Neutral Citation Number: [2011] EWHC 2871 (QB)

Case No: HQ09CX03679

**IN THE HIGH COURT OF JUSTICE**
**QUEEN'S BENCH DIVISION**

Royal Courts of Justice
Strand, London, WC2A 2LL

Date: 08/11/2011

**Before** :

**Mr Justice MACDUFF**

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**Between :**

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| **JGE** | **Claimant** |
| **- and -** | |
| **1. The English Province of Our Lady of Charity.**<br>**2. The Trustees of the Portsmouth Roman Catholic Diocesan Trust.** | **Defendants** |

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**Elizabeth-Anne Gumbel QC and Justin Levinson** (instructed by **Emott Snell & Co Solicitors**) for the **Claimant**

**Lord Faulks QC and Nick Fewtrell** (instructed by **CCIA Services Ltd.**) for the **Defendants**

Hearing dates: 6 & 7th July 2011

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# Approved Judgment

I direct that pursuant to CPR PD 39A para 6.1 no official shorthand note shall be taken of this Judgment and that copies of this version as handed down may be treated as authentic.

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Mr Justice MacDuff

1. This is the determination of a preliminary issue. The issue to be tried is "*whether in law the second Defendant may be vicariously liable for the alleged torts of Father Baldwin"*. Father Baldwin was a Roman Catholic priest. I should make it clear from the outset that it has been agreed that, for the purposes of this litigation, the second Defendant stood in the place of the Bishop of Portsmouth at the material time. The issue is whether the diocesan bishop should be held vicariously liable for the torts of the priest of his diocese.

2. The Claimant, who is now aged 47 years, claims damages for personal injury. She alleges that she was sexually abused and raped by Father Baldwin (now deceased) at a time when she was resident at the Firs Children's Home in Waterlooville, Hampshire between May 1970 and May 1972.

3. The Home was operated and managed by the First Defendants, a religious order of nuns. The claimant also makes allegations against the First Defendants which will fall to be determined at the trial of this action; it is not necessary to consider those matters here. There are other issues also to be tried.

4. The preliminary issue, however, is concerned only with whether the Second Defendant may be responsible for the wrongful acts of Father Baldwin. The First Defendant does not appear. Hereafter I will refer to the Second Defendant as the Defendant.

5. The issue turns upon the relationship between Father Baldwin and the Defendant. The Defendant contends that Father Baldwin was not its employee (nor was the relationship "*akin to employment*") and that vicarious liability cannot attach to the relationship which existed between them. It will be necessary to examine the nature of that relationship. Where I refer hereafter to the Defendant, it is to be understood that this is the Defendant standing in the shoes of the bishop.

6. Leaving aside liability for the acts of agents and partners, vicarious liability, in its purest and most common form, is a doctrine which makes an employer responsible for the tortious acts of an employee, acting within the scope (or course) of his employment. There are two limbs; a contract of employment (or service) and a tortious act arising within the scope of the employment. Both limbs have given rise to much litigation in recent years.

7. Thus, in examining whether party A is vicariously responsible for the acts of party B, there is a two stage test. The first stage involves an inquiry into the relationship between A and B; whether it was a relationship (classically employment) to which the principles of vicarious liability may attach. The second involves an inquiry into the act or omission of B which is in question; whether the act was within the scope of the employment (or other relationship). These are both fact sensitive inquiries *"and it is a judgment upon a synthesis of the two which is required*"; see per Hughes LJ in ***Various Claimants, the Catholic Child Welfare Society and others v The Institute of the Brothers of the Christian Schools and others [2010] EWCA Civ 1106*** at para 37.

8. It is common ground between the parties that I am only concerned with stage one of the test. Stage two is for the trial judge. I only have to decide whether the nature of the relationship is one to which vicarious liability may (I emphasise "*may*") attach.

