consequences."[55] The devil lies, however, in the detail: on what basis, legally, can compensation in the absence of proof of fault be justified? When will the imposition of tortious liability in such circumstances be "fair and just"?

B. Vicarious Liability

The advantages of vicarious liability for claimants are self-evident. An institution (which will usually be insured and/or with means) will be held strictly liable for the torts of others. It is not without limitation, however. Under the traditional formulation stated by Sir John Salmond in 1907, which was adopted across the common law world, a master would only be held responsible for a wrongful act done by his servant in the course of his employment: "It is deemed to be so done if it is either (1) a wrongful act authorised by his master, or (2) a wrongful and unauthorised mode of doing some act authorised by the master."[56] The UK House of Lords in *Lister v Hesley Hall Ltd.*[57] recognised immediately that such a formulation was ill-suited to claims for historic child sexual abuse. However, rather than rejecting such a claim,[58] the House accepted that sexual abuse could be regarded as "in the course of employment" of a carer where the torts of the abuser could be said to be *so closely connected with his employment* that it would be fair and just to hold the employers vicariously liable.[59] This was extended in turn by the Supreme Court in *Mohamud v WM Morrison Supermarkets Plc.*[60] where the UK Supreme Court provided a simplified version of the test. The courts should now focus on two questions to be approached broadly[61]:

[54] See e.g. Limitation of Action Act 1974 (Qld), s. 11A(5) and Limitation Act 1969 (NSW), s. 6A(6).
[55] Lord Hope, "Tailoring the Law on Vicarious Liability" (2013) 129 L.Q.R. 514, at 525. See also former UK Supreme Court justice, Lord Phillips, "Vicarious Liability on the Move" (2015) 45 H.K.L.J. 29.
[56] J. Salmond, *The Law of Torts*, 1st ed. (London 1907), 83 (later found in R. Heuston and R. Buckley, *Salmond and Heuston on the Law of Tort*, 21st ed. (London1996), 443).
[57] *Lister v Hesley Hall Ltd.* [2001] UKHL 22, [2002] 1 A.C. 215.
[58] See *Trotman v North Yorkshire CC* [1999] L.G.R. 584.
[59] *Lister* [2001] UKHL 22, [2002] 1 A.C. 215, at [28], per Lord Steyn.
[60] *Mohamud* [2016] UKSC 11, [2016] A.C. 677.
[61] Ibid., at paras. [44]–[45], per Lord Toulson.

(1) What functions or field of activities had been entrusted by the employer to the employee (or, in everyday language, what was the nature of the employee's job)? *and*
(2) Was there a sufficient connection between the position in which the employee is employed and his wrongful conduct which would make it "right" for the employer to be held liable as a matter of social justice?

The Supreme Court, perhaps surprisingly, was prepared to accept that a racist attack on a customer by a shop worker was sufficiently within the broad field of the activities entrusted to the employee to satisfy the "course of employment" test. Khan had been employed to attend to customers and respond to their enquiries. His violent assault was characterised simply as a foul mouthed and violent means of undertaking the "field of activities" assigned to him.

A more flexible approach to the doctrine of vicarious liability, which includes intentional torts within the field of activities of the perpetrator, has also been extended to the relationship which gives rise to vicarious liability. In the leading case of *Various Claimants v Catholic Child Welfare Society (CCWS)*,[62] the UK Supreme Court undertook a fundamental reframing of vicarious liability to produce "a modern theory of vicarious liability".[63] Vicarious liability would arise where a claimant could establish:

> *Stage one*: a relationship between D1 and D2 capable of giving rise to vicarious liability; *and*
> *Stage two*: a close connection that links the relationship between D1 and D2 and the act or omission of D1.

In *CCWS*, the Supreme Court approved earlier authority that the stage one relationship would extend beyond the traditional contract of employment to include relationships "akin to employment".[64] This was taken further in later Supreme Court decisions to include a prisoner working in a prison kitchen (*Cox v Ministry of Justice*)[65] and foster parent caring for children on behalf of a local authority (*Armes v Nottinghamshire CC*).[66] The key issue is now whether the individual tortfeasor "carries on activities as an integral part of the business activities carried on by a defendant and for its benefit".[67] English law thus acknowledges that the relationship giving rise to vicarious liability will not always comply with the traditional employer/employee relationship. It does mean, however, that the parameters of this relationship are far from fixed. There can no longer be

[62] *Catholic Child Welfare Society* [2012] UKSC 56, [2013] 2 A.C. 1.
[63] See Lord Reed in *Cox* [2016] UKSC 10, [2016] A.C. 660, at [24].
[64] See *JGE* [2012] EWCA Civ 938, [2013] Q.B. 722. It also extends to ministerial servants: *The Trustees of the Watchtower Bible and Tract Society and Others* [2015] EWHC 1722 (QB).
[65] *Cox* [2016] UKSC 10, [2016] A.C. 660.
[66] *Armes* [2017] UKSC 60.
[67] *Cox* [2016] UKSC 10, [2016] A.C. 660, at [24], per Lord Reed.

said to be a "bright line" between employees and independent contractors for whom, traditionally, vicarious liability does not apply.[68]

We can see that such developments render vicarious liability a very useful means by which victims of historic child sexual abuse can obtain compensation from (insured) institutional bodies without having to establish institutional fault. Obstacles such as establishing an "authorised act" or "employment relationship" (note, for example, that priests are not employees but office holders) are removed by the courts and thereby facilitate claims. Further, the Supreme Court in *CCWS* identified five key criteria which would justify any extension of liability:

(i) the employer is more likely to have the means to compensate the victim than the employee and can be expected to have insured against that liability;
(ii) the tort will have been committed as a result of activity being taken by the employee on behalf of the employer;
(iii) the employee's activity is likely to be part of the business activity of the employer;
(iv) the employer, by employing the employee to carry on the activity will have created the risk of the tort committed by the employee; *and*
(iv) the employee will, to a greater or lesser degree, have been under the control of the employee.[69]

While the Court in *Cox* focussed on arguments based on enterprise liability, risk creation and delegation of task and Lord Toulson in *Mohamud* relied on "social justice", Lord Reed in *Armes* argued that the weight to be attached to the *CCWS* criteria will vary according to the context.[70] In *Armes* itself, the majority highlighted, for example, that the absence or unavailability of insurance, or some other means of meeting a potential liability, and the significant degree of control which local authorities exercised over what foster parents did and how they did it, were relevant considerations in determining whether a local authority should be vicariously liable for abuse to children whom it had entrusted to foster carers.[71]

What we see is that the basis for the modern theory of vicarious liability is primarily one of risk management with institutions internalising the risk of abuse which is inherent in hiring workers to care for vulnerable children. Such reasoning notably overlaps with the focus of the public inquiries discussed above. We may also observe that the *CCWS* criteria are now being applied beyond abuse claims to those involving negligence (*Cox*) and non-

[68] *Barclays Bank Plc.* [2018] EWCA Civ 1670, at [61], per Irwin L.J.
[69] *Catholic Child Welfare Society* [2012] UKSC 56, [2013] 2 A.C. 1, at [35], per Lord Phillips.
[70] *Armes* [2017] UKSC 60, at [63].
[71] Ibid., at paras. [62], [63].

sexual intentional torts (*Mohamud*).[72] The implications for tort law more generally will be examined in Section IV below. For the moment, it is worth noting that UK law has developed a broad doctrine of vicarious liability, inspired by its fellow common law jurisdiction, Canada,[73] which places on the institution/enterprise responsibility for the risks associated with its activities. Deakin has noted that nevertheless English judges have been hesitant to adopt a purely "enterprise risk" approach.[74] This is true, but at the very least we can say that enterprise liability has been a driving force to extend the doctrine to cover the inherent risks of child sexual abuse.

