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for discriminatory behaviour by employees if they can prove that they “took such steps as were reasonably practicable to prevent the employee from doing that act, or from doing in the course of his employment acts of that description”. It is difficult to know what employers must do to establish a comparable defence in relation to the Protection from Harassment Act, but it seems likely that they will need to be proactive in their approach to this issue by widening the scope of anti-harassment policies, amending disciplinary procedure to clarify when and how a harasser will be disciplined, and providing training for managers on how to deal effectively with harassment and handle complaints.

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## Liability for Harm Suffered in Institutional Care: *M v Hendron*

### A. INTRODUCTION

Four years ago, in the English case of *Lister v Hesley Hall*,<sup>1</sup> the House of Lords substantially redrew the boundaries of vicarious liability for an employee’s intentional wrong-doing. Previously employers’ liability had been regarded as contingent upon whether the wrong-doer had acted with the scope of his or her employment.<sup>2</sup> That meant that, where, as in *Lister*, the alleged wrong involved a carer intentionally harming an individual under the employer’s charge, the test almost invariably excluded the employer from liability. As was said in an earlier case, such conduct was “far removed from an unauthorised mode” of carrying out the employee’s duties,<sup>3</sup> and there was deep disinclination to look upon “an independent act of self-indulgence or self-gratification” as having been committed in the scope of employment.<sup>4</sup> In *Lister* the court confronted this problem by refocusing the test upon whether the wrong was “so closely connected with his employment that it would be fair and just to hold the [employer] vicariously liable”,<sup>5</sup> and on that basis found the employers of the warden of a school boarding house vicariously liable for his abuse of children in his care.

The recent Outer House case, *M v Hendron*,<sup>6</sup> is one of the first Scots cases since

1 [2002] 1 AC 215.

2 The so-called “Salmond test” which derived originally from J Salmond, *Law of Torts*, 1st edn (1907) at 83.

3 Per Lady Butler-Sloss in *Trotman v North Yorkshire County Council* [1999] IRLR 98 at 101, (overruled in *Lister*). See also *Power v Central SMT Co Ltd* 1949 SC 376 per Lord President Cooper at 380: “it appears to me that if the servant’s caprice might suffice to take an act out of the course of his employment, much more will his private malice or spite, even if the source of that malice or spite is to be found in a transaction intrinsic to his employment.”

4 Per Chadwick LJ in *Trotman* at 102.

5 *Lister v Hesley Hall* [2002] 1 AC 215 per Lord Steyn at para 28.

6 2005 SLT 1122.

*Lister* to consider issues of vicarious liability in the context of institutional care. Like *Lister*, it concerned an action for damages arising out of abuse suffered by a pupil in a residential school, but there was a less straightforward legal relationship between the defenders and the alleged perpetrator of the abuse – a member of the Order of monks which staffed the school. In the event this case provides a useful discussion of the issues relating to vicarious liability, non delegable duties of care, and the primary liability of public authorities.

### B. THE FACTS OF *M v HENDRON*

The pursuer in *M v Hendron* had been committed to a residential “approved” school in 1963, aged only nine years old, and had remained there for three years. The school was staffed mainly by monks from the Order of De La Salle Brothers. The pursuer alleged that he had suffered physical abuse chiefly at the hands of two of the brothers, one of whom, Brother Benedict, had recently been convicted of assaulting the pursuer over a period between 1963 and 1964. The pursuer’s action was brought against a multiplicity of defenders. Decree in absence for £50,000 against Brother Benedict was readily granted, but damages were also claimed from the Congregation of De La Salle Brothers, the school managers, and the Lord Advocate as representing the successor to the Scottish Education Department (SED) which had responsibility for such schools at the relevant time. The issue before the court was whether proof before answer should be allowed as to the arguments of primary and vicarious liability made against these remaining defenders. (This article will not consider the issues of time bar which were also given extended consideration.<sup>7</sup>)