9. However, I cannot consider this issue in isolation. Insofar as a judgment upon a synthesis of the two stages is required, I need to look at the whole question of vicarious liability and the way in which the law has developed over recent times. It is stage two which has been under scrutiny in most of the recent decisions of the courts. Indeed, like this case, many of the recent authorities have been concerned with criminal conduct. Several of them have involved sexual assault by clergymen and others. Although the judgments have been concerned with whether the actions arose within the scope of the employment (in cases where employment was not in issue) the reasoning behind the decisions is entirely relevant to stage one – the "relationship" stage.

10. What is the justification and rationale of a doctrine which creates a form of strict liability whereby one party, who bears no fault, is made responsible for the wrongful act of another? There is no precise unanimity between judges (or between academics) about the rationale; no single accepted truth. In ***Viasystems (Tyneside) Ltd v Thermal Transfer Ltd and others [2005] EWCA Civ 1151*** Rix LJ expressed it in the following way.

> *"The concept of vicarious liability does not depend on the employer's fault but on his role. Liability is imposed by a policy of the law upon an employer, even though he is not personally at fault, on the basis, generally speaking, that those who set in motion and profit from the activities of their employees should compensate those who are injured by such activities even when performed negligently. Liability is extended to the employer on the practical assumption that, inter alia because he can spread the risk through pricing and insurance, he is better organised and able to bear that risk than the employee, even if the latter himself of course remains responsible; and at the same time the employer is encouraged to control that risk"* (paragraph 55)

> *"What has to be recalled is that the vicarious liability in question is one which involves no fault on the part of the employer. It is a doctrine designed for the sake of the claimant imposing a liability incurred without fault because the employer is treated by the law as picking up the burden of an organisational or business relationship which he has undertaken for his own benefit"* (paragraph 79)

11. At paragraph 55, the Lord Justice also noted that the courts had been called upon to determine issues upon both limbs and that:

> *"… over the years, the tests which have been adopted to answer these issues have developed in a way which has gradually given precedence to function over form"*.

12. Having noted myself that there has been much litigation upon both limbs, I should look at the development of vicarious liability in recent years.

13. Insofar as the second limb is concerned (the scope of the employment) there has been much recent movement. Before 2002, it had appeared to be the law that a criminal act by an employee could rarely attach vicarious liability to the employer. In ***Trotman v North Yorkshire County Council [1999] LGR 584,*** it had been held that sexual abuse of a pupil by a school master was an act which was committed outside the scope of the employment; it was not a mode, even an unauthorised mode of carrying out the employee's duties. ***Lister v Hesley Hall Ltd [2002] 1 AC 215*** overturned this decision. The House of Lords held that the company which owned and ran a school was vicariously liable for the sexual abuse of a pupil by its employee, the warden of a boarding house. There is now seen to be a "*closeness of connection*" test: whether the wrongdoing was closely connected with the duties of the job. The correct test was said to be "*whether the (employee's) torts were so closely connected with his employment that it would be fair and just to hold the employer vicariously liable"* (Lord Steyn at [2002] 1 AC 215 paragraph 28). Mere opportunity presented by the employment would not be sufficient. Thus vicarious liability would attach to the boarding house warden, whose responsibilities included the welfare and safety of his charges. It would not attach (for example) to the gardener or other employee whose job would have no connection with the welfare of the pupils.

14. The "*close connection*" test has been applied and developed in later cases. Of most significance is the case of ***MAGA v The Trustees of the Birmingham Archdiocese of the Roman Catholic Church*** *[2010] EWCA Civ 256.* The case involved the sexual abuse of the claimant by a Roman Catholic priest. The facts were similar, almost identical, to the pleaded facts here. In ***MAGA***, however, the Defendant conceded that the priest could be treated as employee of the Archdiocese for the purpose of that case only and the case was defended at stage two. Now the Defendant, (albeit not the same Defendant though a part of the same church) seeks to defend at stage one; the concession as to employment is not made. On the contrary, the nature of the relationship is hotly contested. In ***MAGA***, the Court of Appeal, applying the close connection test, held that the Defendant was vicariously liable.

