ARTICLES

The 'Scope of Entrusted Duties' as a Problem of the Church's Vicarious Liability for Damages Done by Sexual Crimes of the Priests

A Comparative Study

*Anna Wilk**

Abstract

This article refers to the problem of the Roman Catholic Church's liability for the damages caused by sexual abuse of children by priests. The author points to the base of liability – the respondeat superior principle and analyses the problem of the 'scope of entrusted duties'. The major problem arises from the fact that sexual abuse can never be the subject of any legally effective contract or the activities entrusted by the superior, but it happens only 'when the opportunity arises' – during the performance of actual activities covered by scope of the contract, for example, caring for minors, their education, treatment or spiritual formation. However, the problem is wider because sexual crimes can also occur in non-Catholic churches and other religious institutions, as well as all those places and institutions whose employees enter into special trust relationships with minors or adult people with special needs (for sick or disabled). This article refers to the experiences from various countries and presents two methods of its possible interpretation of the concept of the 'scope of entrusted duties' – strict and liberal, as well as the 'enhanced risk theory'. The author also proposes her own method of solving the problem.

Keywords: church, liability, abuse, duties, risk.

A Introduction

Recently, numerous scandals related to sexual abuse of minors committed by Catholic priests have been revealed in many countries. While the tortious liability of the perpetrators of these crimes does not raise any doubts, such doubts may be raised in case of the responsibility of the Church as an institution.

The Church's (diocese) liability for damages is important, because the perpetrators (priests) usually do not have any property or assets from which they could

* Dr. Anna Wilk, WSB University, Dąbrowa Górnicza, Poland.

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compensate the crime victims, and they made vows of poverty so their wealth is only limited to personal belongings.[1] Therefore, it is not surprising that victims expecting difficulties in enforcing their claims from individual perpetrators of harassment address their complaints to the institutional Church on the basis of vicarious liability (liability for the actions of others). However, the resolution of this problem is significant not only in relation to victims of paedophile priests, as child sexual offences are not the exclusive domain of the Church. Such crimes can also occur in non-Catholic churches and other religious institutions, as well as in all those places and institutions whose employees enter into special trust relationships with minors or adult people with special needs – for example, sick, disabled (*e.g.* schools, hospitals, childcare centres, foster families and juvenile halls). Therefore, this article also refers to views and judgments concerning the vicarious liability of institutions other than the Church because the problem is wider.

As the author specializes in Polish civil law, this article presents the Polish approach towards the problem in comparison with experiences from various countries.

B The Essence of the Problem

In trial defence, church legal persons often rely on the fact that the damage was not done 'while performing' pastoral activities entrusted to the priest, but the performance of these activities gave rise to an opportunity to abuse, because the scope of incardination of a clergyman never includes sexual abuse of other people. This is where the fundamental problem related to the responsibility of the Church for damages caused by paedophile acts arises: sexual abuse of third parties can never be the subject of any legally effective contract or the activities entrusted by the superior, but it happens only 'when the opportunity arises' during the performance of actual activities covered by the scope of the contract, for example, while caring for minors, during their education, treatment or spiritual training.[2]

This is one of the major problems of vicarious liability in general – is a superior or employer always liable for damages done by his or her subordinate, or can he or she be exonerated if the subordinate acted outside the scope of entrusted duties? The views of doctrine and judicature may vary significantly.

C Reactions to the Problem in Various Countries

I The USA

In American law, the basis of vicarious liability is concluded in the principle of *respondeat superior* (the superior is responsible for the subordinate). The claim of vicarious liability does not allege fault on the part of the religious organization, but

1 M. Nesterowicz, 'Odpowiedzialność cywilna Kościoła katolickiego za molestowanie małoletnich przez księży (prawo USA i prawo polskie)', *Przegląd Sądowy*, Vol. 1, 2014, p. 9.

2 A. Wilk, 'Is the Catholic Church Liable for Damage Caused by Pedophile Priests?', *ASEJ – Scientific Journal of Bielsko-Biala School of Finance and Law*, Vol. 2, 2019, p. 62.