Australia, however, highlights that such reasoning is not a given. In its leading cases of *New South Wales v Lepore*[75] and *Prince Alfred College v ADC*,[76] the High Court of Australia has demonstrated an overt reluctance to accept the case for enterprise liability reasoning and hence rejected the option to follow the approach of the UK and Canadian courts. The doctrine remains confined to employees.[77] While Australia has accepted, in common with England and Wales,[78] that the governing test for the employment relationship can no longer be simply that of control, but one of the "totality of the relationship",[79] and, in *Hollis v Vabu*,[80] adopted a generous interpretation of this test to find that a motorcycle courier, who negligently injured Hollis while making a delivery, was an employee for whom the company (whose uniform he wore) was vicariously liable, nevertheless, the "akin to employment" test has not been followed. The similar idea of a "representative agent", put forward in cases such as *Hollis* by McHugh J.[81] and which would have extended vicarious liability to some independent contractors, has been rejected by the High Court.[82] Indeed, Leeming J.A. in *Day v The Ocean Beach Hotel Shellharbour Pty Ltd.* noted that, until the High Court determines otherwise, the distinction between independent contractors and employees is a basic proposition central to the law relating to

[72] See P. Giliker, "Vicarious Liability in the Supreme Court" (2017) 7 UK Supreme Court Yearbook 152; D. Ryan, "Close Connection and Akin to Employment: Perspectives on Fifty Years of Radical Developments in Vicarious Liability" (2016) 56 I.J. 239.

[73] See *John Doe v Bennett* [2004] 1 SCR 436 (relationship test) and *Bazley v Curry* [1999] 2 SCR 534 (course of employment test).

[74] S. Deakin, "The Evolution of Vicarious Liability", Allen & Overy Annual Lecture, University of Cambridge, 8 November 2017, 8.

[75] *New South Wales v Lepore* [2003] HCA 4, (2003) 212 C.L.R. 511.

[76] *Prince Alfred College* [2016] HCA 37, (2016) 258 C.L.R. 134.

[77] See H. Luntz D. Hambly, K. Burns, J. Dietrich, N. Foster, G. Grant and S. Harder, *Torts: Cases and Commentary*, 8th ed. (Chatswood NSW 2017), 17.1.3.

[78] *Market Investigations v Minister of Social Security* [1969] 2 Q.B. 173, 185, per Cooke J.

[79] *Stevens v Brodribb Sawmilling* (1986) 160 C.L.R. 16, 29, per Mason J. See also *671122 Ontario Ltd. v Sagaz Industries Canada Inc* [2001] SCR 983, 204 DLR (4th) 542, at [47], per Major J. for the position in Canada.

[80] *Hollis v Vabu* [2001] HCA 44, (2001) 207 C.L.R. 21.

[81] Ibid., at para. [93]; see also *Scott v Davis* [2000] HCA 52, (2000) 204 C.L.R. 333, at [34].

[82] *Sweeney v Boylan Nominees Pty Ltd.* [2006] HCA 19, (2006) 226 C.L.R. 161. See also *Scott* [2000] HCA 52, (2000) 204 C.L.R. 333.

vicarious liability, which is "too deeply rooted to be pulled out".[83] In *Trustees of Roman Catholic Church v Ellis*,[84] therefore, where the plaintiff had been sexually abused by an assistant priest while he had been an altar server at a parish of the Roman Catholic Archdiocese of Sydney, the Court held that:

> The law has proceeded by halting steps, identifying categories that do (e.g. employment) and do not (e.g. independent contractors) attract vicarious liability . . .. The relationship between an assistant parish priest and the "members" [of the church] as a whole is too slender and diffuse to establish agency in contract or vicarious liability in tort.[85]

As Tan has commented, the "akin to employment" test has been instrumental in overcoming church reliance on the defence that abusive priests are office holders, not employees.[86] This "technical" defence continues to exist in Australia.

The High Court in *Prince Alfred College v ADC*[87] also refused to follow the *Mohamud* approach to course of employment. In its view, Khan's conduct was not relevantly connected with his employment.[88] While the case in *Prince Alfred* failed in any event under the Limitation of Actions Act 1936 (SA), the High Court nevertheless provided "seriously considered dicta"[89] to guide the lower courts. This was badly needed in the light of the failure of the majority in *Lepore* to agree on what *should* be the test for course of employment in relation to intentional torts.[90] The case itself involved the all too familiar case of institutional child sexual abuse. The plaintiff had been sexually abused by a master (Bain) in 1962 while a 12-year-old boarder at the defendant school. While the High Court refused to review its earlier decision in *Lepore* that the school's non-delegable duty of care to its pupils would not extend to intentional torts, it did examine the question whether, in the absence of limitation arguments, vicarious liability

[83] *Day v The Ocean Beach Hotel Shellharbour Pty Ltd.* [2013] NSWCA 250, (2013) 85 NSWLR 335, at [14], quoting *Sweeney* [2006] HCA 19, (2006) 226 C.L.R. 161, at [12], [33].

[84] *Trustees of Roman Catholic Church* (2007) 70 NSWLR 565, [2007] NSWCA 117.

[85] Ibid., at paras. [53]–[54], per Mason P. Technically, however, the NSW Court of Appeal left the question open whether a priest could be an employee (at [32]).

[86] D. Tan, "A Sufficiently Close Relationship Akin to Employment" (2013) 129 L.Q.R. 30, at 34.

[87] *Prince Alfred College* [2016] HCA 37, (2016) 258 C.L.R. 134.

[88] Ibid., at para. [80].

[89] Following the HCA's decision in *Farah Constructions v Say-Dee* [2007] HCA 22, (2007) 230 C.L.R. 89, lower courts will be bound by "seriously considered dicta" of the High Court: see paras. [134], [158]. For criticism, see M. Harding and I. Malkin, "The High Court of Australia's Obiter Dicta and Decision-Making in Lower Courts" (2012) 34 Syd.L.Rev. 239.

[90] Subsequent case law had struggled to apply *Lepore* in the absence of a clear ratio and had been criticised by commentators for failing to provide a single test capable of determining the course of employment in the sexual abuse context: see e.g. J. Wangmann, "Liability for Institutional Child Sexual Assault: Where Does *Lepore* Leave Australia?" (2004) 28 MULR 169; and P. Vines, "Schools' Responsibility for Teachers' Sexual Assault: Non-Delegable Duty and Vicarious Liability" (2003) 27 MULR 612. For the struggles of the Australian courts, see *Ffrench v Sestili* [2006] SASC 44; *Sprod v Public Relations Orientated Security Pty Ltd.* [2007] NSWCA 319; *Blake v J R Perry Nominees Pty Ltd.* [2012] VSCA 122; *Withyman v NSW* [2013] NSWCA 10.

could have assisted the plaintiff. There was no problem in establishing a relationship of employment, so the sole issue before the court was whether the abuse was *in the course of employment*, bearing in mind that Bain was a housemaster with responsibilities over the dormitories in which the boys slept.