15. In ***MAGA***, reference was made to two cases in the Canadian Supreme Court, ***Bazley v Curry 174 DLR (4th) 45*** and ***Jacobi v Griffiths 174 DLR (4th) 71***. These cases had been cited with approval also in ***Lister***, where Lord Steyn (at paragraph 27) described the judgments as "*luminous and illuminating"* and "*wherever such problems are considered in future in the common law world these judgments will be the starting point*".

16. ***Bazley*** was also a case of sexual abuse. In the course of her judgment, McLachlin J had surveyed the law of vicarious liability and summarised her conclusions (paragraph 46) as follows:

> *"In summary, the test for vicarious liability for an employee's sexual abuse of a client should focus on whether the employer's enterprise and empowerment of the employee materially increased the risk of the sexual assault and hence the harm. The test must not be applied mechanically, but with a sensitive view to the policy considerations that justify the imposition of vicarious liability – fair and efficient compensation for wrong and deterrence. This requires trial judges to*

> *investigate the employee's specific duties and determine whether they gave rise to special opportunities for wrongdoing. Because of the peculiar exercise of power and trust that pervade cases such as child abuse, special attention should be paid to the existence of a power or dependency relationship, which on its own often creates a considerable risk of wrongdoing"*

17. This passage was cited by Longmore LJ in ***MAGA*** (paragraph 86):

> *"This exposition of the law is highly relevant to the position of (the priest) in respect of whom there undoubtedly existed a 'power or dependency relationship' with the claimant arising from his position as a priest."*

18. It may be noted that McLachlin J referred to deterrence. Lord Faulks QC, on behalf of the Defendant, queried whether deterrence should play any part in the rationale of vicarious liability, given that a vicariously responsible party is not said to be at fault in any way. How can deterrence then arise? Nevertheless, deterrence is a recurring feature of several of the recent judgments of the courts. It seems to me that the concept of deterrence is the other side of a coin which would encourage an employer to choose his employees with care and to foster a spirit of safety consciousness; to put in place systems designed to encourage the employee to do his job properly and safely. This is the deterrence: to deter from appointing the wrong person; to deter from adopting a devil-may-care approach to safe systems of working or, as Rix LJ expressed it in ***Viasystems*** (at paragraph 79 cited above); "*the employer is encouraged to control that risk"*. In ***Bazley*** McLachlin J referred to the employer's being *"fairly and usefully charged with the management and minimization"* of the risk.

19. This was an iteration of what had been said by Watermeyer CJ in ***Feldman (Pty) Ltd v Mall [1945 AD 733, at 741]***:

> *'… a master who does his work by the hand of a servant creates a risk of harm to others if the servant should prove to be negligent or inefficient or untrustworthy; that, because he has created this risk for his own ends he is under a duty to ensure that no one is injured by the servant's improper conduct or negligence in carrying on his work …'*

20. It is not surprising that these cases all refer to "employer" "employee" and "employment". First, these cases were all concerned with stage two of the test. Employment (that is to say the relationship upon which vicarious responsibility was founded) was not in issue. But, second, for many years it had appeared that vicarious liability attached to employment and to no other relationship. "Employment" was a necessary ingredient. A glance at any standard text book on the law of torts demonstrates the point. Where the test at stage two was concerned with whether the wrongful act had been committed within the course of the *employment*, the first stage of the test was to determine whether or not the tortfeasor was in fact employed (or deemed to be employed) by the intended defendant. Most of the cases on stage one were concerned with whether the employee of a subcontractor (or a labour-only subcontractor) was to be deemed to be an employee. It may therefore be of some interest that Longmore J referred to the "*position*" of the priest and not his employment. It is suggested on behalf of the Claimant that it was the fact that the wrongdoer was a priest

which was the relevant factor and not that he was "employed" as a priest.

