Neutral Citation: [2014] IEHC 19

THE HIGH COURT

[2001 No. 1676 P]

BETWEEN

PADRAIC HICKEY

PLAINTIFF

AND

PATRICK JOSEPH MCGOWAN, CHRISTOPHER COSGRAVE

DEFENDANTS

JUDGMENT of O'Neill J. delivered on the 24th day of January 2014

1. In these proceedings, the plaintiff sues for damages for assault and battery perpetrated upon him by the second named defendant over a three-year period from 1969 to 1972, when the plaintiff was pupil in St. John's National School in Sligo where the second named defendant, as a member of the Marist Order of Brothers, was a teacher. The first named defendant, who is the head of or Provincial of the Marist Brothers in Ireland, is sued as being vicariously liable for the acts of the second named defendant. Although the plaintiff complains of physical abuse in the form of corporal punishment administered, that complaint did not feature much in the case, his primary complaint being of sexual abuse perpetrated by the second named defendant on him over the three years in which the plaintiff was in three classes, namely, fourth, fifth and sixth, which were taught exclusively by the second named defendant.

2. The second named defendant vehemently denies all of these allegations, contending that they are all lies. The first named defendant denies any liability in respect of the acts of the second named defendant, vicariously or otherwise.

3. The plaintiff was born in 1960 and grew up in Sligo town. He attended St. John's National School for four years. In the first of these, he was in a class conducted by a Brother Mel and for the remaining three years, from 1969 through to 1972, he was in the second named defendant's class. The evidence establishes that at all times, there were, by modern standards, a very high number of pupils in this class; always well in excess of fifty and sometimes over sixty pupils. As a consequence, I am satisfied that the two classrooms that were used were crowded places with the pupils' desks immediately in front of the teacher's table or desk and with some desks at the side of the teacher's desk.

4. The plaintiff, in his evidence, described becoming involved with the school band. He had to learn to play the tin whistle and the drums. The second named defendant was in charge of these activities and taught both of the foregoing instruments. Whilst the second named defendant was teaching the plaintiff to play the drums, the plaintiff says that he began a practise of holding the plaintiff in a close manner and of bringing his face into very close proximity with the plaintiff's face. This type of activity, the plaintiff said, then continued in the normal classroom. It was the plaintiff's evidence that he would frequently be instructed by the second named defendant to come to the top of the class to a position adjacent to the second named defendant's desk, either under the pretext of reading to the class or of being assisted in learning by the second named defendant. Whilst in this position, the second named defendant began to hold the plaintiff very close to him so that the second named defendant's face either touched or was very close to the plaintiff's face. Next, the plaintiff says the second named defendant began rubbing his legs and this evolved into fondling his anus and genitalia, initially outside his clothes, but then inside his clothes and at times inserting a finger into the plaintiff's anus. Whilst all of this was happening, the plaintiff was held tightly by the second named defendant and could not move away. Sometimes, the plaintiff described the second named defendant placing the gown or upper cape-type garment which he sometimes wore around the plaintiff, thereby obscuring their activities from view. On one occasion, the plaintiff said that the second named defendant placed what the plaintiff described as his "belt" around the plaintiff, thereby securing him to the second named defendant. The plaintiff described these activities as occurring several times during every week and that they were a cause of the gravest upset to the plaintiff and that he was powerless, in the context of the position of authority of the second named defendant and his close relationship with the plaintiff's family, to do anything about it and that he lacked the language to express his distress and unhappiness.

5. Evidence was given by four of the plaintiff's classmates during the three years in question. These were Mr. Martin Harte, Mr. Martin Cadden, Mr. Ray Moylan and Mr. Roddy Gaynor. All four of these persons corroborated the evidence of the plaintiff in greater or lesser detail. All of these witnesses gave evidence of the activities complained of by the plaintiff occurring on a frequent basis as described by the plaintiff over the three years that the plaintiff was in the second named defendant's classes. Mr. Harte describes specifically seeing the second named defendant rubbing the plaintiff's bottom under his clothing. Mr. Cadden described in his evidence that in February of the final year, in sixth class, reaching a point of unbearable revulsion after seeing the second named defendant for most of the day have the plaintiff on his knee fondling the plaintiff's genitalia through the front of his trousers which were open, the plaintiff weeping inconsolably.

6. Mr. Ray Moylan, although speaking in less specific terms, nonetheless described graphically what he saw as follows at page 96, Day 4:

> *"Well, there was a systematic behaviour that dominates my memories of my time in that class which involved the teacher taking up pupils in the room to his desk at the front of the class. It would involve his arm around them. It would involve sitting on his knew. It would involve rubbing his face up against theirs. And it involved not the entire class, but certainly there was a relatively small group of people who would have been regular.*
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> *As I have said, my memory of it is that it was close contact. It was restrained - being restrained, restraining the individual. I remember seeing Padraic and others being very uncomfortable, being crying in the position and not being able to pull away because of the arm of the teacher around them. As I have already said, it was - my memory is that it was close personal contact that was completely inconsistent with the sort of experience that you would expect in a classroom of that nature and it was arbitrary to the extent that there was no particular reason why, that I could see, that somebody could be called up. So, it wasn't to tell people out with their homework. In the case of Padraic, he would*

have been one of the brighter students in the class. So, of all the students, he was probably one of the ones that didn't need help . . ."

7. Mr. Roddy Gaynor in his evidence described the plaintiff as being one of a small number of pupils who were regularly brought to the front of the class. He described the plaintiff as being held close by the second named defendant who would move his face close to him and at times the plaintiff would be sitting on his lap and that all of this happened on a regular basis.

8. Whilst there is considerable difference in the detail of the evidence given by these four witnesses, which is quite understandable and indeed explicable by the fact that forty years have elapsed since these events occurred, nevertheless I am quite satisfied that there is a high level of consistency between all four of them, concerning the activities of the second named defendant and that their evidence amply corroborates the evidence of the plaintiff. I entirely reject the second named defendant's denials of having perpetrated these sexual assaults on the plaintiff, and his assertion in evidence that the evidence of the plaintiff, and these other four former pupils of his, is the result of a conspiracy between them to obtain damages is utterly lacking in credibility.

9. Over the three-year period in question, and having regard to the relative close proximity between the second named defendant and his pupils and the prominent position in the classroom where this abuse took place, I have no doubt that over that period of time these four witnesses had ample opportunity to see the activity of the second named defendant as described by them. I am satisfied that the evidence of the plaintiff and his four classmates is truthful and reliable and that the second named defendant did assault and batter the plaintiff in the manner complained of by the plaintiff. Whilst I accept that the plaintiff did suffer corporal punishment during these three years at the hands of the second named defendant, the evidence does not persuade me that this went any further than was lawful at the time. Hence, the plaintiff has proven his case in assault and battery only in respect of the sexual abuse complained of.

10. A striking feature of the case to which much attention was given was the plaintiff's memory of the sexual abuse perpetrated upon him by the second named defendant.