### C. VICARIOUS LIABILITY AND RELIGIOUS ORGANISATIONS

In *M v Hendron* the court accepted, on the authority of *Lister*, that there could in principle be a sufficiently close connection between child abuse and the work of those employed specifically to care for children<sup>8</sup> to justify imposing liability on the employers.<sup>9</sup> To that extent it was not necessary to consider problems such as those raised by recent North American case-law<sup>10</sup> as to liability for clergy who exploit their general pastoral role to perpetrate abuse upon children or vulnerable adults. (One of the leading Canadian cases in this category, *John Doe v Bennett*,<sup>11</sup> was cited to the court in *M v Hendron*.) The point of contention in such cases has been whether there is a sufficient link between the pastoral duties and the abuse to find the church authorities vicariously liable.

7 At paras 130-138. For discussion as to the exercise of discretion in overriding the normal rules on limitation under ss 17 and 19A of the Prescription and Limitation (Scotland) Act 1973, see *B v Murray* 2005 SLT 982; also *C v D* [2004] EWHC 534 (QB) (on the comparable English provisions).

8 Cf *E v Order of the Oblates of Mary Immaculate* 2005 SCC 60, 258 DLR (4th) 385 in which the abuse was committed at a residential school by the school baker – vicarious liability was not found.

9 At para 95. On the authority of *Lister* in Scotland see, e.g., *Sharp v Highland and Islands Fire Board* 2005 SLT 855 per Lord Macphail at para 33.

10 For an overview see I C Lupu and R W Tuttle, “Sexual misconduct and ecclesiastical immunity” (2004) *Brigham Young University LR* 1789, in particular at 1879ff.

11 [2004] 1 SCR 436, 2004 SCC 17.

A greater source of difficulty was that the alleged wrongdoer was hardly in a conventional employment relationship. The De La Salle Order's current description of the working relationship amongst its members refers to "Christian Educators who live and work together in community, according to the ideals and principles of our founder – Saint John-Baptist De La Salle".<sup>12</sup> Assuming this was also how the Order saw itself in 1963, there was scarcely an "intention to create a binding contractual relationship enforceable in civil law"<sup>13</sup> as between the monks and their Order, at least while the monks were living within the religious community itself. Nevertheless, it is open to argument that when they went out to serve in institutions such as schools the monks became employees of those institutions, even though they did so to follow their vocation rather than for profit.<sup>14</sup> The court appeared to accept that there might be a "quasi-employment" relationship between the school managers and the monks, although a preliminary proof was required to determine the identity and status of those said to be managers at the relevant time. Similarly, the SED had been involved in the selection, supervision and remuneration of school staff, to the extent that there was sufficient basis for proof as to whether the closeness of its involvement in the Brothers' work at the school gave rise to vicarious liability. On the other hand, the question whether the De La Salle Order itself should be found vicariously liable was more complex.

The Order had entered into an agreement with the then Scottish Education Department to provide teachers and carers for the school, in return for which the Order's mother house received payment. It was not clear whether contracts of employment as such were issued to individuals, but the monks lived in the school and were dependent for support upon the school bursar. The pursuer ventured a comparison between the position of the Order and that of the Episcopal Corporation which had employed the errant priest in *John Doe v Bennett*.<sup>15</sup> However, Lady Paton quite rightly dismissed this analogy, since the Order was not a corporation, but a form of unincorporated association, with no legal personality independent of its members.<sup>16</sup> But equally, this meant that members of the Order could not be held liable simply because a delict had been committed by another member.<sup>17</sup> The joint and several liability of the members of the Order was dependent, first, upon whether the wrongdoer was acting as the agent or servant of the "association", and, if so, second, on whether at the time of the delictual

12 As stated on the Order's website at <http://www.delasalle.org.uk/>.

13 The test applied in *Percy v Church of Scotland* [2005] UKHL 73, per Lord Hope at para 107, in finding that an associate minister was in an employment relationship with the Church of Scotland within the meaning of the Sex Discrimination Act 1975 Act, s 82(1).