21. As to stage two of the test, I have been referred to other decisions of the courts which, in recent times, have adopted and applied the "close connection" test. Of these decisions, the most relevant for my purposes (apart from ***MAGA***) is the Judgment of the Lords of the Judicial Committee of the Privy Council in ***Bernard v The Attorney General of Jamaica [2004] UKPC 47*** where it was held that the Attorney General was liable for the acts of a police officer who, using a pistol, shot the Plaintiff at point blank range with no hint of justification. That was again a case where employment was not in issue.

22. The Board delivered a single speech. Although it was held that the Defendant was vicariously liable, the Board cautioned against too great an extension of the doctrine (see paragraphs 21 and 23).

> *"Vicarious liability is a principle of strict liability. It is a liability for a tort committed by an employee not based on any fault of the employer. There may, of course, be cases of vicarious liability where employers were at fault. But it is not a requirement. <u>This consideration underlines the need to keep the doctrine within clear limits</u>*
>
> *The Board is firmly of the view that the policy rationale on which vicarious liability is founded is not a vague notion of justice between man and man. It has clear limits…….<u>The principle of vicarious liability is not infinitely extendable</u>" (*my underlining).

23. There was also a further citation of a part of the judgment of McLachlin J in ***Bazley***:

> *"The policy purposes underlying the imposition of vicarious liability on employers are served only where the wrong is so connected with the employment that it can be said that the employer <u>has introduced the risk of the wrong</u> (and is thereby fairly and usefully charged with its management and minimization). The question is whether there is a connection or nexus between the employment enterprise and that wrong that justifies imposition of vicarious liability on the employer for the wrong, in terms of fair allocation of the consequences of the risk and/or deterrence"*; per McLachlin J at 62 (my underlining)

24. The South African case of ***Police v Rabie 1986 (1) S.A. 117*** was another case where employment was not in issue. It was concerned with a police officer who, in pursuit of a private vendetta, had maliciously assaulted and arrested an individual. By a majority the court found vicarious liability established. The judgment of the majority was given by Jansen JA:

> *"By appointing (the police officer) as a member of the (police) force, and thus clothing him with all the powers involved, the State created a risk of harm to others, viz the risk that (he) could be untrustworthy and could abuse or misuse those powers for his own purposes or otherwise, by way of unjustified arrest, excess of force constituting assault and unfounded prosecution. His acts fall*

> *within this purview and in the light of the actual events it is evident that his appointment was conducive to the wrongs he committed. …. in the particular circumstances of the present case ….the State, in view of the risk it created should be held liable for (the police officer's) wrongs*"; per Jansen JA at 134H – 135.

25. What then of the cases where the nature of the relationship (stage one) has been under scrutiny? Until recent years, the courts concentrated on employment as underpinning vicarious liability. Where that relationship was in doubt, the court would look at all the circumstances and treat the relationship as one of employment where certain criteria – not always easy to discern in abstract – were met. The court would look at the nature of the relationship where the third party workman was supplied by some other party (an independent contractor) or where he was said to be self employed. In ***Short v JW Henderson (1946) 62 TLR 427*** employment was determined by the application of the "control test". Where a component of the relationship was one of control of the manner of the work, the relationship was deemed to be one of employment. However, in those cases where the worker had a high degree of skill, the so-called control test was adapted to include concepts such as organisation and enterprise; see ***Stevenson Jordan and Harrison Ltd v Macdonald [1952] 1 TLR 101***. The question was asked: whose were the organisation and the enterprise? In ***Ferguson v Dawson (Contractors) Ltd [1976] 1 WLR 1213*** the contract between the Defendant and the workman was expressly not one of employment. The workman was self employed and was so treated for taxation purposes. The court, however, assessed the relationship as being one of employment, given that he worked under the direction of the Defendant's foreman. Supervision and organisation as well as control were factors in the determination of the issue; whether the relationship was "deemed employment" or employment *pro hac vice*. The intention of the parties was relevant but not determinative; so too the manner of payment of remuneration for the work.