In rejecting the position of the UK and Canadian courts as being too reliant on general principle and policy choices, the High Court advised that courts should focus on the *role* given to the employee and *the nature of his responsibilities* to establish whether his employment was the "occasion" for the commission of the wrongful act:

> in cases of this kind, the relevant approach is to consider any special role that the employer has assigned to the employee and the position in which the employee is thereby placed vis-à-vis the victim. In determining whether the apparent performance of such a role may be said to give the "occasion" for the wrongful act, particular features may be taken into account. They include authority, power, trust, control and the ability to achieve intimacy with the victim . . .. Where, in such circumstances, the employee takes advantage of his or her position with respect to the victim, that may suffice to determine that the wrongful act should be regarded as committed in the course or scope of employment and as such render the employer vicariously liable.[91]

In specifying a test of "occasion", the High Court went back to basics: its 1949 decision in *Deatons v Flew*[92] in which Dixon J. asked whether the intentional tort was one of those wrongful acts to which the ostensible performance of his employer's work gave occasion.[93] Reference is made to specific features of the parties' relationship: authority, power, trust, control and the ability to achieve intimacy with the victim. This is a deliberately narrower formulation to that found in UK and Canadian law. It is fact-specific and requires the plaintiff to identify a situation of power-disparity and vulnerability between him and his abuser. There is an overt criticism of policy/enterprise risk driven expansion. For the High Court, it was more appropriate to follow:

> the orthodox route of considering whether the approach taken in decided cases furnishes a solution to further cases as they arise. This has the advantage of consistency in what might, at some time in the future, develop into principle. And it has the advantage of being likely to identify factors which point toward liability and by that means provide explanation and guidance for future litigation.[94]

While some commentators have queried whether any real difference can be found between the employment providing the "occasion" or "opportunity"

[91] See *Prince Alfred College* [2016] HCA 37, (2016) 258 C.L.R. 134, at [81].
[92] *Deatons v Flew* [1949] HCA 60. *Deatons* in turn was regarded as unjust and wrongly decided in *Mohamud* [2016] UKSC 11, [2016] A.C. 677, at [30].
[93] *Prince Alfred College* [2016] HCA 37, (2016) 258 C.L.R. 134, at [81].
[94] Ibid., at para. [46]. See also the speech of Chief Justice S. Kiefel, "The adaptability of the common law to change", Brisbane 24 May 2018.

for engaging in wrongdoing,[95] the Australian courts now have the ability to construct a test which does distinguish between the two in a meaningful way. What is important is that the High Court is trying to signal a change in approach. In rendering it easier for plaintiffs to rely on vicarious liability, it is seeking simultaneously to reduce the threat of over-extensive liability to which decisions like *Mohamud* give rise. It does not attempt a "new" theory of vicarious liability, but places emphasis on incremental development, focussing on the facts of each case.

We may ask why, in view of the different positions taken by other common law jurisdictions, such an approach was taken. Is it natural conservativism or something deeper? One possible answer derives from the emphasis that enterprise risk places on the relationship between insurance and vicarious liability. McLachlin J. in *Bazley v Curry* put it succinctly: "the employer is often in the best position to spread the losses through mechanisms like insurance and higher prices, thus minimising the dislocative effect of the tort in society".[96] Australia, however, in the early 2000s experienced an insurance crisis, leading to a radical reappraisal of the role of tort law in society and the introduction of legislation limiting claims in tort in view of the fear that the award of damages for personal injury had become unaffordable and unsustainable as the principal source of compensation for those injured due to the fault of others.[97] In this light, Goudkamp and Plunkett suggest that any proposal for a generous approach to civil liability would be treated with extreme caution: "[the] clear message [is] that an expansive law of torts is politically unacceptable."[98] Commentators have also noted in other fields that the High Court has in recent years been less inclined to embark on the exercise of reshaping fundamental doctrine where innovation is deemed unnecessary to decide the case at hand. On this basis, there is a "new sobriety" in the High Court.[99] We may identify, however, a further reason: the doctrinal coherence of the law of tort. In criticising *Mohamud* and adopting a cautious approach to the development of vicarious liability, the High Court is resisting the lure of compensation when it comes at the price of conceptual uncertainty. In its earlier decision of *Sweeney*, it had expressed concern at the absence of any clear or stable principle underpinning the development of the

[95] See e.g. D. Ryan, "From Opportunity to Occasion: Vicarious Liability in the High Court of Australia" [2017] C.L.J. 14, at 17. Goudkamp and Plunkett argue that the analysis is overly focused on terminology at the expense of content and that a test of "authority, power, trust, control and the ability to achieve intimacy" is likely to make little sense in relation to negligence claims, "Vicarious Liability in Australia", p. 167. This is true, but it is not clear that the test would apply in this context.

[96] *Bazley v Curry* (1999) 174 DLR (4th) 45, 61. See also See S. Deakin, "Enterprise-Risk: The Juridical Nature of the Firm Revisited" (2003) 32 I.L.J. 97; and D. Brodie, *Enterprise Liability and the Common Law* (Cambridge 2010).

[97] Commonwealth of Australia, *Review of the Law of Negligence: Final Report* (Canberra 2002). See R. Davis, "The Tort Reform Crisis" (2002) 25 UNSWLJ 865; P. Cane, "Reforming Tort Law in Australia: A Personal Perspective" (2003) 27 MULR 649.

[98] Goudkamp and Plunkett, "Vicarious Liability in Australia", p. 168.

[99] M. Bryan, "Almost 25 Years On: Some Reflections on *Waltons v Maher*" (2012) 6 J.Eq. 131, at 134.

doctrine of vicarious liability.[100] There is a perceived need, therefore, for the courts to establish basic propositions from which the law could evolve. Here "sobriety" reflects a distinct form of legal reasoning. While the UK courts have been willing to intervene to assist claimants, finding a mechanism which enables them to do so, the High Court sees its role in developing legal principle, leaving overtly policy-based matters for the legislator.

For the Australian Royal Commission, such reasoning, while understandable, continues to offer insufficient protection for victims of historic child sexual abuse. Its solution was radical: a statutory custom-made *non-delegable duty* owed by institutions (defined broadly) to vulnerable parties over which they exercise some level of control. Such a proposal raises questions which many UK commentators are now asking: if vicarious liability is increasingly giving rise to fears of over-extensive liability, are non-delegable duties the answer? In the next section, I will examine the possibility of using non-delegable duties, created by statute and/or at common law, to respond to child sexual abuse claims.

C. Non-Delegable Duties (Statutory/Common Law)

Traditionally a non-delegable duty is one imposed directly on the defendant *to ensure that reasonable care is taken*.[101] It is primary, not vicarious, liability and holds the institution *personally* liable to victims injured due to the torts of any employees or independent contractors to whom it has delegated its duty of care.[102] As the UK Supreme Court commented in *Armes*:

> The expression thus refers to a higher standard of care than the ordinary duty of care. Duties involving this higher standard of care are described as non-delegable because they cannot be discharged merely by the exercise of reasonable care in the selection of a third party to whom the function in question is delegated . . . [Such duties] are exceptional, and have to be kept within reasonable limits.[103]

Until recently, non-delegable duties were seen almost as an historical anachronism, dealing with a limited category of claims arising in particular contexts. They would be found, thus, as an addendum to any discussion of vicarious liability or treated as confined to their specific context.[104] Australia has, however, led the way in developing the concept of the modern non-delegable duty, as acknowledged recently in the UK case of

[100] *Sweeney* [2006] HCA 19, (2006) 226 C.L.R. 161, at [11].
[101] *The Pass of Ballater* [1942] P 112, 117, per Langton J.
[102] M.A. Jones (ed.), *Clerk and Lindsell on Torts*, 22nd ed. (London 2017), para. 6–60.
[103] *Armes* [2017] UKSC 60, at [31]–[32].
[104] For example, employers' liability (*Wilsons and Clyde Coal Co. Ltd. v English* [1938] A.C. 57) or the rule in *Rylands v Fletcher* (1868) LR 3 HL 330.