14 In this connection, see the information pamphlet issued by the US Department of Labor, Labor Standards Division, "Employment Relationship Under the Fair Labor Standards Act", available at [http://www.osha.gov/pls/epub/wageindex.download?p\\_file=F11973/WH1297.pdf](http://www.osha.gov/pls/epub/wageindex.download?p_file=F11973/WH1297.pdf): "Persons such as nuns, monks, priests, lay brothers, ministers, deacons, and other members of religious orders who serve pursuant to their religious obligations in schools, hospitals and other institutions operated by the church or religious order are not considered to be 'employees' within the meaning of the law. However, the fact that such a person is a member of a religious order does not preclude an employee-employer relationship with a State or secular institution."

15 [2004] 1 SCR 436, 2004 SCC 17.

16 Para 88 – as were the defenders in *Gorrie v The Marist Brothers* 2002 SCLR 436.

17 See *Harrison v West of Scotland Kart Club* 2004 SC 615.

actions he was acting on its behalf and within the scope of his authority from it.<sup>18</sup> In this case Lady Paton was persuaded that the errant monks had been acting as agents for their Order in staffing the school, and that the Order might therefore be found liable for delicts found to have been committed in the course of their agency.<sup>19</sup> This meant that there were adequate grounds for the second part of the inquiry – as to whether in the particular circumstances of the case there was a sufficiently close connection between the delict and the type of work deputed to the monks as “agents”.

Although the analysis of the relationship between a religious order and one of its number as one of agency is not wholly straightforward, it can probably be regarded as correct. The classic model of agency (as a “fiduciary relationship which exists between two persons one of whom expressly or impliedly consents that the other should act on his behalf so as to affect his relations with third parties”<sup>20</sup>) doubtless gives little sense of what might have been the subjective understanding between the parties in relation to their Christian calling. But on objective assessment the Order had entered into an agreement with the SED to provide services at the school, and from the perspective of third parties, the monks acted on its behalf in delivering those services.

#### D. PUBLIC AUTHORITIES AND NON-DELEGABLE DUTIES OF CARE

A further matter considered by the court was whether proof should be allowed as to whether the SED was under a non-delegable duty of care to protect the safety of pupils. The concept of non-delegable duties applies where the defender is said to have been under a direct duty to protect the property or the person of the pursuer, notwithstanding that the actual cause of harm has been the actions of a third party and the defender has not been immediately at fault. There is thus a clear distinction to be drawn between the situation where an employer is vicariously liable for the wrongdoing of an employee and the situation where an employer is in breach of a non-delegable duty of care owed to the person wronged. Vicarious liability occurs when a duty arises out of the relationship between *employee* and pursuer; the employer is liable only because the delict was committed in the course of the employee’s work. In contrast, a non-delegable duty arises out of a direct relationship between *employer* and pursuer.<sup>21</sup>

Due to their onerous nature, non-delegable duties are recognised sparingly.<sup>22</sup> It is settled that employers have a duty to provide for the safe operation of the workplace, and this cannot be evaded simply by delegating it to another employee or an independent

18 Para 91. See also *Harrison v West of Scotland Kart Club* 2004 SC 615 per Lord Marnoch at para 23.

19 On vicarious liability of a principal for the delicts of an agent, see *The Laws of Scotland: Stair Memorial Encyclopaedia*, vol 15 (1995), para 244; A Barron, “Vicarious liability for employees and agents” 2004 SLT (News) 91; F M B Reynolds et al, *Bowstead & Reynolds on Agency*, 17th edn (2001) at paras 8–176–8–177.

20 F M B Reynolds et al, *Bowstead & Reynolds on Agency*, 17th edn (2001) at para 1-001

21 See J A Weir, *A Casebook on Tort*, 10th edn (2004) 292. The distinction between non-delegable duties and vicarious liability is clearly made in *New South Wales v Lepore*, note 26 below, and in the Canadian case of *KLB v British Columbia* 2003 SCC 51, [2003] 2 SCR 403, (duty to protect welfare of foster children under supervision of public authority). See also *Marshall v Wm Sharp & Sons Ltd* 1991 SLT 114, in which the distinction is made with regard to the employer’s duty to maintain safety in the workplace.