26. It may be that the label is not important. Of importance was the setting of the bounds of the relationship upon which vicarious liability could be founded; the nature of the relationship and the features which had to be present before vicarious liability could attach.

27. In this case it is conceded by Lord Faulks QC that vicarious liability can be founded on a relationship other than employment. In ***Viasystems*** the Court of Appeal found that two parties could share vicarious responsibility for the acts of a workman. In ***Lister*** there was express reference to the possibility that the relationship may be other than employment.

> "*Questions may arise in some cases whether the person who committed the tort was in such a relationship with another to enable the concept of vicarious liability on the other person to arise*"; per Lord Clyde at paragraph 33

28. The argument before me has centred upon whether the relationship here was "akin" to employment and the extent to which the Defendant was in a position to exercise control of Father Baldwin. I received evidence from the Reverend Morgan currently the secretary to the Diocesan Trustees and Finance Council of the Defendant. There was also expert evidence called on behalf of both parties upon canon law – with the widest measure of agreement.

29. The following matters are uncontroversial:

(i) Within the Diocese of Portsmouth, priests are informed of their appointments verbally; these are then announced "*ad clerum*" in a circular letter sent out to the clergy. There are no terms and conditions other than those derived from canon law. Vacancies are not advertised and there is no form of contract, no offer and acceptance, and no terms and conditions. The appointment is subject only to the provisions of canon law.

(ii) There is effectively no control over priests once appointed. Within the bounds of canon law, a priest is free to conduct his ministry as he sees fit, with little or no interference from the bishop, whose role is advisory not supervisory. A bishop has a duty of vigilance but is not in a position to make requirements or give directions. Although I was told that a parish visit would be every five years, it could have been more frequent. The bishop had no power of dismissal. Dismissal from office would have to be effected through the church in Rome.

(iii) At the time of these events, priests did not receive any financial support from the Diocese. Each parish was responsible for generating sufficient income to support its parish priest. Remuneration came mainly from the collection plate. The priest would withdraw the funds required to pay for his basic living expenses. There was no fixed amount payable and the priest would take what he decided was appropriate. Father Baldwin was considered to be an office holder by the Inland Revenue and was so treated for income tax and national insurance purposes.

(iv) There is a joint statement of the canon law experts; and there is little between them. Within each diocese is a bishop whose appointment is from Rome. The bishop appoints a priest to each parish within the diocese. The bishop must exercise Episcopal vigilance. There is clearly some element of control within this, although there is nothing in the way of penalty or enforcement; the purpose is to oversee and advise. The bishop may only redeploy the priest in another parish if the latter consents.

(v) There are a number of differences between the relationship and the standard contract of employment. The priest owes the bishop reverence and obedience but he exercises his ministry as a co-operator and collaborator rather than as someone who is subject to the control of his superior. There are various requirements made of the priest by canon law with provisions as to prescribed penalties; but the experts agree that "*these are not akin to those seen in situations of managerial supervision in secular employment*". Matters such as duties, financial support and time away from the parish are left to the general provisions of canon law.

(vi) It seems clear to me that – as Lord Faulks QC submitted – a bishop and priest would not regard their relationship as being one that could be adjudicated upon by the civil courts; and Father Baldwin would have been considered as a holder of office rather than an employee of the Defendants.

30. Insofar as the Defendants submit that this relationship differed from employment in a number of ways, I am able to agree. There are many significant differences; the lack of the right to dismiss; little by way of control or supervision; no wages and no formal contract.