Woodland v Essex CC.[105] In *Kondis v State Transport Authority*,[106] Mason J. accepted that a non-delegable duty would arise:

> because the person on whom it is imposed has undertaken the care, supervision or control of the person or property of another or is so placed in relation to that person or his property as to assume a particular responsibility for his or its safety, in circumstances where the person affected might reasonably expect that due care will be exercised.[107]

The *Kondis* non-delegable duty is replicated to a certain extent by the UK Supreme Court in *Woodland* where Lord Sumption identified three critical characteristics:

(i) There is an antecedent relationship between the defendant and the claimant.
(ii) It imposes a positive or affirmative duty to protect a particular class of persons against a particular class of risks, and is not simply a duty to refrain from acting in a way that foreseeably causes injury.
(iii) The duty is by virtue of that relationship *personal* to the defendant.[108]

On this basis, non-delegable duties have been found to arise in relation to institutions such as schools[109] and day care centres[110] and hospitals.[111]

It is easy to see how the modern non-delegable duty might appeal in relation to institutional child sexual abuse cases. The institution will be dealing with vulnerable parties to whom it is offering some form of care or protection. As yet, however, neither legal system has extended the modern non-delegable duty to *intentional* torts. This would require treating a duty "to ensure that reasonable care is taken" to cover both deliberate and negligent harm. For Gleeson C.J. in *Lepore* this is a step too far. His concerns range

[105] *Woodland v Essex CC* [2013] UKSC 66, at [23], per Lord Sumption. For a comparison of UK and Australian law, see N. Foster, "Convergence and Divergence: The Law of Non-Delegable Duties in Australia and the United Kingdom" in A. Robertson and M. Tilbury (eds.), *Divergences in Private Law* (Oxford 2016), 119ff.

[106] *Kondis v State Transport Authority* [1984] HCA 61, (1984) 154 C.L.R. 672 (employers' liability).

[107] Ibid., at p. 687. See also J. Murphy, "The Juridical Foundations of Common Law Non-Delegable Duties" in J.W. Neyers, E. Chamberlain and S.G.A. Pitel, (eds), *Emerging Issues in Tort Law* (Oxford 2007); cf. R. Stevens, "Non-Delegable Duties and Vicarious Liability" in the same text. See also *Burnie Port Authority v General Jones Pty Ltd.* [1994] HCA 13, (1994) 179 C.L.R. 520, 551: "the relationship of proximity giving rise to the non-delegable duty of care in such cases is marked by special dependence or vulnerability on the part of that person."

[108] *Woodland* [2013] UKSC 66, at [7] (emphasis added). Note, in particular, the five defining features identified by Lord Sumption, at [23]. Lord Sumption noted also a second category of non-delegable duties which consists of a large, varied and anomalous class of cases involving inherently hazardous activities and dangers on the public highway.

[109] Ibid., but not in relation to the intentional torts of a teacher: *Lepore* (2003) 212 C.L.R. 511.

[110] *Commonwealth v Introvigne* [1982] HCA 40, (1982) 150 C.L.R. 258, at [26]–[32], per Mason J. and [5], per Murphy J.; *Woodland* [2013] UKSC 66; *Fitzgerald v Hill* [2008] QCA 283.

[111] *Albrighton v Royal Prince Alfred Hospital* [1980] 2 N.S.W.L.R. 542; Introvigne [1982] HCA 40, (1982) 150 C.L.R. 258, 270, per Mason J., with whom Gibbs C.J. agreed; *Ellis v Wallsend District Hospital* (1989) 17 N.S.W.L.R. 553. Recent English case law has extended this non-delegable duty to health care provision to detainees in an immigration centre*: GB v Home Office* [2015] EWHC 819 (QB); cf. *Razumas v MoJ* [2018] EWHC 215 (QB) which distinguished *GB* due to its different legislative backdrop.

from the potentially negative impact of such a duty on charitable and small organisations, which do not necessarily have the "deeper" pockets or insurance cover to meet such claims, to the absence of proof of deterrence when the sanctions imposed by criminal law have clearly not served to prevent the criminal actions of the tortfeasor.[112] The Court of Appeal in *Armes (NA) v Nottinghamshire CC*[113] also expressed concern at the burden such a duty might place on local authorities with a detrimental impact on the best interests of children in care. In *Woodland* itself, the duty was confined to *negligence* claims (although the issue of intentional torts did not arise).

Questions have also been raised to what extent reliance can legitimately be placed on non-delegable duties when they do not appear to be readily distinguishable from vicarious liability. For Lord Reed in *Armes*, such problems are exaggerated – there is a clear classificatory distinction between vicarious liability and non-delegable duties with the doctrines having different "incidents and rationales".[114] However, if we consider how both doctrines *function*, then both operate to render an institution, which is not guilty of institutional negligence, liable in tort for wrongs committed by another. Fleming on this basis famously called non-delegable duties a "disguised form of vicarious liability".[115] Glanville Williams was also critical of the lack of conceptual unity between the different non-delegable duties with cases decided "on no rational grounds, but … whether the judge is attracted by the language of non-delegable duty".[116] Williams's argument has been countered to some extent by Lord Sumption's rationalisation in *Woodland* of a distinct category of non-delegable duty based on assumption of responsibility, but the *Woodland* non-delegable duty has not stopped academics such as Jonathan Morgan arguing that non-delegable duties remain functionally identical to vicarious liability and thus represent "nothing more than a sleight of hand to produce what is supposed to be impossible, namely vicarious liability for the torts of independent contractors".[117] While more positive, Beuermann also sees definitional problems and seeks to identify a more coherent underlying theory which she entitles "conferred authority strict liability".[118] The current functional overlap of vicarious liability and non-delegable duties, in her view, undermines any principled basis for strict liability for the wrongdoing of another in the law of tort. Deakin has also conceded recently that "many issues remain to be

[112] See Gleeson C.J. in Lepore (n 109) at [36].
[113] *Armes (NA) v Nottinghamshire CC* [2015] EWCA Civ 1139, [2016] 2 W.L.R. 1455.
[114] *Armes* [2017] UKSC 60, at [50]. See also Baroness Hale in *Woodland* [2013] UKSC 66, at [33].
[115] J.G. Fleming, *The Law of Torts*, 9th ed. (Sydney 1998), 434.
[116] G. Williams, "Liability for Independent Contractors" (1956) 14 C.L.J. 180, at 186.
[117] J. Morgan, "Liability for Independent Contractors in Contract and Tort: Duties to Ensure that Care is Taken" (2015) 74 C.L.J. 109, at 120. Cf. state legislation such as the Civil Liability Act 2002 (NSW), s. 5Q, which treats non-delegable duties as equivalent to vicarious liability
[118] See C. Beuermann, "Conferred Authority Strict Liability and Institutional Child Sexual Abuse" (2015) 37 Syd.L.Rev. 113.

clarified".[119] Non-delegable duties, at best, may be described as "under construction".

Nevertheless, the Australian Royal Commission in 2015 saw the introduction of a *statutory* non-delegable duty as the best means to deal with the problem of compensating victims of child sexual abuse. The UK Supreme Court in *Armes* also refused to rule out the possibility of extending common law non-delegable duties to intentional torts. The merits of both these options will be examined below.