11. After leaving St. John's National School, the plaintiff moved on to Summerhill College in Sligo. Having done his Leaving Certificate, he then went to University College Galway where he graduated with a Bachelor of Civil Engineering Degree in 1981. Thereafter, he took up employment with Jennings O'Donovan, a firm of consulting engineers in Sligo, and he was with them until early 1983. From February 1983 until September 1983, he was a substitute teacher in Summerhill College. In September 1983, he returned to Jennings O'Donovan, Consulting Engineers, and was with them as a design engineer until August 1984. He was also a part-time lecturer in Sligo Regional Technical College until May 1984. From August 1984 until October 1986, he was employed by Dublin Corporation as a design engineer earning IR£11,500 a year. In April 1986, he moved to Saudi Arabia with a firm of engineers known as Harza Engineering. This contract came unexpectedly to an end in October 1986, and from then until June 1987, he took a break from work and travelled the world. In July 1987, he took up employment as a site engineer with T. Costello & Company in Middlesex in England. There, he was on a salary of Stg. £16,000 *per* annum. This employment lasted until July 1988, when he took up employment as a construction manager with J. Mowlem in London on a salary of Stg. £21,500 *per* annum. He remained there until July 1991, when he returned to Ireland and took up employment with the ESB as an assistant resident engineer on a salary of IR£18,000 *per* annum, working on a 60-kilometer canal project. This lasted until April 1993. From April 1993 until November 1994, he was employed by Longford County Council as an assistant resident engineer on a salary of IR£18,000 *per* annum. In November 1994, he took up employment in India with Harza Engineering as a construction consultant on a salary of Stg. £50,000 *per* annum. This contract ended prematurely in August 1995, and from August 1995 to October 1995, he was unemployed. In November 1995, he returned to J. Mowlem in London as a construction manager on a salary of Stg. £22,500 *per* annum and remained with them until July 1997. At this point, *i.e*. July 1997, he moved to Cornwall and took up employment with Tilbury Douglas in Truro in Cornwall as a site engineer on a salary of Stg. £28,000 *per* annum. In November 1997, he moved, again in Cornwall, to a firm known as E. Thomas as a site manager on a salary of Stg. £21,500 *per* annum. This continued until April 1999. From April 1999 until July 2001, he worked fulltime as a restaurateur with his partner. In July 2011, he joined Wainhomes Par & Fowey in Cornwall as a site manager, supervising the construction of a housing project. This was a temporary position and he moved, in September 2001, to L&T Building Contractors, Truro, Cornwall, as a site manager, and he remained with them until April 2006. In April 2006, he moved to Symons Construction in St. Ives, Cornwall, as a contracts manager until August 2008. He was unemployed from September 2008 until December 2008, and in January 2009, he took up employment with Sir Robert McAlpine in Bristol as an engineer. This lasted until May 2009.

12. In the summer of 1999, the plaintiff was contacted by An Garda Síochána. He was living in Cornwall at the time and his contact details or telephone number had been supplied to the gardaí by his parents. I am quite satisfied that when the plaintiff was contacted by the gardaí, he had no memory at that time of the sexual abuse that had been perpetrated on him from 1969 to 1972. It would appear that the gardaí wished to make contact with the plaintiff because of statements they had taken from other pupils in the plaintiff's class which identified the plaintiff as a person who had been sexually abused by the second named defendant. It is quite clear from the evidence that when contacted by the gardaí, the plaintiff indicated to the gardaí that he had not been involved in the subject matter of their investigation. Nevertheless, the gardaí persisted in contacting him again and in due course, arrangements were made for the gardaí to interview the plaintiff in Cornwall in November 1999.

13. I am quite satisfied, from the evidence that when this interview started, the plaintiff still had no memory of the abuse perpetrated on him and I am also satisfied that he was not given any introductory materials such as the statements of other witnesses nor any resume or account of that evidence or of the state of the investigation by the gardaí which could have informed him or prompted him in any way. In the course of that interview, in response to a general question or invitation from the interviewer to describe daily life in the classroom in St. John's National School, the plaintiff spontaneously began to remember what had happened to him over that three-year period and he recounted that abuse in the statement which he made to the gardaí at the time.

14. I am satisfied that what occurred in this instance was the spontaneous recalling, without any therapeutic or other process, of memories which had been suppressed or blocked out by the plaintiff, by this time, for about thirty years.

15. At this time, namely November 1999, the plaintiff was engaged in a counselling process with Ms. Mary Tuhig, a psychotherapist, in relation to his relationship difficulties with his then partner. Early in his 30s, the plaintiff had "*come out*" as a homosexual person, and for the first time, when he was about 36 years of age, he formed a stable, long-term relationship. Because of this relationship and the desire of his partner to leave London and move to Cornwall, the plaintiff made the move to Cornwall in 1997. However, the relationship got into difficulty which the plaintiff attributed exclusively to the plaintiff's own repeated infidelities. It was in respect of his behaviour in this regard that he sought counselling from Ms. Mary Tuhig. The plaintiff was unable to understand or come to terms with what he knew was reprehensible conduct on his part, which was having a destructive effect on his relationship with somebody who loved him.

16. Even in the context of all of this, not a glimmer of memory in respect of his child sex abuse ever emerged.

17. After his interview with the gardaí, the focus of or content of his counselling relationship with Mary Tuhig changed radically and then became focused around his childhood experiences as now revealed from his recovered memory.

18. For the plaintiff, these memories had an immediate enlightening effect on him which convincingly explained to him his recidivist, destructive sexual behaviours. In his evidence, he explained that there came upon him a realisation, that he did what he did, because he perceived himself as unworthy of or undeserving of his partner's love, that he was unable to accept that he was loved or deserved to be loved. With that went an unhealthy attitude to sex whereby he treated sex as a commodity to be taken wherever available, regardless of love. His recovered memory of the sexual abuse of himself brought to him a realisation that the abuse that had been perpetrated upon him had involved the second named defendant using him and taking sex from him, and in essence, that he been thereby conditioned subconsciously to treat sex in the same way.

19. Initially, after the recovery of his memory, he described it as "*misty*", but as time went on, it solidified as he gained confidence in his memory. Later, still, this process was reinforced by the fact that there was corroboration of his memory from other sources, namely, his fellow pupils.

20. There was what he thought was a gap in his memory which caused him considerable difficulty and which he came to treat as a "*brick wall*" in his dealing with all of this. This concerned a period of one year which he thought was missing and in respect of which he thought he had no memory, and because he had, what he thought was no memory of this, he apprehended that dreadful things; much worse things than he could actually remember, were done to him in that period and were still blocked out or suppressed. In about 2005, he dealt with this by coming to terms with it; in the sense that he realised he was recovering from the entirety of this abuse, and regardless of what might have happened in this unremembered year, he was able to live with it. The reason he could not recall this year was because he could not remember the classroom he should have been in for that year and therefore he assumed that academic year was blocked out from his memory.

21. All of this was resolved in 2010, when, as a result of a conversation with a fellow pupil, it was explained to him that there had not been three classrooms, that there had only been two, whereupon he realised that there was no missing classroom and therefore no missing year from his memory and that his memory did in fact cover the entire three-year period from 1969 to 1972.

22. In all of this, I accept the evidence of the plaintiff as a careful, reflective and truthful account of his rediscovery of his memory from 1999 to 2010.

23. That conclusion is relatively easily arrived at given the unusual, if not extraordinary, amount of evidence corroborating the entire content of those recovered memories as contained in the evidence of his classmates. There can be no doubt that the content of his recovered memory is accurate and now comprehensive.

24. It was put to Dr. Ann Leader, a psychiatrist called on behalf of the plaintiff that the process of therapy engaged in by the plaintiff with Ms. Mary Tuhig, a psychotherapist, involved a recovery of memory process. The plaintiff attended Mary Tuhig from 1998 through to May 2000. He discontinued attending her until February 2001. Her report of May 2001 discloses clearly that the reason the plaintiff was in a therapeutic relationship with Mary Tuhig was to discover and address the causes of what he considered to be his destructive behaviour in his relationship with his then partner. Her report reveals that as part of the process, there was an exploration of his childhood and his memories of it. It is, however, abundantly apparent from her report that at the time that this exercise was engaged in during this therapy, the plaintiff's memories of his childhood were essentially happy and no memories concerning the sexual abuse of him emerged at that stage. Other than the fact that the plaintiff was greatly bothered or upset by his own conduct and was searching intensively for an explanation of it, I am quite satisfied that there was nothing in this therapeutic relationship which could be said to have been a therapeutic process of memory recovery. Because, however, the plaintiff was actively engaged in this process, it was, in my opinion, entirely unremarkable that when his memory of the child sex abuse came to him in the interview with the gardaí, he instantly saw a connection, as is evident from his statement to the gardaí, between this abuse and the various aspects of his life that had been troubling him so much.

25. The fact that these memories were so totally suppressed for so long says much about the impact which the sexual abuse perpetrated by the second named defendant had on the plaintiff, both during the period when these activities were going on and up to the present time.

26. Having carefully considered the evidence of Dr. Anne Loughlin, a psychologist who saw the plaintiff in 2002, Mr. Billy Fox, another psychologist who saw the plaintiff in 2004, and Dr. Ann Leader, a psychiatrist who saw the plaintiff in February 2002 and March 2011, I have come to the conclusion that the plaintiff, as a result of this sexual abuse, suffered a severe Post-Traumatic Stress Disorder characterised, initially by extreme avoidance to the point that for almost thirty years, he totally blocked out any memory of these events. Having elicited these memories late in 1999, for a number of years thereafter, he suffered the more typical symptoms of Post-Traumatic Stress Disorder. When seen by Ms. O'Loughlin in 2002, the appropriate tests carried out on him at that stage revealed high levels of symptoms of this disorder. I would accept that when seen by Mr. Fox two years later, similar tests demonstrated much lower levels of symptoms and I would agree with Mr. Fox that this was likely the result of the benefit the plaintiff was achieving from his ongoing therapy with Ms. Tuhig.