31. I have to determine whether vicarious responsibility may attach to the relationship between Father Baldwin and the Defendants, notwithstanding that it was a relationship which differed in significant respects from a relationship of employer and employee. This is not an issue which has previously been decided by the courts of England and Wales. It has, however, been considered elsewhere. In 2004 in the case of ***Doe v Bennett and others [2004] ISCR 436***, the Supreme Court of Canada decided that a bishop was vicariously liable for the actions of a priest who had sexually abused boys within his parish. Employment was not conceded and both stages of the test were at large. There were some differences in the factual background. The priest had taken a vow of obedience to the bishop. Also:

> *"The bishop exercises extensive control over the priest, including the power of assignment, the power to remove the priest from his post and the power to discipline him."*

In those circumstances, the court held that the relationship was "*akin to employment*" and that, in the full circumstances of the case, it was just to impose liability on the bishop.

32. In holding that the bishop was liable for the wrongful actions of the priest, the Chief Justice said:

> *"…. the* ***relationship between the tortfeasor and the person against whom liability is sought must be sufficiently close****. Second, the wrongful act must be sufficiently connected to the conduct authorised by the employer";* per McLachlin CJ at paragraph 20; my emphasis.

33. Is this a proper analysis of the law; and is it one which I should follow? If so, how should I apply it in this case? On behalf of the Defendants, Lord Faulks QC submits (i) that the case is distinguishable on the facts. In that case there was, it seems, extensive control and the right of removal from office; (ii) that the authority is (of course) not binding in this jurisdiction; and (iii) that the reasoning in that case does not strike a chord with the reasoning in decided cases in England. I understand the first submission; I agree with the second; I disagree with the third.

34. I have no hesitation in adopting that approach. There is a "close connection test" at both stage one and stage two. At stage two the close connection is between the tortious act and the purpose and nature of the employment / appointment. At stage one the closeness of connection is between *"the tortfeasor and the person against whom liability is sought"*. Clearly a relationship of employer – employee will meet this test with ease; but other relationships will also qualify. As the Chief Justice said in ***Doe*** at paragraph 27:

> *"The priest is reasonably perceived as an agent of the diocesan enterprise. The relationship between the bishop and the priest is sufficiently close. Applying the relevant test to the facts, it is also clear that the necessary connection between the employer-created or enhanced risk and the wrong complained of is established";*

35. I am satisfied, as I have already noted, that the relationship between Father Baldwin and the Defendants was significantly different from a contract of employment; no real element of control or supervision, no wages, no formal contract and so on. But are those differences

such that the Defendants should not be made responsible for the tortious acts of the priest acting within the course of his ministry? There are, it seems to me, crucial features which should be recognised. Father Baldwin was appointed by and on behalf of the Defendants. He was so appointed in order to do their work; to undertake the ministry on behalf of the Defendants for the benefit of the church. He was given the full authority of the Defendants to fulfil that role. He was provided with the premises, the pulpit and the clerical robes. He was directed into the community with that full authority and was given free rein to act as representative of the church. He had been trained and ordained for that purpose. He had immense power handed to him by the Defendants. It was they who appointed him to the position of trust which (if the allegations be proved) he so abused.

36. Why, one may ask, does it matter that some of the features of a classic contract of employment do not apply here? What is the relevance to the concept of vicarious liability, for example, of the lack of a formal agreement with terms and conditions; or of the manner of remuneration; or of the understanding that the relationship was not subject to adjudication by the secular courts? Those features may have relevance in a different context, but not to the question of whether, in justice, the Defendants should be responsible for the tortious acts of the man appointed and authorised by them to act on their behalf.

37. Thus I have reached the conclusion that the answer to the question posed as the preliminary issue is "yes". In doing so I am aware that one of the justifications of vicarious responsibility lies within the notion that the employer is in a position to control the work – whether in the manner of its execution or otherwise. The employer also has the right to hire and fire, whereas here there was just the right to appoint. But I am also conscious of the dicta in the Canadian cases of ***Bazley*** and ***Jacobi*** which have been cited with approval within this jurisdiction: also of Rix LJ in ***Viasystems***, which I have quoted earlier in this Judgment. These, it seems to me, are relevant to the whole of the test, not just to the second stage. I am also conscious of the need to keep the doctrine within clear limits – and that the doctrine is not "*infinitely extendable*".