1. A statutory non-delegable duty

A legislative response, it might be argued, has a number of advantages. It can address definitional uncertainty by setting out clearly the nature and scope of a particular non-delegable duty and provide a targeted and measured response to a particular social problem. The Commission was also eager to highlight that its duty would be prospective. This would, it argued, avoid allegations of crushing liability, allowing institutions to plan for the future and to mould their work practices accordingly.[120] Its recommendation was for the enactment of a statutory non-delegable duty to be imposed on institutions which provide residential, school or day care facilities for children and on any religious organisation (or any other facility operated for profit) that provides services for children that involve the care, supervision or control of children for a period of time.[121] This would impose liability towards children harmed by both the deliberate criminal acts and negligent misconduct of its members and employees. In choosing selected institutions, the common connecting factor appears to be that these institutions represent places where children are at high risk of abuse.

The duty would not, however, extend to not-for-profit institutions and foster and kinship care. In relation to the former, the Commission did not wish to discourage volunteers from offering opportunities for children to engage in cultural, social and sporting activities.[122] The Commission took the view that in relation to foster and kinship arrangements, the degree of supervision or control needed to justify a non-delegable duty was absent.[123] Its second recommendation, however, was that regardless of any non-delegable duty, the *onus of proof should be reversed* in relation to institutions where children are abused by their members or employees. This would apply to a wider category of institutions, including foster and kinship arrangements: "this change will help to encourage higher standards

[119] S. Deakin, "Organisational Torts: Vicarious Liability versus Non-Delegable Duty" (2018) 77 C.L.J. 15, at 18.
[120] Royal Commission, 2015 Report, p. 55.
[121] Ibid., Recommendations 89–93.
[122] Ibid., at p. 491.
[123] Ibid., at p. 493. Contrast the views in *Armes* [2017] UKSC 60 discussed above in relation to vicarious liability.

of governance and risk mitigation in institutions that provide foster care and kinship care."[124] It suggested that it would be easier for community-based voluntary institutions to rebut the presumption than a commercial institution. An institution would be personally liable for institutional child sexual abuse by persons associated with the institution unless the institution proves it took reasonable steps to prevent the abuse.[125]

The aim therefore is to place the liability of institutions for abuse on a clear statutory basis. In the Commission's view, the HCA decision in *Prince Alfred* (discussed above) did not resolve difficulties arising from the status of the abuser (confined to employees) nor provide a straightforward test for courts to apply (the occasion test being dependent on consideration of the circumstances of the abuse and the precise role allocated to the abuser where evidence due to passage of time might be unavailable).[126] There was a need, therefore, for a more generous test which would not depend on proof that the institution was negligent, but would extend to deliberate criminal acts of persons associated with the institution.

The response to the recommendations in the 2015 Report has been revealing. In contrast to the willingness, discussed in Section IIIA, to introduce legislation to amend limitation periods, to date only Victoria has legislated in this field. In 2017,[127] it introduced legislation under which organisations that exercise care, supervision or authority over children would be required to take reasonable precautions to prevent child abuse and, if abuse occurred, there would be a presumption that the organisation failed in its duty of care unless it can prove that reasonable precautions were taken to prevent the abuse. Noticeably, however, this legislation did *not* extend to the statutory non-delegable duty. Commentators have questioned whether a reversed onus of proof, on its own, will offer sufficient support to victims of sexual abuse in the light of the evidential difficulties highlighted earlier in this paper in the context of fault-based claims.[128] This seems to leave much to the courts to determine just how easily institutions can rely on measures of good practice to rebut the presumption of liability. The Royal Commission in its 2017 Report noted that while the Queensland and New South Wales

[124] Royal Commission, 2015 Report, pp. 493–494.

[125] Recommendations 91–92. Persons associated with the institution would include the institution's officers, office holders, employees, agents, volunteers and contractors.

[126] Royal Commission, *Final Report: Beyond the Royal Commission*, vol. 17 (Commonwealth of Australia 2017), 26–27.

[127] See Wrongs Amendment (Organisational Child Abuse) Act 2017, inserting ss. 88–93 into the Wrongs Act 1958 (Vic). The Victorian Government has stated, however, that its measures were influenced not only by the Royal Commission but also by the state's own inquiry – Family and Community Development Committee, *Betrayal of Trust: Inquiry into the Handling of Child Abuse by Religious and Other Non-Government Organisations* (Victoria 2013).

[128] Much will depend on how strong the presumption in favour of liability will be in practice. The Commission merely comments that the steps that are reasonable for an institution will vary depending upon the nature of the institution and the role of the perpetrator in the institution: Royal Commission, 2015 Report, p. 494. See A. Silink and P. Stewart, "Tort Law Reform to Improve Access to Compensation for Survivors of Institutional Child Sexual Abuse" (2016) 39 U.N.S.W.L.J. 553.

governments had released issues/consultation papers including the possibility of a non-delegable duty, other states and territories had yet to act.[129]

Such hesitation does suggest that the option of a statutory non-delegable duty is not one a legislator takes lightly. Statutory change requires the political will to adopt the recommended measures (and the costs to state-run institutions which go with them). As noted above, to date, state and territory legislators across Australia have been less than keen to adopt this option. Should the legislators act, there appears at present to be a distinct possibility of an "implementation gap" whereby measures will vary from state to state, leaving victims to the happenstance of where the tort is deemed to take place.[130] There are, however, more profound difficulties raised by the statutory non-delegable duty option. Legislation will only provide greater clarity and guidance for both plaintiffs and defendant if its scope is clearly defined. Tofaris, for example, has remarked that "[a] crucial issue in cases of non-delegable duty is to identify *with precision* the duty whose performance is purportedly delegated".[131] Commentators have been critical of the lack of exactitude in defining the statutory non-delegable duty and whether its scope would be acceptable to the public. For example, the Commission states that liability would extend to persons *associated* with the institution, including officers, office holders, employees, agents, volunteers, and priests.[132] This term is vague and potentially very broad. Just how "associated" must the abuser be to the institution for liability to arise? The potential for litigation on this point is self-evident. It might also be argued that the decision not to include not-for-profit institutions and foster and kinship care within the duty would hard to defend to the public given that Royal Commission CEO Philip Reed noted himself that, following over 4,000 private sessions conducted by Commissioners with survivors of child sexual abuse, "Over 40 per cent of individuals who attended private sessions said they were sexually abused as a child in out-of-home care, such as in former children's homes and in foster care".[133] Excluding organisations such as the Scouts despite the Royal Commission raising concerns about the ability of organisations such as Scouts Australia to prevent and report child sexual abuse in a report published in 2014 highlights the difficulty

[129] Royal Commission, *Final Report*, pp. 28–29. In June 2018, the NSW government announced its intention to introduce measures which would reverse the onus of proof and require institutions to prove they took reasonable measures to prevent abuse.

[130] See W. Budiselik, F. Crawford and D. Chung, "The Australian Royal Commission into Institutional Reponses to Child Sexual Abuse: Dreaming of Child Safe Organisations?" (2014) 3 Social Sciences 565–583. The Federal system in Australia means that it is for state and territory governments to decide whether they wish to implement the Commission's recommendations.

[131] S. Tofaris, "Vicarious Liability and Non-Delegable Duty for Child Abuse in Foster Care: A Step too Far?" (2016) 79 M.L.R. 871, at 890 (emphasis added).