27. The plaintiff himself perceives that his life was affected in several ways by the sexual abuse. In the first instance, as a subconscious determinant, it rendered him lacking in confidence; unable to form appropriate emotional attachments; distrustful; lacking in self-confidence and self-esteem, all of which predisposed him to the kind of behaviours which firstly kept him away from or out of any long term relationship until he was in his late 30s and led to the destruction of the one relationship he did form, and since the collapse of that relationship, have left him single and alone, although his evidence was, that since the recovery of his memory of child sex abuse in 1999, he has desisted from the sexual practices *i.e*. cottaging, that had such a destructive effect on his life prior to then.

28. In his vocational life, he attributes the fact that he has had no settled career path and has had 17 different jobs in the past twenty years to the unsettling effect on him at a subconscious level of the sex abuse, causing him to react in an extreme way to stress and adopting drastic solutions, usually involving moving away, where more sensible stratagems were available to him.

29. I am satisfied that the sexual abuse suffered by the plaintiff has had profound impacts on his life during the time that it occurred and since. The fact that for almost thirty years, the plaintiff had entirely blocked this out of his memory illustrates how deeply traumatic this abuse was for him. I have no doubt that as this was being done to him as a child over what must have felt to a child of that age, as an interminably long period of time, and not having the knowledge or language to understand it or do anything about it; being overwhelmed by the authority of the person who was doing it to him, but at the same time having an innate sense that it was grievously wrong, all of this, combined with the isolation and humiliation he experienced, must have caused the plaintiff terrible

suffering during the years of the abuse. So terrible was all of this for him that it caused him unconsciously to suppress or block out all memory of these events. This appears to me to have been avoidance at the extreme end of the scale.

30. Notwithstanding, however, that these memories did not form any part of the plaintiff's consciousness between 1972 and 1999, I am quite satisfied that at a subconscious level they did effect him and impact upon his life. I accept Dr. Leader's evidence in regard to all of this, and specifically, that the sexual abuse had the consequence of leaving the plaintiff unsettled, emotionally inhibited, lacking in self-confidence and self-esteem and prone to destructive sexual behaviours, all of which operated on him at a subconscious or unconscious level.

31. Whilst it is the case, as was pointed out in the cross-examination of the plaintiff by Mr. Hartnett S.C., there were sound and rational reasons for all of his changes of employment, nevertheless, the overall pattern of his vocation life is that of someone who either had no settled long-term career plan or was unable to adhere to any such plan, and I am satisfied that the plaintiff was predisposed to this pattern by the unconscious effect which the sexual abuse had on him.

32. The fact that he is, as he described himself now, 52 years of age, alone, without a settled career or a secure home is to a large extent, though not entirely, due to the effect which the sexual abuse has had on his life.

33. In assessing compensation by way of general damages, this Court must have regard to the levels of general damage that apply in other situations such as for serious or catastrophic injury. Whilst the plaintiff has, I am quite satisfied, endured great suffering and serious adverse impacts on his life, it cannot be said these have destroyed his life in the same way as would catastrophic injury. I think it would be fair to say that his life has been greatly impaired rather than destroyed.

34. Although he has benefited considerably from the therapy he has engaged in and also achieved the relief of knowing that there is no gap in his memory, there are still long-term effects of the child sex abuse which are persisting as discussed above in the sense of the overall impairment of his position in life. I am satisfied that it is probable that he will never entirely recover from the effects of the sexual abuse as the *sequelae* of it have continued with him to a stage in life *i.e*. his 50s, so that the prospect of undoing the effect these have had on his vocational life and domestic life has become remote.

35. Bearing all of this in mind, I would award the plaintiff the sum of €250,000 in respect of his general damages to date and €100,000 in respect of general damages for the future, making a total of €350,000 for general damages.

36. This brings me to the question of who is to be liable to the plaintiff. The plaintiff sues the first named defendant as being vicariously liable for the actions of the second named defendant. In order to consider the claim that the first named defendant was vicariously liable, as claimed, it is necessary to examine the status of the first and second named defendant *vis a vis* each other and the position of the second named defendant in St. John's School and the contractual and other relationships governing his position in that school.

37. The uncontested evidence establishes that between 1969 and 1972, the second named defendant was a brother in the Marist Congregation. As such, the second named defendant had taken vows of chastity, poverty and obedience. The vow of obedience obliged the second named defendant to accept the direction and instruction of his superiors within the Marist Congregation. The Marist Congregation had a hierarchical structure which was essentially international, provincial and local. Locally, the second named defendant was subject to the authority of the Superior in the house to which he belonged. The congregation of Marist Brothers was divided into provinces, each province having as its head a Provincial. The first named defendant holds that position and is sued in that capacity. The second named defendant, whilst he was a member of the Marist Congregation, was bound to accept the instruction, direction or advice of the Provincial. Internationally, the Marist Congregation was headed by a Superior, but for the purposes of this case, it is unnecessary to extend any consideration beyond the relationship between the second named defendant and his immediate house Superior and the Provincial of his province.

38. I am satisfied on the evidence that the second named defendant was subject to the authority of the Provincial of the Marist Brothers, of that province of the congregation that included Ireland. He was also subject to the authority of the Superior of the house in which he lived. The vow of obedience that the second named defendant took was, as was described in evidence by Professor Mullaney, a surrender of his normal adult autonomy and an undertaking to accept the direction, supervision and advice in all aspects of his life from his Provincial and house Superior.

39. In addition to his vow of obedience, the plaintiff took a vow of poverty which required him to surrender ownership of his worldly goods and entitlements to the Marist Congregation. What this meant was that his salary as a teacher in St. John's School, paid by the Department of Education, was not paid to the second named defendant but to the Marist Congregation and I would infer into a fund held by trustees for the Marist Congregation. As a necessary corollary of his vow of poverty and the obligations that went with that, the Marist Congregation had an obligation, no doubt performed through its trustees, to provide the second named defendant with the necessities of life, namely, accommodation, food and clothing and a small income to cater for such things as books and social and recreational expenses at a minimum level.

40. St. John's National School in Sligo, when the plaintiff was a pupil in it, was a Marist school in the sense that the Principal was a Marist Brother and the teachers in it were nearly all Marist Brothers. These Brothers were selected for their respective positions and directed to take up those positions by the predecessor of the first named defendant, the Provincial for the time being of the Marist Brothers in Ireland. The Marist Congregation was dedicated to the care of the young and in pursuit of this primary objective, the principal activity engaged in was teaching.

41. Notwithstanding the clear identity of St. John's School as a Marist school, it was nonetheless a national school subject to the prevailing legal regime for the governance of national schools discussed at great length in the judgments in the Supreme Court in the case of *O'Keeffe v. Hickey* [2009] 2 I.R. 309. What this meant, as was confirmed in the evidence of Father Hever, the current administrator of the Cathedral Parish in Sligo, in which parish St. John's National School is located, was that the administrator of the parish, on behalf of the Bishop who was the patron, was the manager of the school and it was he who discharged the function of legally appointing teachers to the school, including the Principal. The school was run under the 1965 National School Rules regime, so that the curriculum pursued and the academic standard required was regulated by the Department of Education which pursued its interest in the system through the School Inspectorate system.

42. I am satisfied on the evidence that, on a day-to-day basis, the school was run by the Marist Brothers and was under the day-to-day supervision of the Principal, who was a Marist Brother, and the manager at the time, Canon Collins, had very little, if any, hands-on involvement in the day-to-day management and running of the school, which I have no doubt the manager at the time and also, probably, the Bishop of the Diocese as patron, were more than content to leave in what they would have seen as the competent

hands of the Marist Brothers, whose charism was in teaching and who could supply sufficient numbers of trained and experienced teachers who shared the religious ethos which the Bishop, as patron, sought to uphold.