38. In ***MAGA***, Lord Neuberger MR noted the same thing. He gave a number of reasons – seven in all – for determining that the Defendants in that case should be held vicariously responsible for the priest's sexual assaults. Those reasons (between paragraphs 45 and 50) included the wearing of clerical garb and the adoption of the church's moral authority, as well as the use of church functions and church premises as an aid to wrongdoing. In my judgment, these considerations do not go just to the test at stage two, but have a much wider relevance. They are equally valid whether or not the relationship was strictly one of employment. To adapt the principles distilled from ***Viasystems*** (per Rix LJ) and ***Bazley*** (per McLachlin J) the activities of Father Baldwin had been set in motion by the Defendants in pursuance of a relationship into which the Defendants had entered for their own benefit. It was their empowerment of the priest which materially increased the risk of sexual assault, the granting of the power to exploit and misuse the trust which the Defendants had granted to him. It was the Defendants who had introduced the risk of wrongdoing.

39. I can also adapt the words of Jansen JA in ***Rabie***. By appointing Father Baldwin as a priest, and thus clothing him with all the powers involved, the Defendants created a risk of harm to others, viz the risk that he could abuse or misuse those powers for his own purposes or otherwise.

40. However, it is the reasoning of the Canadian Supreme Court in ***Doe v Bennett***. from which I derive most assistance. This case was decided after ***Lister*** (where the earlier Canadian cases had been cited with approval). It seems that it was not considered by the Court of Appeal in ***MAGA***. In my judgment, ***Doe*** adopted the same reasoning as the earlier cases. It is a case which sits very comfortably with the reasoning in ***Viasystems*** as well as ***MAGA*** and it reinforces the point that the two stages of the test are not to be determined in isolation; the overall test is a synthesis of the two stages. Between paragraphs 28 and 32 the Chief Justice gave reasons for reaching the conclusion that the Diocese should be liable. These are echoed in the seven reasons given by Lord Neuberger MR in ***MAGA***.

41. I have thus reached the conclusion that it is the nature and closeness of the relationship which is the test at stage one. This close connection may be easier to recognise than to define. The court will look carefully at the full nature of the relationship. All the surrounding facts and circumstances are to be considered. These will include many of the matters which are of relevance also at stage two. Several of the factors considered in ***MAGA*** apply clearly to both stages. There is obvious overlapping. This is not surprising as it is a judgment upon a synthesis of the two stages which is required.

42. Of particular relevance to stage one will be the nature and purpose of the relationship: whether tools, equipment, uniform or premises were provided to assist the performance of the role; the extent to which the one party has been authorised or empowered to act on behalf of the other; the extent to which the tortfeasor may reasonably be perceived as acting on behalf of the authoriser. This is not an exhaustive list. Every case will be fact specific and other factors will become apparent as and when they occur. The extent to which there is control, supervision, advice and support will be of relevance but not determinative. Where the tortfeasor's actions are within the control and supervision of the third party, the relationship will be the closer. Control is just one of the many factors which will assist a judge to the just determination of the question. That question will be whether on the facts before the court, it is just and fair for the defendant to be responsible for the acts of the tortfeasor – not in some abstract sense, but following a close scrutiny of (i) the connection and relationship between the two parties and (ii) the connection between the tortious act and the purpose of the relationship / employment / appointment.

43. In this case, the empowerment and the granting of authority to Father Baldwin to pursue the activity on behalf of the enterprise are the major factors. In my judgment, whether or not the relationship may be regarded as "*akin to employment*" the principal features of the relationship dictate that the Defendants should be held responsible for the actions which they initiated by the appointment and all that went with it. Accordingly, this preliminary issue is determined in favour of the Claimant.