[132] Royal Commission, 2015 Report, p. 56. Consider, for example, the attempt in s. 90, Wrongs Act 1958 (Vic), to define an individual "associated" with a relevant organisation.

[133] Submissions published on institutional responses to child sexual abuse in out-of-home care: 18 July 2016. Cf. the position in the UK and New Zealand: *Armes* [2017] UKSC 60; *S. v Attorney-General* [2003] 3 N.Z.L.R. 450.

of determining where to draw the line.[134] Such questions also indicate the political delicacy of determining the scope of such a duty and the reluctance of legislators to engage with difficult and controversial demarcation issues. Finally, there is the question how the statutory non-delegable duty will relate to the common law. As the Commission acknowledged, the law after *Prince Alfred College* is in a state of development. How should the common law respond to statutory intervention – revert to its earlier more limited doctrine of vicarious liability or evolve alongside statutory developments? Competing legal frameworks will be confusing for litigants, particularly with the possibility of different statutory formulations being adopted in states and territories across Australia. At the very least, there is a need for statutory intervention to complement, not contradict, the common law.

2. Extending common law non-delegable duties to intentional torts

If the statutory non-delegable duty proves difficult, then, in terms of definition, scope and political will, can we argue that it lies to the courts to offer an alternative framework? The groundwork exists – the modern *Woodland/Kondis* non-delegable duty, albeit presently confined to negligent misconduct. While Australia continues to hold firm against this development, in *Armes*, the UK Supreme Court did not exclude the possibility that, in principle, there could be a non-delegable duty protecting against intentional harm to children in care.[135] On the facts, the Court held that the wording of the statutory framework rendered the imposition of a non-delegable duty on a local authority providing fostering services "too broad and … the responsibility with which it fixes local authorities is too demanding".[136] However, obiter, Lord Reed clearly expressed a view put forward earlier by Stevens – if a non-delegable duty can arise to protect against negligent mistreatment of the victim, can it be right that it does not extend to deliberate mistreatment of the same individual? Stevens is typically more forthright:

> Liability for the breach of a [non-delegable] duty cannot be avoided by showing that the breach as gross …. If the duty assumed is a duty that care will be taken, this is breached where the child is abused … [L]iability for deliberate abuse follows *a fortiori* from liability for want of care.[137]

[134] Royal Commission into Institutional Responses to Child Sexual Abuse, *Report of Case Study No. 1* (Commonwealth of Australia 2014), 1–57. We could also raise questions of interpretation: for example, would the Boys' Brigade (a Christian foundation) be included as a religious organisation or excluded as not-for-profit organisation?

[135] *Armes* [2017] UKSC 60, at [50]–[51] (majority). See also Lord Hughes who dissented on the issue of vicarious liability but not that of non-delegable duties, at [75].

[136] *Armes* [2017] UKSC 60, at [49]. Cf. *K.L.B. v British Columbia* [2003] SCC 51, [2003] 2 SCR 403 (which did also conclude that the case for extending vicarious liability to the relationship between governments and foster parents had not been established).

[137] Stevens, "Non-Delegable Duties", p. 361. See also R. Stevens, *Torts and Rights* (Oxford 2007), 122–123.

While this may be contested doctrinally – does negligence encompass deliberate misconduct?[138] – the policy argument is clear: if the non-delegable duty is there to protect the vulnerable, how can intentional harm be excluded morally from such a duty? Deakin goes further and argues that, while vicarious liability might seem more familiar to lawyers, it is the non-delegable duty which provides the most convincing form of enterprise liability.[139] Tofaris also argues that *Armes* should have been a non-delegable duty case[140] and draws on a body of literature that indicates that non-delegable duties provide a more appropriate basis of liability in child abuse cases.[141]

Such arguments have force, so the real question is why the English courts have favoured (as in *Armes*) reliance on vicarious liability rather than non-delegable duties. If, as the authors above suggest, the non-delegable duty provides a purer enterprise risk response and is more focussed on the particular context in which the protective duty arises, why has it yet to be adopted in the UK?

A number of reasons may be identified. First, the non-delegable duty remains, as indicated above, conceptually problematic. At the very least, pre-*Woodland* (2013), it was not regarded by the courts as providing a conceptual tool upon which the courts could confidently rely. Hence, for the majority of the House of Lords in *Lister* (2001),[142] the logical response to the plight of the child abuse victims was to rely on the well-known concept of vicarious liability. Even post-*Woodland*, the courts are still testing the boundaries of the assumption of responsibility non-delegable duty,[143] in particular, the relationships to which it applies. On this basis, abuse in a hospital or care home might be deemed to fit easily into this category, but other institutional cases, such as abuse by soccer coaches, scout masters etc. are far from clear and remain to be resolved by the courts. It is a doctrine then which remains in need of clarification and is in the process of legal development.

Second, it is of note that commentators such as Stevens and Beuermann who argue in favour of primary liability see it as an alternative *replacing* vicarious liability, and offering a more controlled and certain legal

[138] The classic starting point for this much debated topic is *Letang v Cooper* [1965] 1 Q.B. 232. Markesinis and Deakin, for example, argue that the functions of negligence and trespass torts differ fundamentally in practice: S. Deakin, A. Johnston and B. Markesinis, *Markesinis and Deakin's Tort Law*, 7th ed. (Oxford 2013), 360. For differences between Australia and England and Wales, see P. Handford, "Intentional Negligence: A Contradiction in Terms" (2011) 32 Syd.L.Rev. 29.

[139] Deakin, "The Evolution of Vicarious Liability", p. 7.

[140] Tofaris, "Vicarious Liability".

[141] See D. Tan, "For Judges Rush in Where Angels Fear to Tread" (2013) 21 T.L.J. 43; Beuermann, "Conferred Authority".

[142] Arguably Lord Hobhouse's judgment may be seen as supporting non-delegable duty analysis: *Lister* [2001] UKHL 22, at [54]–[55].

[143] See e.g. *Razumas* [2018] EWHC 215 (QB). For uncertainties which remain post-*Woodland*, see R. George, "Non-Delegable Duties of Care in Tort" (2014) 130 L.Q.R. 534; P. Giliker, "Vicarious Liability, Non-Delegable Duties and Teachers: Can You Outsource Liability for Lessons?" (2015) 31 P.N. 259.

framework. Certainly, with hindsight, we can argue that *Lister might* have been better interpreted as a non-delegable duty case, confined to the particular context of institutional carers abusing the very children they were employed to look after.[144] The problem is that the UK courts at present seem to be treating the possibility of a non-delegable duty not as an alternative replacing vicarious liability, but as an *additional* basis for liability. In other words, as Morgan states, a means by which they can extend vicarious liability to independent contractors. In opting, then, in 2001 for vicarious liability in lieu of non-delegable duties, the courts' choice in *CCWS*, *Cox*, *Mohamud* and *Armes* has been one of extending, not constraining, the doctrine. As a result of recent cases such as *Barclays Bank Plc. v Various Claimants*,[145] in which a bank was held vicariously liable for the sexual assaults of a doctor in private practice offering medical examinations for its job applicants and employees, there is increasingly little need for the UK courts to "add on" non-delegable duties and make the effort needed to resolve the conceptual difficulties associated with them. The non-delegable duty is treated as a fall-back if the vicarious liability argument fails. The problem is that vicarious liability very rarely fails …

We can conclude therefore that, at present, the common law non-delegable duty is simply not strong enough conceptually to match the force of vicarious liability. While academics can make a strong case for reform, without conceptual certainty and the need to engage in the real effort required to construct a controlled legal framework, it seems likely that vicarious liability will continue to be seen by the courts as the "go to" doctrine to deal with claims of historical child sexual abuse. In the next section, I will examine the impact of this finding for the general principles of the law of tort.