22 For a recent unsuccessful attempt to extend the category see *A (A Child) v Ministry of Defence* [2005] QB 183.

contractor.<sup>23</sup> There is Scots and English authority to suggest that a custodian to whom an item has been consigned has a non-delegable duty to ensure its safekeeping and is therefore liable if it is damaged or misappropriated by an employee.<sup>24</sup> In addition, it would appear that landowners have a non-delegable duty to prevent nuisance to their neighbours due to works on their property.<sup>25</sup> And there is further authority, directly relevant here, from the High Court of Australia. The case of *New South Wales v Lepore*,<sup>26</sup> cited in *M v Hendron*, indicates that non-delegable duties may in principle be imposed upon public authorities with regard to the safety of pupils at schools in their charge.

One issue which caused the court difficulty in *New South Wales v Lepore* was whether an authority's duties might extend to the situation where the claimant had been injured by intentional wrongdoing – indeed criminal actions – on the part of employees, or whether the authority was required only to exercise reasonable care.<sup>27</sup> However, the case-law in Scotland and England leaves little question that such duties may encompass protection against criminal actions as well as carelessness.<sup>28</sup> Indeed, Lady Paton accepted that such duties might be found in this context and might bind an authority even where there had been no fault on its part.<sup>29</sup>

Lady Paton's recognition of the concept of non-delegable duties was based on her reading of the "developing jurisprudence", "underlying policy reasons", and, more specifically, on "the reasoning of the House of Lords in *Lister v Hesley Hall Ltd*".<sup>30</sup> And indeed the policy justifications invoked in *Lister* to support the extension of vicarious liability might apply equally, if not more appropriately, to non-delegable duties. The following passage, for example, is found in Lord Steyn's judgement, explaining the overruling of *Trotman*:<sup>31</sup>

The reality was that the county council were responsible for the care of the vulnerable children and employed the deputy headmaster to carry out that duty on its behalf. And the sexual abuse took place while the employee was engaged in duties at the very time

23 The concept was originally applied in this context as a means of allowing employees to recover when the common employment doctrine might otherwise have left them without a remedy against employers after accidents in the workplace (D M Walker, *Delict*, 2nd edn (1981) 551-553). See, e.g., *Wilson and Clyde Coal Co v English* 1937 SC (HL) 46.

24 *Central Motors (Glasgow) Ltd v Cessnock Garage & Motor Co* 1925 SC 796; *Morris v CW Martin & Sons Ltd* [1966] 1 QB 716.

25 *Powrie Castle Properties Ltd v Dundee City Council* 2001 SCLR 146.

26 [2003] HCA 4. For commentary see P Vines, "Schools' responsibility for teachers' sexual assault: non-delegable duty and vicarious liability" (2003) 27 *Melbourne University Law Review* 612. (Of the seven judges, Callinan J dissented as to the existence of a "unique non-delegable" duty (at para 340).)

27 Gleeson CJ at paras 34ff, and Gummow and Hayne JJ at para 265, took the view that intentional harm by the employee did *not* put the employer in breach of the non-delegable duty of care. McHugh J at para 163 stated that it did. Gaudron J did not commit herself on the issue, and Kirby J at para 293, reserved his position. (Callinan J dissented as to the existence of non-delegable duties.)

28 E.g. *Central Motors (Glasgow) Ltd v Cessnock Garage & Motor Co* 1925 SC 796; *Morris v CW Martin & Sons Ltd* [1966] 1 QB 716. On this point, see N J McBride and R Bagshaw, *Tort Law* 2nd edn (2005) 232-233.

29 At para 113.

30 At para 113.

31 Para 25.

and place demanded by his employment. The connection between the employment and the torts was very close.

Similarly Lord Hoffmann explained:<sup>32</sup>

The school was responsible for the care and welfare of the boys. It entrusted that responsibility to the warden. He was employed to discharge the school's responsibility to the boys. For this purpose the school entrusted them to his care.