43. Thus, insofar as the control of the day-to-day activity of a teacher, such as the second named defendant, was concerned, I am quite satisfied that this would have rested exclusively within the realm of the Marist Congregation, initially between the teacher and the Principal of the school, and if issues were not resolved within that relationship, it is probable that they would have been, within the hierarchical structure of the Marist Congregation, no doubt achieving compliance to whatever was required, on the part of the teacher by recourse to his vow of obedience. Only in the extraordinary circumstance of a Marist Brother defying the authority of his superiors in the congregation, in my opinion would it have been necessary to have involved the manager of the school to resolve problems or difficulties arising in connection with the discharge by the teaching Brother of his teaching duties.

44. In the context of the foregoing, it is necessary to consider the current state of Irish law on vicarious liability. It is useful to observe at this stage that there is no allegation of direct negligence on the part of the first named defendant as the representative of the Marist Congregation. There is no suggestion that the Marist Brothers knew or had any reason to know of the activities of the second named defendant as complained of in these proceedings. Nor is there any suggestion of any failure on the part of the Marist Congregation to have taken appropriate steps to deal with the activities of the second named defendant. Vicarious liability involves the transfer of liability from a culpable party, in this case, the second named defendant, to another party who is blameless, in this case, the Marist Congregation of Brothers. Vicarious liability has been part of common law jurisprudence for many centuries. At one time, husbands were vicariously liable for the torts of their wives and children. The Industrial Revolution and the explosion of commerce thereafter led to the contraction of vicarious liability into well-defined commercial relationships, principally the relationship of employer/employee, but also the relationship between partners and between agents and principals. The shifting of liability in respect of the torts of the blameworthy to a party who was blameless was based on a policy consideration, namely, that a victim of a tortious action should not be left without remedy where there was a relationship between the tortfeasor and another party arising out of a common endeavour in which the tortfeasor was engaged on behalf of the other party, and in the course of which the tortious injury was inflicted on the innocent claimant. Some would characterise this policy direction as no more than a search for the "*deep pocket*", but there is more to it than that, in the sense that there had to be a sufficiency of association or connection in the relationship between the tortfeasor and the party sought to be held liable and their common or shared endeavour so that it could be said, that it was fairer and more just that the liability would fall on this other party, rather than leaving the innocent victim of a tortious act without a remedy.

45. Over time, the same underlying policy consideration has resulted in vicarious liability moving through different relationships, but for the past 100 years, has been predominantly found in the employer/employee relationship. The explosion or proliferation of child sex abuse cases in the past twenty years has required, throughout the common law world, a reconsideration, in the light of the foregoing underlying policy consideration, of whether the complex of relationships involved in the variety of voluntary institutions and State authorities engaged in the broad range of childcare activities should have the principles of vicarious liability applied to them.

46. In the case of *O'Keeffe v. Hickey and the Minister for Education and Science, Ireland and the Attorney General* [2009] 2 I.R. IESC 72, the judgments of the Supreme Court comprehensively review the jurisprudence on this topic in the common law world, including Ireland. In that case, the plaintiff sued the first named defendant who was the Principal of a National School for sexual abuse perpetrated against the plaintiff in the early 1970s. That defendant did not contest the plaintiff's claims and judgment in default was obtained against him. The plaintiff in that case claimed that the other defendant i.e. the State defendants, were vicariously liable in respect of the sexual abuse perpetrated on her by the first named defendant. The plaintiff failed in that claim, four of the judges holding that because a direct employment relationship did not exist between the first named defendant and the State defendants, there could not be vicarious liability. Geoghegan J. dissented, concluding:

> *"Applying the general modern principles underlying vicarious liability, I take the view that it is wrong to exempt the State from vicarious liability in this case and I would, therefore, allow the appeal."*

47. The "general modern principles underlying vicarious liability" mentioned by Geoghegan J. were reviewed in the judgment of Fennelly J. Murray C.J. and Denham J. agreed with the judgment of Fennelly J. Hardiman J., in his judgment, trenchantly criticised and rejected what Geoghegan J. described as "*the general modern principles underlying vicarious liability*". Murray C.J. also agreed with the judgment of Hardiman J.

48. Having considered the line of English cases starting with *Barwick v. English Joint Stock Bank* [1867] L.R. 2 Exch. 259; *Cheshire v. Bailey* [1905] 1 K.B. 237; *Lloyd v. Grace Smith & Company* [1912] A.C. 716; *Imperial Chemical Industries v. Shatwell* [1965] 1 A.C. 656; *Morris v. CW Martin & Sons Ltd.* [1966] 1 Q.B. 716; *Williams v. A&W Hemphill Ltd.* [1966] S.C. (H.L.) 31; *Trotman v. North Yorkshire County Council* [1999] L. LGR 584; *Lister v. Hesley Hall Ltd.* [2001], UKHL 22 [2002] 1 A.C. 215; the Canadian case of *Bazley v. Curry* [1999] 174 DLR (4th) 45, and the Australian case of *New South Wales v. Lepore* [2003] HCA 4, [2003] 195 A.L.R. 412, and the two Irish cases, *Johnson & Johnson (Ireland) Ltd. v. CP Security Ltd.* [1985] I.R. 362, and *Delahunty v. South Eastern Health Board* [2003] 4 I.R. 361, Fennelly J. concluded as follows at para. 62 et seq:

> *"62. Ultimately, I am satisfied that it is appropriate to adopt a test based on a close connection between the acts which the employee is engaged to perform and which fall truly within the scope of his employment and the tortious act of which complaint is made. That test, as the cases have shown, has enabled liability to be imposed on the solicitor's clerk defrauding the client (Lloyd v. Grace, Smith and Company [1912] 1 A.C. 716); the employee stealing the fur stole left in for cleaning (Morris v. C. W. Martin & Sons Ltd. [1966] 1 Q.B. 716) and the security officer facilitating thefts from the premises he was guarding (Johnson & Johnson (Ire.) Ltd. v. C.P. Security Ltd. [1985] I.R. 362). In each of these cases, the action of the servant was the very antithesis of what he was supposed to be doing. But that action was closely connected with the employment. In Delahunty v. South Eastern Health Board [2003] 4 I.R. 361, O'Higgins J., rightly in my view, held that there was no such close connection. The employee of the orphanage had abused a visitor, not an inmate.*
>
> *63. The close connection test is both well established by authority and practical in its content. It is essentially focussed on the facts of the situation. It does not, in principle, exclude vicarious liability for criminal acts or for acts which are intrinsically of a type which would not be authorised by the employer. The law regards it as fair and just to impose liability on the employer rather than to let the loss fall on the injured party. To do otherwise would be to impose the loss on the entirely innocent party who has engaged the employer to perform the service. The employer is, of course, also innocent, but he has, at least, engaged the dishonest servant and has disappointed the expectations of the person to whom he has undertaken to provide the service. There is no reason, in principle, to exclude sexual abuse from this type of liability. That is very far, as I would emphasise, from saying that liability should be automatically imposed. The decision of O'Higgins J. provides an excellent example of the practical and balanced application of the test. All will depend*

on a careful and balanced analysis of the facts of the particular case. In Bazley v. Curry (1999) 174 D.L.R. (4th) 45 the employees of the care home were required to provide intimate physical care for the residents. The sexual abuse was held to be closely connected.

64. In the present case, there is no claim against the manager or patron of the school. It is not, therefore, appropriate to decide whether vicarious liability should be imposed on the direct employer of the first defendant. In such a case, all the facts would have to be carefully considered or, to recall the words of Lord Steyn already quoted, there must be 'an intense focus on the connection between the nature of the employment and the tort of the employee'. It may be relevant to consider whether it matters that the music lessons were not part of the ordinary school curriculum and were provided outside normal hours. Counsel for the second to fourth defendants referred to the residential setting of the abuse in both Bazley v. Curry (1999) 174 D.L.R. (4th) 45 and Lister v. Hesley Hall Ltd. [2001] UKHL 22, [2002] 1 A.C. 215. Clearly, that may be a material factor. However, I express no concluded view.