IV. Impact on Tort Law Generally

Vicarious liability continues, therefore, to be on the move.[146] The statutory/common law non-delegable duty for intentional torts, while advocated by the Royal Commission and certain commentators, has yet to be accepted in the UK or Australia. While vicarious liability has proved to be able to respond to the needs of victims of historic child sexual abuse, albeit more flexibly in the UK than in Australia, such developments have had a knock-on effect on tort law generally. In contrast to the *Woodland*/*Kondis* non-delegable duty which is premised on an institutional defendant

[144] See N.J. McBride and R. Bagshaw, *Tort Law*, 6th ed. (Harlow 2018), 842–843; T. Weir, *An Introduction to Tort Law*, 2nd ed. (Oxford 2006), 112–113.

[145] *Barclays Bank Plc.* [2018] EWCA Civ 1670. Irwin L.J, at [46], further questions whether, in the light of the later decisions of *Cox* and *Mohamud*, *Woodland* could now have been argued on the basis of vicarious liability.

[146] To use the well-known phrase of Lord Phillips in *Catholic Child Welfare Society* [2012] UKSC 56, [2013] 2 A.C. 1, at [19]. See also Lord Reed in *Cox* [2016] UKSC 10, [2016] A.C. 660, at [1].

assuming responsibility for the care and welfare of a particular set of victims,[147] the UK test for vicarious liability is applicable to a broad category of relationships (prison authorities/prisoner in *Cox*; local authority/foster parents in *Armes*), within a wide field of activities (racist abuse and attacks in *Mohamud*) and covers both negligence and intentional torts (*Cox*/*Mohamud*). Lord Reed in *Cox* made it clear that the modern theory of vicarious liability stated in *CCWS* is not confined to some special category of cases, such as the sexual abuse of children, but intended to provide a basis for identifying the circumstances in which vicarious liability may in principle be imposed.[148] The criteria set out in *CCWS* for vicarious liability are therefore as readily applicable to a negligent driver as to a person deliberately attacking a co-worker or customer. In refusing to distinguish sexual abuse cases from other claims in tort, the UK courts have established as a matter of precedent that a broad doctrine of vicarious liability, primarily based on notions of enterprise risk, is applicable across the law of torts.

Inevitably this has led to concerns of over-extensive liability being placed on defendants who are not at fault bar being connected in some way to a tortfeasor "integrated" into their organisation whose torts are "within the field of activities" allocated to him or her. The recent case of *Barclays Bank* where the bank was found vicariously liable for a doctor in private practice operating from his own consulting rooms has confirmed concern that "the wall around vicarious liability for independent contractors has been breached".[149] While some cases have sought to interpret the *CCWS* test more narrowly,[150] a broad notion of vicarious liability now operates across the English law of torts, with consequences in terms of loss distribution, insurance and, post-*Armes*, serious concerns as to its impact on local authority funding. We can also observe that the decisions of the Supreme Court have not diminished litigation in this field. Quite the opposite. A number of cases are currently on appeal raising once again the operation of the two-stage test. A future Supreme Court case on this topic (the fifth since 2012) is increasingly likely.

The issue of vicarious liability and unincorporated associations provides a good illustration of the concerns raised in this paper. One problem facing victims of child sexual abuse cases is that the perpetrators may be working for an organisation that is not incorporated, such as a church, charity, voluntary or sporting organisation. In Australia, the courts have maintained as a matter of strict law that the rules applicable to suing unincorporated

[147] See Lord Sumption in *Woodland* [2013] UKSC 66, at [23], who sets out the defining features of the *Woodland* non-delegable duty.
[148] *Cox* [2016] UKSC 10, [2016] A.C. 660, at [29].
[149] A. Silink, "Vicarious Liability of a Bank for the Acts of a Contracted Doctor" (2018) 34 P.N. 46, at 46.
[150] See e.g. *Kafagi v JBW Group Ltd.* [2018] EWCA Civ 1157; *Bellman v Northampton Recruitment Ltd.* [2016] EWHC 3104 (QB), [2017] I.C.R. 543 (on appeal); but not all: *Various Claimants v Wm Morrisons Supermarket Plc.* [2017] EWHC 3113 (QB), [2018] I.R.L.R. 200.

associations must continue to be applied. This means that the plaintiff will have to show that the trustee corporation possessed a sufficient community of interest in the matter to maintain an action against it.[151] The contrast with the position in the UK is remarkable. When the issue was raised in the UK Supreme Court in *CCWS*, the Court simply dismissed it out of hand: "Because of the manner in which the institute carried on its affairs it is appropriate to approach this case as if the institute were a corporate body existing to perform the function of providing a Christian education to boys, able to own property and, in fact, possessing substantial assets."[152]

McIvor has argued that the most important contribution of *CCWS* to the law is its confirmation that unincorporated associations can be subject to vicarious liability, which she describes as "an entirely sensible development".[153] The fact remains, however, that a solution provided (with little or no conceptual analysis) to deal with a hurdle facing victims of child sexual abuse now operates across the law of torts. Without, it should be added, any consideration of its broader impact in terms of loss distribution, insurance premiums and so on.

The question is how we react to this. The broad test for vicarious liability, as developed in the UK, would seem lack definitional certainty, is expanding from case to case and lacks a clear theoretical underpinning. The Australian reluctance to follow this path is understandable, particularly as Deakin rightly observes, the law in its current form seems to represent "something of a historical accident" rather than a considered and coherent form of legal development.[154] Such a view is shared by many UK academics, who fear that, far from seeking a close connection, *Mohamud* suggests that vicarious liability may arise simply because the employment provides an opportunity for the commission of the wrongful act.[155] We may also contrast the willingness of English tort law to embrace enterprise risk for vicarious liability with its reluctance to permit claims against public bodies such as the police for negligent investigations.[156] If vicarious liability is regarded as an exception to corrective (fault-based) liability, how can

[151] See *Trustees of Roman Catholic Church* (2007) 70 NSWLR 565, [2007] NSWCA 117. See also Ireland: *Hickey v McGowan* [2017] IESC 6, at [52]. The Royal Commission has recommended that state and territory governments should introduce legislation to provide that, where a survivor wishes to commence proceedings for damages in respect of institutional child sexual abuse where the institution is alleged to be an institution with which a property trust is associated, then unless the institution nominates a proper defendant to sue that has sufficient assets to meet any liability arising from the proceedings: (a) the property trust is a proper defendant to the litigation, and (b) any liability of the institution with which the property trust is associated that arises from the proceedings can be met from the assets of the trust: Recommendation 94. So far only Victoria has legislated (in a slightly different form).

[152] *Catholic Child Welfare Society* [2012] UKSC 56, [2013] 2 A.C. 1, at [33].

[153] C. McIvor, "Vicarious Liability and Child Abuse" (2013) 29 P.N. 62, at 63.

[154] Deakin, "The Evolution of Vicarious Liability", p. 9.

[155] E.g. P. Morgan, "Certainty in Vicarious Liability: A Quest for a Chimaera?" (2016) 75 C.L.J. 202.

[156] See *Michael v Chief Constable of South Wales* [2015] UKSC 2, [2015] A.C. 1732; *CN v Poole BC* [2017] EWCA Civ 2185, [2018] 2 W.L.R. 1693.

we accept its ongoing extension to cover claims for which even 10 years ago no court would have considered its imposition?