On the other hand, the reasoning applied in *Lister* does not send clear signals as to the existence of non-delegable duties as a basis of liability separate from vicarious liability. All of the judgments in *Lister* concluded with a finding of vicarious liability based upon the close and direct connection between the care-worker's employment and the abuse perpetrated upon the claimants. None founded the defendant's duty in terms of an independent non-delegable duty of care on the part of the employer, although, as Tony Weir has commented, "the speeches in *Lister* modulate vertiginously between these two grounds of liability, which are quite distinct and should be kept so".<sup>33</sup> Their Lordships looked in some detail at the relationship between the school and the abused children, and in doing so they applied, in varying degrees, the terminology of non-delegable duties. But their purpose in doing so was not in the end to establish whether the employer was under a free-standing direct duty to the children, but to consider whether in policy terms it was fair and just to find the employer *vicariously* liable for the employee's breach of duty.<sup>34</sup> Thus the reasoning applied in *Lister*, left the boundaries between vicarious liability and non-delegable duties in some confusion. It is therefore a welcome aspect of *M v Hendron* that it makes the distinction clearly.

And indeed once the difference between the two concepts is sufficiently focused it is possible to ask a further important question: would application of the non-delegable duties doctrine in this context achieve the policy objectives identified in *Lister* equally well, but without the vagueness and uncertainty of the "close and direct" connection test for vicarious liability?<sup>35</sup> As Gaudron J stated in *Lepore v New South Wales*:<sup>35</sup>

As a matter of legal policy, there is no advantage and considerable disadvantage in holding a person vicariously liable in circumstances in which he or she is directly liable because of a breach of his or her personal or non-delegable duty, as was the case in *Lloyd v Grace, Smith & Co*<sup>36</sup> and, also, in *Morris v C W Martin & Sons Ltd*.<sup>37</sup> That course is likely to lead the persons concerned to think, erroneously, that they have been held liable without fault on their part. Further, it seems at least arguable, in the case of

<sup>32</sup> Para 82.

<sup>33</sup> *Casebook on Tort*, 10th edn (2004) 292.

<sup>34</sup> E.g. Lord Clyde at paras 46 and 50; Lord Hobhouse at paras 54-55; Lord Millett at paras 79 and 80. In this connection see also the judgment of Lord Wheatley (IH) in *Williams v Hemphill* 1966 SC (HL) 31 at 41. (An authorised passenger was injured travelling in the defender's lorry while the driver made an unauthorised detour. The pursuer had been brought into "neighbourhood" with the defenders who thereby came under an obligation to him to take reasonable care to see that he was transported in safety, but the employer was found vicariously, not directly, liable.)

<sup>35</sup> Para 127. But cf Kirby J at para 295, suggesting that non-delegable duties should be restricted to cases where "the broader basis of vicarious liability" did not apply.

<sup>36</sup> [1912] AC 716.

<sup>37</sup> [1966] 1 QB 716.

those who are young or especially vulnerable, that they are better protected by identification of the content of the duty of care that is owed to them by those authorities and institutions that have assumed responsibility for their welfare than by the imposition of vicarious liability for the deliberate criminal acts of their employees.

## E. PUBLIC AUTHORITIES AND DIRECT FAULT-BASED LIABILITY

Recent cases concerning abuse in institutional care have raised concern as to the means of ensuring appropriate redress for victims. A question left open by *Lister* is why the response in the common law has been to push forward the boundaries of vicarious liability rather than by confronting issues of non-delegable duties or indeed primary fault-based liability on the part of the institutions and the authorities engaged in supervision of institutional care. From this point of view it is significant that in *M v Hendron* Lady Paton found that there was a sufficient case to allow inquiry into whether the SED had failed, in primary duty to investigate serious concerns as to the running of the school.<sup>38</sup>