65. The important question in the present appeal is whether liability can be imposed on the second to fourth defendants or on any of them, in other words, on the State. It is immediately necessary to note that, in each and every one of the cases on close connection, a direct employment relationship existed. The first defendant was not employed by the second defendant nor by any of the other defendants. He was, in law, the employee of the manager, Canon Stritch. It is true that he was required to possess qualifications laid down by the second defendant and to observe the detailed and minute provisions of the rules for national schools. The State had disciplinary powers in relation to him pursuant to those rules. However, the State did not have the power to dismiss him; nor was he originally engaged by the State. The scheme of the rules and the consistent history of national schools is that the day to day running of the schools is in the hands of the manager. The inspection regime does not alter that. The department inspectors do not have power to direct teachers in the carrying out of their duties. . ."

Thus, the majority of the Supreme Court in the O'Keeffe case held that the "*close connection*" test is now firmly embedded in our jurisprudence on vicarious liability.

49. The application of this test requires, as remarked by Fennelly J., an intense focus on the particular circumstances of an individual case. In this case, the Marist Congregation is engaged in the activity of teaching boys at National School level in Ireland. In St. John's National School in Sligo, boys in the 4th, 5th and 6th classes, namely, the classes the plaintiff was in between the years 1969 and 1972, were taught all of the academic subjects for the entire three years by the same teacher, in this case, the second named defendant. This would be in marked contrast to pupils in the Secondary level cycle, who, in general, would be taught the different academic subjects by different teachers.

50. All of this meant that in the 4th, 5th and 6th classes, the teacher had a great deal of contact with pupils, being with them for the entire school day. This necessarily implied that part of the duty of the teacher was to participate in the character formation of pupils, meaning that the teacher would be obliged to correct misbehaviour, to provide instruction in appropriate or good behaviour where necessary, and generally to assist to ensuring that pupils developed into upright citizens. Given the length of time each day that pupils were in the care of a teacher, probably significantly longer than they were in the care of the parents on a daily basis, it was inevitable that a caring relationship would evolve between teacher and pupils which could also have involved a high level of one-to-one contact with individual pupils. Because of the tender age of the pupils, the teacher was invested with and would have been perceived to have a level of authority over the pupils which, to the pupils, would have seemed, certainly in the years 1969 to 1972, virtually absolute.

51. Where a person with paedophile tendencies became a teacher, all of these circumstances concerning the teaching arrangements in St. John's National School, not only created a high level of risk of child sexual abuse, but made it a near certainty.

52. I am quite satisfied that the nature of the teaching arrangements in St. John's National School amply satisfies that part of the "*close connection test*" which requires that the activity actually being carried on by the abuser is closely connected to the activity that the abuser is engaged to do. By way of contrast to illustrate this, one might say that a gardener engaged to attend the school grounds or a janitor to look after a school building, while having some access to the pupils and therefore opportunity, nonetheless would not have the kind of daily engagement with pupils that a teacher such as the second named defendant would have had with his pupils in his class. By way of further example, there is the decision of Higgins J. in *Delahunty v. The South Eastern Health Board* [2003] 4 I.R. 361, in which it was held that the necessary close connection was not established where the person abused was a visitor to the institution in question rather than an inmate of it.

53. This brings me to a consideration of the first part of the close connection test which focuses on the relationship between the abuser and the party claimed to be vicariously liable for his tortious actions. In the *O'Keeffe* case, the claim of vicarious liability against the State failed because of the absence of an employer/employee relationship, the evidence establishing that that relationship existed between the first named defendant in that case and the manager of the school who was not sued.

54. Likewise, in this case, the second named defendant's contract of employment as a teacher in St. John's National School was not with the first named defendant or his predecessor as Provincial of the Marist Brothers. Does that fact alone necessarily exclude a finding of vicarious liability against the first named defendant, as indeed was submitted for the first named defendant? Before embarking on a consideration of further legal authorities on this aspect of the case, it is necessary to recall the nature of the relationship between the second named defendant and the Marist Congregation and with the manager of the school at the time in question, Canon Collins. Although the evidence did not establish with certainty, I would infer as a matter of probability that Canon Collins has been deceased for many years, and that by the time the plaintiff recovered his memory of the abuse in November 1999, any claim arising out of that abuse would have been statute-barred as against Canon Collins or his estate by virtue of s. 9(2) of the Civil Liability Act 1961.

55. The evidence establishes that the mission of the Marist Congregation was the care of the young which included teaching. Each member of the congregation, including the second named defendant, was bound to the other members of the congregation by his oaths of poverty, chastity and obedience. Given the all-embracing scope of the vow of obedience, extending over all aspects of the life of a member, and, as described by Professor Mullaney, the surrender of normal, adult autonomy that it involved, together with the vow of poverty which required a member such as the second named defendant who was entitled to and did receive a normal salary from the State as a National School teacher, to surrender that salary to the congregation, it is clear beyond doubt that the relationship between the second named defendant and the Marist Congregation was a much closer one than the normal employer/employee relationship.

56. When one looks at the actual employer/employee relationship that the second named defendant had with the manager of the

school, the evidence of Canon Hever establishes to my satisfaction that this went no further than the completion of the legal contractual formalities, necessary, no doubt, to entitle the second named defendant to his salary from the Department of Education. I am quite satisfied from the evidence that the Marist Congregation had full control on a daily basis over the management of St. John's National School between the years 1969 and 1972. This is clearly illustrated by the fact that the second named defendant, in his evidence, made clear that he was assigned to teach in that school by the Provincial, that he had previously been assigned to teach in Strokestown and subsequently assigned to teach in Athlone. All of these moves were made by the Provincial at the time of the Marist Congregation, relying upon his exclusive authority over the second named defendant and without recourse to or consultation with the manager of St. John's National School, save only to the extent of having the formal contractual arrangements completed. It is clear from the evidence of Canon Hever that the manager of the school in all probability had no involvement on a day-to-day basis in the running of the school, all of that being left to the Marist Brothers. Insofar as any disciplinary issues might have arisen with regard to the second named defendant, I would infer, as a matter of probability, that these would have been dealt with by his superiors in the Marist Congregation and the role of the manager would have been confined to formal, contractual arrangements.

57. In the context of the evidence in this case, it is necessary to ask the question whether any other party might have a vicarious liability in respect of the second named defendant's tortious acts, and if so, who should that be? Unlike the *O'Keeffe* case, in this case, the role of the religious congregation of which the second named defendant was a member must be considered and the court most confront the issue of whether the relationship between the first and second defendants in this case can give rise to vicarious liability, a problem that did not arise for consideration in the *O'Keeffe* case.

58. This was the problem considered recently by the UK Supreme Court in the case of *Catholic Child Welfare Society & Ors. v. Various Claimants (FC) & Ors*, in which judgment was delivered on 21st November 2012, judgment being given by Lord Philips with whom all the other members of the court agreed. The case concerned claims by approximately 170 former inmates of a residential reformatory school known as St. William's, in respect of child sexual abuse perpetrated upon by them by members of the De La Salle Brothers who staffed and ran this institution over the relevant period in question. There were many remarkable similarities between that case and the present one. In the *CCWS* case, the institution in question, St. William's, was owned and managed by a group of defendants known as the "Middlesbrough defendants". They took over the management of the school in 1973 and inherited under statute the liability of the managers of the school before that date, and as such managers, they concluded contracts of employment with the Brother teachers. In that case, they, the managers, were held vicariously liable in the first instance for the sexual abuse of the Brothers in question. In the Court of Appeal, that court held that the De La Salle congregation known in the proceedings as the "Institute" were not vicariously liable. The Middlesbrough defendants appealed to the Supreme Court and the claimants being content to rely upon their remedy against the Middlesbrough defendants did not participate in the appeal hearing in the Supreme Court. In that appeal, the Middlesbrough defendants contended that the "Institute" were vicariously liable also in respect of the child sex abuse of their Brothers. In the course of a lengthy judgment, Lord Philips, at para. 20 said the following concerning vicarious liability in general:

> *"20. Since Ward LJ and I cut our teeth the courts have developed the law of vicarious liability by establishing the following propositions:*
>
> *i) It is possible for an unincorporated association to be vicariously liable for the tortious acts of one or more of its members: Heaton's Transport (St Helens) Ltd v Transport and General Workers' Union [1973] AC 15, 99; Thomas v National Union of Mineworkers (South Wales Area) [1986] Ch 20, 66-7; Dubai Aluminium Co Ltd v Salaam [2002] UKHL 48; [2003] 2 AC 366.*
>
> *ii) D2 may be vicariously liable for the tortious act of D1 even though the act in question constitutes a violation of the duty owed to D2 by D1 and even if the act in question is a criminal offence: Morris v CW Martin & Sons Ltd [1966] 1 QB 716; Dubai Aluminium; Brink's Global Services v Igrox [2010] EWCA Civ; [2011] IRLR 343.*
>
> *iii) Vicarious liability can even extend to liability for a criminal act of sexual assault: Lister v Hesley Hall [2001] UKHL 22; [2002] 1 AC 215.*
>
> *iv) It is possible for two different defendants, D2 and D3, each to be vicariously liable for the single tortious act of D1: Viasystems (Tyneside) Ltd v Thermal Transfer (Northern) Ltd and others [2005] EWCA Civ 1151; [2006] QB 510."*

59. Apropos the relationship between the Institute in that case and the teaching Brothers, the following was said by Lord Philips at paras. 56 to 58:

> *"56. In the context of vicarious liability the relationship between the teaching brothers and the Institute had many of the elements, and all the essential elements, of the relationship between employer and employees:*
>
> *i)The institute was subdivided into a hierarchical structure and conducted its activities as if it were a corporate body.*
>
> *ii) The teaching activity of the brothers was undertaken because the Provincial directed the brothers to undertake it. True it is that the brothers entered into contracts of employment with the Middlesbrough Defendants, but they did so because the Provincial required them to do so.*
>
> *iii) The teaching activity undertaken by the brothers was in furtherance of the objective, or mission, of the Institute.*
>
> *iv)The manner in which the brother teachers were obliged to conduct themselves as teachers was dictated by the Institute's rules.*
>
> *57. The relationship between the teacher brothers and the Institute differed from that of the relationship between employer and employee in that:*
>
> *i) The brothers were bound to the Institute not by contract, but by their vows.*
>
> *ii) Far from the Institute paying the brothers, the brothers entered into deeds under which they were obliged to transfer all their earnings to the Institute. The Institute catered for their needs from these funds.*
>
> *58. Neither of these differences is material. Indeed they rendered the relationship between the brothers and the Institute closer than that of an employer and its employees."*

60. Lord Philips concluded his analysis of the relationship between teaching Brothers in that case and the Institute, saying the following at paras. 59 and 60:

> *". . . The business of the Institute was not to train teachers or to confer status on them. It was to provide Christian teaching for boys. All members of the Institute were united in that objective. The relationship between individual teacher brothers and the Institute was directed to achieving that objective.*
>
> *60. For these reasons I consider that the relationship between the teaching brothers and the Institute was sufficiently akin to that of employer and employees to satisfy stage 1 of the test of vicarious liability."*

61. Further on, at para. 84 *et seq*. Lord Philips says the following:

> *"84. Where those who have abused children have been members of a particular church or religious order and have committed the abuse in the course of carrying out activities in that capacity claimants have had difficulty in establishing the conventional relationship of employer/employee. What has weighed with the courts has been the fact that the relationship has facilitated the commission of the abuse by placing the abusers in a position where they enjoyed both physical proximity to their victims and the influence of authority over them both as teachers and as men of god.*
>
> *85. The precise criteria for imposing vicarious liability for sexual abuse are still in the course of refinement by judicial decision. Sexual abuse of children may be facilitated in a number of different circumstances. There is currently concern at the possibility that widespread sexual abuse of children may have occurred within the entertainment industry. This case is not concerned with that scenario. It is concerned with the liability of bodies that have, in pursuance of their own interests, caused their employees or persons in a relationship similar to that of employees, to have access to children in circumstances where abuse has been facilitated.*
>
> *86. Starting with the Canadian authorities a common theme can be traced through most of the cases to which I have referred. Vicarious liability is imposed where a defendant, whose relationship with the abuser put it in a position to use the abuser to carry on its business or to further its own interests, has done so in a manner which has created or significantly enhanced the risk that the victim or victims would suffer the relevant abuse. The essential closeness of connection between the relationship between the defendant and the tortfeasor and the acts of abuse thus involves a strong causative link.*
>
> *87. These are the criteria that establish the necessary 'close connection' between relationship and abuse. I do not think that it is right to say that creation of risk is simply a policy consideration and not one of the criteria. Creation of risk is not enough, of itself, to give rise to vicarious liability for abuse but it is always likely to be an important element in the facts that give rise to such liability.*
>
> *88. In this case both the necessary relationship between the brothers and the Institute and the close connection between that relationship and the abuse committed at the school have been made out.*
>
> *89. The relationship between the brothers and the Institute was much closer to that of employment than the relationship between the priest and the bishop in JGE. The Institute was subdivided into a hierarchical structure and conducted its activities as if it were a corporate body. The brothers were subject to the directions as to their employment and the general supervision of the Provincial, their superior within that hierarchical structure. But the relationship was not simply one akin to that of employer and employee. The business and mission of the Institute was the common business and mission of every brother who was a member of it.*
>
> *90. That business was the provision of a Christian education to boys. It was to achieve that mission that the brothers joined and remained members of the Institute.*
>
> *91. The relationship between the Institute and the brothers enabled the Institute to place the brothers in teaching positions and, in particular, in the position of headmaster at St William's. The standing that the brothers enjoyed as members of the Institute led the managers of that school to comply with the decisions of the Institute as to who should fill that key position. It is particularly significant that the Institute provided the headmasters, for the running of the school was largely carried out by the headmasters. The brother headmaster was almost always the Director of the Institute's community, living on the school premises. There was thus a very close connection between the relationship between the brothers and the Institute and the employment of the brothers as teachers in the school.*
>
> *92. Living cloistered on the school premises were vulnerable boys. They were triply vulnerable. They were vulnerable because they were children in a school; they were vulnerable because they were virtually prisoners in the school; and they were vulnerable because their personal histories made it even less likely that if they attempted to disclose what was happening to them they would be believed. The brother teachers were placed in the school to care for the educational and religious needs of these pupils. Abusing the boys in their care was diametrically opposed to those objectives but, paradoxically, that very fact was one of the factors that provided the necessary close connection between the abuse and the relationship between the brothers and the Institute that gives rise to vicarious liability on the part of the latter.*
>
> *93. There was a very close connection between the brother teachers' employment in the school and the sexual abuse that they committed, or must for present purposes be assumed to have committed. There was no Criminal Records Bureau at the time, but the risk of sexual abuse was recognised, as demonstrated by the prohibition on touching the children in the chapter in the Rule dealing with chastity. No doubt the status of a brother was treated by the managers as an assurance that children could safely be entrusted to his care. The placement of brother teachers in St William's, a residential school in the precincts of which they also resided, greatly enhanced the risk of abuse by them if they had a propensity for such misconduct.*
>
> *94. This is not a borderline case. It is one where it is fair, just and reasonable, by reason of the satisfaction of the relevant criteria, for the Institute to share with the Middlesbrough Defendants vicarious liability for the abuse committed by the brothers. I would allow this appeal."*

62. Apart from the fact that the institution where it is alleged abuse took place in the *CCWS* case was a reformatory residential institution, there do not appear to me to be any material differences between that case and the present case. In both cases, there

appears to have been a similar relationship between the Brother teacher and the congregation to which he belonged. This relationship gave to the Superiors of the second named defendants in this case a high level of control over his life and vocational activities, a level of control to which he voluntarily submitted by taking his vow of obedience.

63. In the *CCWS* case, the relationship between the abusing Brothers and their institute was treated as "*akin to employment*". I am persuaded to take the same view of the relationship between the second named defendant and the Marist Congregation of which he was a member. Thus, that relationship is one which can give rise to vicarious liability, and because of the closeness of connection between the teaching activities of the second named defendant and the mission on which he was sent, and which he shared with the Marist Congregation, both aspects of the "*close connection*" test are, in my view, met in this case.

64. Whilst it was submitted on behalf of the first named defendant that the judgments in the *O'Keeffe* case expressly are impliedly rejected, the developments in relation to vicarious liability taking place in other common law jurisdictions, I would have to reject that submission. It is clear that a majority of the Supreme Court held that the "close connection test" was now firmly embedded in our law. In that case, the evidence established that there was no employer/employee relationship between the first named defendant and the State defendants, but also that there was no evidence of any relationship between the first named defendant and the State defendants which gave to the State defendants a necessary degree of control over the teaching activities of the first named defendants in that case, so as to attract vicarious liability.