The Australian response has been to put on the brakes. It is perhaps inevitable that this has led to an overly cautious approach. In particular, retaining a narrow interpretation of "employee" is misguided in that it fails to respond to the casualisation of modern working relationships.[157] Nowadays the motorcycle courier in *Hollis v Vabu*[158] would be far more likely to be working as casual labour than under a contract of employment. Recognising the impact of the gig economy is not a sign of weakness, but one of progress. Nevertheless, the High Court's decision to favour a test of "occasion" does indicate a genuine attempt to adopt a controlled, incremental approach to the growth of vicarious liability. While we can argue whether, in practice, this test will prove sufficiently robust to provide a framework for the course of employment test,[159] it marks a clear refusal to follow the path of the UK courts and one which, if applied in a clear and structured way, can grow into a test providing guidance for the lower courts.

It is submitted that such an incremental approach provides the most sensible means by which greater clarity can be brought to UK law. It needs, however, to be applied to both stages of the vicarious liability test. On this basis, when applying the stage two "close connection" test to intentional torts, the court should move towards adoption of a more controlled test. It is submitted that the Australian "occasion" test does provide a way forward, albeit one which will require some elaboration by the courts. In focussing on the *role* given to the employee and the *nature of his responsibilities*, the court examines the relationship uniting the parties, particularly whether the tortfeasor had been placed in a position where he or she had authority, power, trust, control and the ability to achieve intimacy with the victim. This can be easily translated into the language of risk: vicarious liability should only be imposed if the tortfeasor's role and the nature of his responsibilities give rise to a heightened degree of risk. By such means, the courts have guidance to frame the operation of the doctrine, enabling them to move towards a more structured and coherent framework for vicarious liability. One immediate consequence would be the need to reflect further on the decision taken in *Mohamud*: can we really say that a kiosk attendant in a petrol station with a duty to interact with customers has such authority, power or control over the customer to give rise to vicarious liability? If not, *Mohamud* is a step too far.

[157] See H. Collins, "Independent Contractors and the Challenge of Vertical Disintegration to Employment Protection Laws" (1990) 10 O.J.L.S. 353; J. Prassl, *The Concept of the Employer* (Oxford 2015).

[158] *Hollis* [2001] HCA 44, (2001) 207 C.L.R. 21.

[159] Some Australian commentators have been positive. Crawford, for one, has argued that it provides greater certainty than had previously existed in Australia (or indeed is found in the UK and Canada): H. Crawford, "A Step in the Right Direction?" (2017) 24 T.L.J. 179.

The incremental approach also suggests a more cautious approach is needed to the stage one relationship test. While it does not prevent the courts imposing vicarious liability on a prison for the misconduct of prisoners working in its kitchen, it stresses that such relationships must be genuinely "akin to employment" and not simply loosely linked to the enterprise. *Cox* is correct, on this basis, but I would question whether *Armes* (finding the relationship of foster-carer/local authority akin to employment) is a step too far. This leads to a more radical conclusion. If, as certain commentators have indicated above, the local authority/foster-carer relationship is not naturally "akin to employment", then rather than denying liability, a case can be made to consider whether the *Woodland* non-delegable duty should be extended to this scenario. This requires caution. The move from negligence to intentional torts is not to be taken lightly and the statutory framework in question needs to be considered carefully. The latter, it will be recalled, was considered by the Supreme Court to bar this option in *Armes*. Nevertheless, an incremental approach to vicarious liability requires the court to recognise that vicarious liability has its limits. On this basis, if the "akin to employment" tests fails, the answer is not to further extend the stage one relationship, but look to different options and see whether, exceptionally, the *Woodland* non-delegable duty should extend to this case. By such means, the law would promote consistency and, it is submitted, diminish the threat of over-extensive liability with defendants acting as guarantors against the possibility of tortious harm. I would argue, therefore, that reining in vicarious liability with cautious development of the *Woodland* exception will provide the UK courts with the opportunity to provide greater certainty in the law and more predictability for the lower courts. It would, however, require the courts to recognise that *Mohamud* and *Armes* need to be reconsidered as illegitimate extensions of the doctrine of vicarious liability.

V. Conclusions

Emerging from four Supreme Court judgments between 2012 and 2017, UK vicarious liability law is still operating in a state of uncertainty. Recent case law continues to test its boundaries. There is a lack of clarity in the current law. The law has been shaped by the global scandal of child sexual abuse as highlighted in the reports of the Australian Royal Commission and IICSA. Difficulties in bringing claims in private law against abusers or for institutional fault have led the courts and reform bodies to consider two options: vicarious liability and non-delegable duties. In particular, the Australian 2015 *Redress and Civil Litigation Report* recommended the introduction of a statutory non-delegable duty to assist plaintiffs in bringing their claims. As this paper has indicated, the statutory non-delegable duty has not been adopted and we can identify concerns as to its cost, scope and interpretation. The common law non-delegable duty,

revived in the UK in *Woodland* in 2013 based on Australian authority, has received some academic support as a means of dealing with abuse cases, but, as seen, it remains unclear whether the *Woodland* duty will apply to intentional harm and there are unresolved questions of conceptual clarity. Notably if the non-delegable duty is treated simply as a means of *supplementing* vicarious liability, it is likely to offer little bar further complicating the existing law. UK and Australian tort law, to date, have thus opted to develop vicarious liability rather than non-delegable duties to assist victims of child sexual abuse. In the UK, in particular, the two-stage test adopted in *CCWS* permits a flexible approach both to the relationships which give rise to vicarious liability and the "field of activities" covered by the doctrine. Australia, while continuing to require a contract of employment, has, in *Prince Alfred College*, responded to the need to adjust vicarious liability to meet social concerns and it is hoped that it will only be a matter of time before the High Court reconsiders the "employment" requirement.

My paper has highlighted, however, difficulties arising from the broad doctrine of vicarious liability in UK law and contrasted it with the controlled extension of vicarious liability in Australia. It argues that the time has come to reflect on the current state of English tort law. Recent Supreme Court decisions have led to questionable extensions of both stages of the vicarious liability test and, it is submitted, a more considered approach would ask whether *Mohamud* and *Armes* should legitimately be treated as vicarious liability cases. The paper recommends, therefore, adoption of an incremental approach at both stages of the UK vicarious liability test. A case is also made for an exceptional non-delegable duty based on the *Woodland* framework which could be applied in relation to intentional torts, although it would need to be analysed carefully, notably in relation to the statutory framework within which the institution operates, and would require the court to address fundamental concerns as to the conceptual coherence of such duties.

We often turn to comparative law to learn from other jurisdictions and gain inspiration, particularly in relation to systems sharing a common legal tradition and facing similar social problems.[160] *Prince Alfred College* offers a way forward. The High Court advised on the need for an approach which "has the advantage of being likely to identify factors which point toward liability and by that means provide explanation and guidance for future litigation."[161] In 2001 in *Lister*, the House of Lords sought inspiration from Canada.[162] It is time for the UK Supreme Court to look to the High Court of Australia. In a nutshell, vicarious liability should no longer be on the move. It should stop. And reflect.

[160] K. Zweigert and H. Kötz, *An Introduction to Comparative Law*, 3rd ed. (Oxford 1998), 223.
[161] *Prince Alfred College* [2016] HCA 37, (2016) 258 C.L.R. 134, at [46].
[162] *Bazley* [1999] 2 SCR 534.