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only that the wrongdoer was an agent of the organization, and that the wrong involved acts that fall within the scope of that agency.[3] Because the organization – the principal – reaps the benefit of its agent's work, the principal should also bear the costs of that agent's work, including harms imposed on third parties through the agent's performance of his work.[4]

The *respondeat superior* principle requires the following elements to be applied: the existence of a relationship between the direct perpetrator of the act and his superior, an agreement between the superior and the subordinate, under which the subordinate performs certain activities with or without remuneration, as well as the supervisor's right to control these activities, regardless of whether this right is actually exercised.[5] As it is rightly pointed out in the doctrine, such liability provides the possibility of effective search for compensation from an entity that cannot be personally blamed, but which has better financial possibilities to remedy the damage, and is also a factor motivating superiors to take actions to reduce the risk of damage caused by subordinates.[6]

American lawyers usually apply a test for determining whether an employee is acting within the scope of employment, according to which the conduct of a servant is within the scope of employment if: it is of the kind he is employed to perform; it occurs substantially within the authorized time and space limits; it is actuated, at least in part, by a purpose to serve the master and, if force is intentionally used by the servant against another, the use of force is not unexpected by the master.[7] Conduct of a servant is not within the scope of employment if it is different in kind from that authorized, far beyond the authorized time or space limits, or too little actuated by a purpose to serve the master.[8]

Unfortunately, American courts often find that the tortious behaviour was not within the scope of a cleric's agency, as sexual misconduct is generally not within the scope of a religious leader's employment by a religious organization, but is only motivated by the wrongdoer's desire for 'personal gratification'.[9] In alleging that the clergyman breached his duty of loyalty by taking personal advantage of the relationship, the plaintiff at least implicitly claims that the clergyman has put his own desires above his professional responsibilities.[10] A number of courts state that a 'motivation to serve' is a prerequisite to any recovery in respondeat superior and therefore employers cannot be held liable for the sexual acts of their employees, because sexual acts, though perhaps motivated by desire, are not motivated by a

3 I.C. Lupu & R.W. Tuttle, 'Sexual Misconduct and Ecclesiastical Immunity', *The George Washington University Law School, GW Law Faculty Publications & Other Works, Public Law and Legal Theory Working Paper*, No. 92, 2004, p. 103.
4 I.C. Lupu & R.W. Tuttle, 'Sexual Misconduct …', p. 103.
5 M. Nesterowicz, 'Odpowiedzialność…', pp. 11-12.
6 A. Sieczych, 'Odpowiedzialność odszkodowawcza związków wyznaniowych za przestępstwa seksualne popełnione przez duchownych w USA i w Polsce (casus Kościoła katolickiego)', *Państwo i Prawo*, Vol. 1, 2017, pp. 66-67.
7 P. Hornbeck, 'Respondeat Superior Vicarious Liability for Clergy Sexual Abuse: Four Approaches', *Buffalo Law Review*, Vol. 68, No. 4, 2020, p. 988.
8 P. Hornbeck, 'Respondeat Superior …', p. 988.
9 I.C. Lupu & R.W. Tuttle, 'Sexual Misconduct …', p. 104.
10 I.C. Lupu & R.W. Tuttle, 'Sexual Misconduct …', p. 104.

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desire to serve the employer (see *Andrews v. United States*, 732 F.2d 366, 370, 4th Cir. 1984;[11] *Hoover v. University of Chicago Hospitals*, 51 Ill. App. 3d 263, 9 Ill. Dec. 414, 366 N.E.2d 925, 929, 1977).[12]

For example, in the case *Moses v. Diocese of Colorado*, the Supreme Court of Colorado stated (basing on previous judgments enumerated in the sentence) that:

> an employee is acting within the scope of his employment if he is doing the work assigned to him by his employer, or what is necessarily incidental to that work, or customary in the employer's business. [...] When a priest has sexual intercourse with a parishioner it is not part of the priest's duties nor customary within the business of the church. Such conduct is contrary to the principles of Catholicism and is not incidental to the tasks assigned a priest by a diocese (*Moses v. Diocese of Colorado*, 863 P.2d 310, 1993).[13]

In the case *Tichenor v. Roman Catholic Church, New Orleans* (32 F.3d 953, 5th Cir. 1994),[14] the court rejected the contention that the perpetrator of a sexual abuse was acting within the scope of his employment as a priest, stating that

> although a priest's duties are less susceptible to definition than, say, a store clerk, we can nonetheless outline the basics. It is a priest's duty to represent the word of God, as embodied in the Scriptures. The central aspect of that duty is to aid people in their relationship with God and, also, the Church. Moreover, it is his duty to help others – whose paths may have wandered – to find safety and security in the doctrines of Catholic theology. According to the court's view, given the perpetrator's vow of celibacy and the Catholic Church's unbending stand condemning homosexual relations, his acts represent the paradigmatic pursuit of some purpose unrelated to his master's business.