Often the standard of care expected of a public authority in such a supervisory role has been construed restrictively, and there is reluctance to penalise a failure to intervene. Harm which has arisen out of a single incident tends to be regarded as unforeseeable<sup>39</sup> (an approach which stems perhaps from a fear of encouraging “defensive” and unhelpful over-regulation<sup>40</sup>). But even where harm has been sustained over a prolonged period, liability is rarely found. The *locus classicus* on the liability of local authorities in relation to failures in child care is of course *X (Minors) v Bedfordshire County Council*,<sup>41</sup> and in particular the statement by Lord Browne-Wilkinson on the common law duty of care arising from the performance, or non-performance, of a statutory duty in this context.<sup>42</sup> Broadly speaking, the three-stage test as set out in *Caparo Industries Plc v Dickman*<sup>43</sup> of a) foreseeability; b) proximity; and c) justness and reasonableness, must be satisfied if a duty of care is to be recognised and public policy considerations mean that the third element is often problematic. However, it is significant that one of the specific contexts identified by Lord Browne-Wilkinson in which the duty might exist is where a public authority was in charge of the running of a school, pursuant to its statutory duties: “in such latter case a common law duty to take reasonable care for the physical safety of the pupils will arise”.<sup>44</sup> Indeed it appears to have been

38 Paras 102-104.

39 See *Ahmed v City of Glasgow Council* 2000 SLT (Sh Ct) 153 (pupil assaulted by other pupil in classroom while teacher was absent) in which the pleading concerning fault by the education authority were repelled at an early stage; *Partington v London Borough of Wandsworth* [1990] Fam Law 468 (autistic teenager under supervision of a local education authority attacked a member of the public) in which the authority was held to have acted reasonably in the circumstances.

40 A fear perhaps reflected in the arguably redundant s 1 of the Compensation Bill (for England and Wales) currently before the UK Parliament.

41 [1995] 2 AC 633, and see now *Z v UK*, note 48 below. For commentary on developments subsequent to *X (Minors)* see M Johnson, “Public authority liability in child abuse compensation claims” 2004 *Journal of Personal Injury Law* 28.

42 At 730H-731A.

43 [1990] 2 AC 605.

44 At 735.



accepted in English case-law (not cited in *M v Hendron*) since *X(Minors)* that a failure adequately to supervise residential care can give rise to fault-based liability on the part of the relevant local authority.<sup>45</sup>

### F. POST SCRIPT: THE ECHR

Had the events of *M v Hendron* taken place forty years later, it might further have been argued that the SED – or its successor – was under an obligation as a public authority<sup>46</sup> under Article 3 of the European Convention on Human Rights to protect the rights of the children against inhuman or degrading treatment. Issues of proportionality must of course be considered, but parallels may be drawn with the criteria used in the common law to find that it is fair just and reasonable to impose a positive duty of care in this context.<sup>47</sup> Moreover, the judgment of the European Court of Human Rights in *Z v UK*<sup>48</sup> signals the onerous nature of the obligation placed on public authorities to safeguard the Article 3 rights of children under their supervision, whether or not in residential institutions.

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45 See *Various Claimants v Flintshire CC*, unreported, QBD, 26 July 2000 (aff'd [2001] PIQR Q9) per Scott Baker J at para 16: "the Defendants' poor supervision did render it likely that the children would be abused by the staff, and it is by this route that in my judgment liability can be established". This case refers also to the unreported judgement of Potts J in *Lesiakowski v Leicestershire CC*, unreported, QBD, 2 April 1996 (cited also by Johnson, note 41 above, at 30).

46 Human Rights Act 1998, s 6.

47 Text at note 44 above. On the overlap between proportionality and criteria to determine what is fair, just, and reasonable, see, by way of contrast, *Mitchell v Glasgow City Council* 2005 SLT 1100 where the issue was whether the local authority's failure to intervene to protect a tenant's rights under Art 2 gave rise to a claim in damages. Lord Bracadale held that it would not be fair, just or reasonable to impose upon the Council a positive duty to intervene. Similarly in relation to the Convention right he concluded: "That obligation is not to impose an impossible or disproportionate burden on the authorities. The test to be applied is whether the authorities knew or ought to have known at the time of the existence of a real and immediate risk... and that they failed to take measures within the scope of their powers which, judged reasonably, might have been expected to avoid that risk" (para 71).

48 (2002) 34 EHRR 3.