65. The facts in this case are very different. Here, the first named defendant against whom a claim of vicarious liability is made did have a high level of control over the teaching activities of the sexual abuser. That critical distinction based on the evidence in this case persuades me that I should follow the reasoning of the United Kingdom Supreme Court in its judgment in the *CCWS* case, whose facts are similar to the case I have to deal with.

66. The first named defendant submits that because the Marist Congregation is a non-incorporated association of individuals, there is no basis for a finding of vicarious liability against either the first named defendant as a member of the Marist Congregation or of any of the other individual members of the congregation. In the written submission of the first named defendant, there is set out a long list of the varying circumstances of individual members, past and present, of the Marists. The question is posed, why should any one of these individuals be held to be vicariously liable for the tortious acts of the second named defendant. By way of illustration of this, the position of a Marist brother in Australia is put forward or a situation of somebody who was a member of the Marist but left many years ago, or what of the position of a person who only joined the Marist Brothers in the last few years. The question is asked, why should any of these, or others, be held to be vicariously liable for the tortious acts of the second named defendant.

67. The self-same issue arose in the *CCWS* case in the United Kingdom and the position of the De La Salle Brothers in that case was remarkably similar. Starting at para. 27, Lord Philips in his judgment dealt with this problem as follows:

> *"'The nature of "the Institute'*
>
> *27. Before considering stage 1 of the test for vicarious liability I must address the problem of the Institute. Hughes LJ held, and Lord Faulks now accepts, that it is possible for vicarious liability to arise out of the relationship between one member of an unincorporated association and the other members, at least where the former acts on behalf of the others. He held, however, at para 57 that there was not a sufficiently close connection between the brothers of the Institute scattered all over the world and the torts committed by the brother teachers at St William's to give rise to vicarious liability. This raises the question of whether it is right to treat the De La Salle Defendants as being simply an unincorporated band of brothers scattered around the world.*
>
> *28. A similar problem perplexed Ward LJ in JGE. The issue in that case was whether there was vicarious liability for sexual abuse committed by a Roman Catholic priest. He observed at para 5 that there had been other occasions on which the Church had been called on to answer for the acts of its clergy and that JGE was the first occasion on which the Church had challenged the allegation that it was the employer of its clergy. The issue had always before been simply whether the acts of abuse had been committed in the course of that employment.*
>
> *29. The defendants against whom the claim was brought were 'the Trustees of the Portsmouth Roman Catholic Diocesan Trust'. Ward LJ observed at para 8 that because English law did not recognise the Catholic Church as a legal entity in its own right but saw it as an unincorporated association with no legal personality, the diocese usually established a charitable trust to enable it to own and manage property and otherwise conduct its financial affairs in accordance with domestic law. At para 18 Ward LJ remarked that there had been understandable confusion as to whom to sue and that the case had proceeded effectively against the Bishop, though it was the trustees who would be covered by the relevant insurance should liability be established. He added that intuitively one would think that, as a priest is always said to be 'a servant of god', the Roman Catholic Church itself would be the responsible defendant, but the Roman Catholic Church could not be a party as it had no legal personality. In those circumstances Ward LJ treated the Bishop as being the person whose vicarious liability was in issue.*
>
> *30. There are parallels between this aspect of JGE and the present case. The choice of defendants suggests that the claimants may well have been in doubt as to whom they should sue, as they have adopted something of a scatter gun approach. Of the 35 defendants on the pleadings, the action has proceeded against 13. Of these I select as a typical De La Salle defendant the 10th defendant, Patrick Joseph Campbell "sued on his own behalf and as a former trustee of the 1947 trust and as representing all persons (other than any other party to the claim) who were at any time relevant to the claimant's claims:*
>
> *i) members of the Order*
>
> *ii) members of the English Province or the Great Britain Province*
>
> *iii) responsible for the supervision management or direction of brothers carrying on the work of the England Province or the Great Britain Province, or*
>
> *iv) Trustees of the 1947 trust before 14 July 1992.*
>
> *31. I can appreciate Hughes LJ's difficulty in accepting that a De La Salle brother in Australia could be vicariously liable for the sexual assault by a brother at St William's. Indeed, there is something paradoxical in the concept of an attempt to hold vicariously liable a world wide association of religious brothers, all of whom have taken vows of poverty and so*

have no resources of their own. So far as individual defendants are outside the jurisdiction this might also have given rise to an interesting question of conflict of laws. This is, however, a long way from the realities of these proceedings and Lord Faulks has not taken any point on the nature of the Institute.

32. It is open to the claimants on the pleadings to seek to establish vicarious liability on the part of an unincorporated association made up at the relevant times of the brothers world wide, or of members of the London Province, or of the England Province, or of the Great Britain Province. At the end of the day what is likely to matter will be access to the funds held by the trusts, or to insurance effected by the trustees. Whether one looks at the picture world wide, or within Great Britain, the salient features are the same. The Institute is not a contemplative order. The reason for its creation and existence is to carry on an activity, namely giving a Christian education to boys. To perform that activity it owns and manages schools in which its brothers teach, and it sends its brothers out to teach in schools managed by other bodies. The Institute is, for administrative purposes divided into Provinces, each administered by its Provincial. To carry out its activities it has formed trusts that have recognised legal personality. The trusts are funded in part from the earnings of those brothers who receive payment for teaching. The trust funds are used to meet the needs of the brothers and the financial requirements of the teaching mission.

33. It seems to me more realistic to view the brothers of the Province from time to time responsible for the area in which Market Weighton lies as members of the relevant unincorporated association rather than the Order as a whole, but I doubt if it makes any difference in principle. 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."

68. In my opinion, the foregoing passage from the judgment of Lord Philips, and in particular the last quoted paragraph, could apply with little adaptation to the role of the Marist Brothers in this case. I find the reasoning of Lord Philips in this regard compelling and I adopt it as necessary to arrive at a just outcome of the litigation. To hold otherwise, as submitted on behalf of the first named defendant; that the Marist Brothers were merely an unincorporated band of individuals is to ignore the reality of their true collective identity, to ignore their common purpose, to which each member is committed individually and collectively on behalf of all of the Brothers; to ignore that for the purposes of carrying out their mission, they necessarily acquire and manage property, no doubt held by trustees for the benefit of the congregation; that in their necessary commercial dealings with the world at large, for example, in employing lay staff, in effecting insurance policies, they must do so under the collective identity or personality of the Marist Congregation, albeit acting through trustees.

69. Having regard to all of this, is it right, when it comes to the issue of vicarious liability, that the well-known identity of the Marist Congregation can simply disappear into the sands of unincorporated association. I do not think so. In my opinion, the position of the first named defendant as Provincial of the Marists is to be seen, for the purposes of this litigation, as representative of the province of the Marist Congregation in which St. John's National School was located, and I would follow the reasoning of Lord Philips in the *CCWS* case and hold that it is right to approach this case on the basis that the Marist Brothers were a corporate body existing to perform the function of providing a Christian education to boys and that the first named defendant is sued as a representative of that body, which is vicariously liable for the tortious acts of the second named defendant.

70. In the *CCWS* case, the United Kingdom Supreme Court found that there was dual vicarious liability on the part of the De La Salle Brothers and the "Middlesbrough defendants" who were the managers of the institution in question. In this case, the manager of the school was not sued. This raises a question as to how the liability (if any) of the manager of the school is to be dealt with, and in particular, as submitted by the first named defendant, is the plaintiff to be affixed with that liability pursuant to s. 35(1)(i) of the Act of 1961, which is in the following terms:

"35.—(1) For the purpose of determining contributory negligence—

. . .

(i) where the plaintiff's damage was caused by concurrent wrongdoers and the plaintiff's claim against one wrongdoer has become barred by the Statute of Limitations or any other limitation enactment, the plaintiff shall be deemed to be responsible for the acts of such wrongdoer. . ."

71. The first named defendant submitted that the possible liability of members of the Marist Congregation as members of an unincorporated association, who are now long since dead and against whom actions are barred under s. 9(2) of the Civil Liability Act 1961, and also the potential liability of the manager of the school or his estate, also probably time-barred under s. 9(2); these liabilities are by virtue of s. 35(1)(i) should now be attributed to the plaintiff.

72. Insofar as members of the Marist Congregation are concerned, I have already held that for the purposes of these proceedings, the congregation is to be treated as a corporate body, in these proceedings represented by the first named defendant, and hence, the liability of individual members of the congregation, dead or alive, cannot come within the terms of section 35(1)(i).

73. The position of the manager of the school is somewhat different. As already stated above, it is probable that the plaintiff's action arising out of the sexual abuse on him by the second named defendant is time-barred by virtue of s. 9(2) of the Civil Liability Act 1961, against the estate of the late Canon Collins who was the manager at the relevant time. Thus, if there was a liability in respect of the second named defendant's sexual abuse attaching to the late Canon Collins or his estate by virtue of s. 35(1), I would be satisfied that the plaintiff must now be affixed with that liability.

74. That begs the question of whether or not there was a liability attaching to the late Canon Collins as manager of the school. As discussed above, I have come to the conclusion that, apart from the completion of legal formalities with respect to the contracts of teachers, the manager at the relevant time in all probability had no other role in the day-to-day management of the school and that the second named defendant's teaching activities were entirely under the supervision and control of his superiors in the Marist Congregation, in the first instance, the Principal of the school who was a Marist Brother, and thereafter, the Superior of the house in which he lived, and above him, the Provincial of his Province, who, in the evidence of the second named defendant, assigned him to teach in the various schools in which he taught.

75. Whilst I am satisfied that in law, there can be dual vicarious liability in respect of tortious acts of another, in this case, I am satisfied on the evidence that by far the greatest element of control over the teaching activities of the second named defendant rested with his superiors in the Marist Congregation and the manager of the school had little or no role to play in any of this. The manager did, however, retain his residual legal authority over the contractual arrangements between the manager and the second

named defendant, an authority which cannot be treated as negligible or a nullity. However, a fair apportionment of liability and, it would seem to me that such an apportionment is necessary in this case to assess the extent of the liability which the plaintiff must assume pursuant to s. 35(1)(i); must be of small degree. Thus, I would assess the liability of the manager at 10% of the overall liability.

76. This brings me, finally, to the question of delay. In the proceedings, there was a complaint by the first named defendant with regard to the delay in the bringing of proceedings against the first named defendant. This issue appears to have been addressed on a motion which came before O'Keeffe J., and in his closing submissions, Mr. McDonagh S.C. for the first named defendant addressed the delay issue as follows:

> *"There was a motion before Mr. Justice O'Keeffe that you heard mention of, but in dealing with that, he said these issues could be revisited at the trial in the light of whatever prejudice could be established and I do not accept that there is no prejudice established because the evidence of Canon Hever is very clear, that the dramatis personae who were involved at the time are dead, the Principals have passed on, Canon Collins is dead, etc. Those individuals who were actually involved in the school are no longer with us. And this has two ramifications: one is from the point of view of prejudice and the standard in established case law which is set out in our written submissions, both in respect of pre-commencement delay and post-commencement delay. And one of the witnesses, one of the Principals died in 2009 which was eight years after the plenary summons was served - sorry, issued. But only the year after, a renewal was obtained when we hadn't been served for the first seven years. So - the same year, in fact; he died the same year we were served. So, I mean there are real issues there which I will come back to as to whether there is real risk of an unfair trial and whether or not the case can proceed, but there is another way of looking at least considering those delay issues and that's in the context of what the court's task is on a vicarious liability claim because as has been alluded to, but it hasn't been the subject of any submissions, the Irish courts have indicated that a close analysis of the facts underpinning the events on foot of which there is a claim of vicarious liability is essential and it will become apparent and it is apparent, I think that it is impossible to have that close analysis of the facts of the type which the Supreme Court have said is essential because the witnesses are not longer available and it's in that context also, therefore, that there was a failure to - the absence of the possibility of a close examination of the facts is in itself precludes, effectively, any finding that could have been made on foot of those facts that's a difficulty again from the plaintiff's point of view. . ."*

77. Later on in his closing submission, Mr. McDonagh says the following at p. 86 of the transcript:

> *"Tied into that close connection test and a necessity to examine very closely the nature of what was going on, as I have said to the court, we also rely on the delay involved, both pre-commencement and post-commencement delay, which make it impossible for the court really to address the facts and, in our written submissions we have set out all the relevant case law there and I rely on that as well as I say that is relevant into context. One is the standard risk as addressed in that case law as to whether there is a real risk of an unfair hearing, risk of injustice, I say there clearly is here, 40 years after the event, with all the principal actors deceased. We simply are here trying to make as best we can a defence, but in terms of what actually - those individuals who might have given us instructions are not available to us, and that, as I say, feeds into the fact that the court cannot really conduct the sort of analysis that is mandated in an employer-employee relationship, a close examination of the facts and circumstances, that's relevant there as well. The Irish case law, as I say, seems to be against the plaintiff . . ."*

78. Thus, the essence of the first named defendant's complaint in this regard is that evidence relevant to the vicarious liability issue has been lost due to the lapse of time and the deaths of the people involved.

79. The issue of vicarious liability involved a consideration of the relationship between the first and second named defendant and between the second named defendant and the manager of the school, Canon Collins. As to the relationship between the second named defendant and the Marist Congregation, the uncontested facts were that the second named defendant was, at the relevant time, a Brother in the Marist Congregation; that he took the normal vows taken by a Brother in that congregation and that he was subject to the hierarchical structure pertaining at the time. The first named defendant has not intimated any contest or disagreement in respect of the foregoing. If the first named defendant was discontent with the factual matrix as presented in the evidence to this court in relation to the foregoing, it would seem to me that any of these matters could have been put in contest with evidence drawn from the records of the Marist Congregation, and it is impossible for me to accept that the nature of the relationship between a Brother and his superiors at the relevant time and the arrangements in place for assigning teachers to various schools and who had the authority to do this, could not have been dealt with by the first named defendant, either through his own evidence, had he chosen to give evidence, with appropriate reliance on the records of the Marist Congregation, or evidence from other members of the Marist Congregation who might have had closer knowledge of these matters. Insofar as this aspect of the case is concerned, I do not think that the first named defendant has been prejudiced in defending the proceedings by the passage of time.

80. As to the relationship between the second named defendant and the manager of the school, the evidence given to the court and not subject to any challenge from the first named defendant, was that the normal contractual arrangements were in place as between a teacher and the manager of a National School. Not only did the first named defendant not challenge that arrangement, but relied heavily on it in defence of the proceedings.

81. As to the arrangements for the day-to-day running of the school, the evidence led before me was to the effect that the Principal and teachers were assigned and nominated by the Marist Congregation and merely formally appointed by the manager and that the manager did not have a day-to-day hands on role in the running of the school. If the first named defendant was again discontent with that presentation of facts, it would seem to me to be highly probable that the records of the Marist Congregation would either confirm it or reveal a contrary picture if that existed. Furthermore, I find it impossible to accept that either the first named defendant or some other Brother in the Marist Congregation with seniority would not have been able to give detailed evidence concerning the manner in which the Marist Brothers ran National Schools which were clearly identified as Marist schools, and staffed either exclusively or mainly by Marist Brothers.

82. There was no suggestion from the first named defendant that records were not available relating to St. John's National School for the relevant period, nor was it suggested that institutional knowledge concerning how the Marist Brothers conducted its affairs in National Schools was not readily available in the form of admissible evidence to the first named defendant.

83. I am quite satisfied that the considerable lapse of time that has occurred in this case has not prejudiced the first named defendant in his defence of these proceedings and such assertions of prejudice as have been made have been of the most general and unspecific nature and not well founded.

84. In summary, therefore, I have come to the conclusion that the plaintiff was sexually abused systematically over a period of three years from 1969 to 1972 by the second named defendant when he was a teacher in St. John's National School in Sligo. The first named defendant, as a representative of the Marist Congregation of which the second named defendant was a member at the relevant time, is vicariously liable for the aforesaid tortious acts of the second named defendant.

85. I assess the damages in the sum of €350,000.

86. Because I determined that the manager of the school had a dual vicarious liability with the first named defendant but is not sued and cannot now be sued because any action is long since time-barred, the plaintiff must absorb the liability of that manager which I assessed at 10% of the overall liability, thereby reducing the award of damages to the plaintiff by 10% to €315,000.