However, some courts have expressed the opposite view. In the case *Doe v. Samaritan Counseling Center* (791 P.2d 344, 1990),[15] which referred to the sexual abuse of a woman by a spiritual counsellor, the Supreme Court of Alaska stated that

> the 'motivation to serve' test would too significantly undercut the enterprise liability basis of the respondeat superior doctrine and the 'scope of employment' as a test for application of respondeat superior would be insufficient if it failed to encompass the duty of every enterprise to the social community which gives it life and contributes to its prosperity. The basis of respondeat superior has been correctly stated as the desire to include in the costs of operation inevitable losses to third persons incident to carrying on an enterprise, and thus distribute the burden among those benefited by the enterprise.

11 www.supreme.justia.com.
12 www.ravelaw.com.
13 www.law.justia.com.
14 www.casetext.com.
15 www.law.justia.com.

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In the case *Mullen v. Horton* (700 A.2d 1377, 1381),[16] the plaintiff was sexually abused by a priest of the Missionary Oblates of Mary Immaculate, who was also a psychologist. The court presented the view that

> the Oblate institutional defendants employed Horton (the perpetrator) to give pastoral counseling to parishioners, in conjunction with his other priestly duties. The Oblate institutional defendants also employed Horton as a staff psychologist for the annulment tribunal and at a number of religious retreats sponsored by the Oblate institutional defendants. The Oblate institutional defendants enabled Horton to counsel both church personnel and the public at large, by giving him an office in their retreat house. The Oblate institutional defendants benefited from Horton's pastoral and psychological counseling of their parishioners and clerical personnel. They also benefited monetarily from his clinical psychology practice, because all profits derived from his practice were given to the Oblate institutional defendants pursuant to his vow of poverty. Thus, a trier of fact could reasonably find that Horton's pastoral and psychological counseling of the plaintiff was well within the scope of his employment for the Oblate institutional defendants and was in furtherance of the Oblate institutional defendants' business.

II Canada

In Canada, one of the most important judgments referring to the problem of *respondeat superior* principle was the judgment of Canadian Supreme Court in *Bazley v. Curry case* (1999 2 SCR 534).[17] In this case, the warden of a school for troubled children sexually assaulted the children while performing his duties, such as bathing the children and putting them to bed. The court stated that

> the risk of harm may [...] be enhanced by the nature of the relationship the employment establishes between the employee and the child. Employment that puts the employee in a position of intimacy and power over the child (*i.e.* a parent-like, role-model relationship) may enhance the risk of the employee feeling that he or she is able to take advantage of the child and the child submitting without effective complaint. The more the employer encourages the employee to stand in a position of respect and suggests that the child should emulate and obey the employee, the more the risk may be enhanced. In other words, the more an enterprise requires the exercise of power or authority for its successful operation, the more materially likely it is that an abuse of that power relationship can be fairly ascribed to the employer.

Therefore, the vulnerability of potential victims should be taken into account to establish if the enterprise enhanced the risk that such wrongful acts could occur.[18]

16 www.casetext.com.

17 https://scc-csc.lexum.com/scc-csc/scc-csc/en/item/1709/index.do.

18 K. Calitz, 'The Liability of Churches for the Historical Sexual Assault of Children by Priests', *Potchefstroom Electronic Law Journal*, Vol. 17, No. 6, 2014, p. 2464.

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The opportunity for intimate private control and the parental relationship and power required by the terms of employment created the special environment that nurtured and brought to fruition the plaintiff's sexual abuse – the abuse was not a mere accident of time and place, but the product of the special relationship of intimacy and respect the employer fostered, as well as the special opportunities for exploitation of that relationship it furnished.[19]

III United Kingdom

In the United Kingdom, vicarious liability is usually assessed by five factors: whether the 'employer' is more likely to have the means to compensate the victim than the tortfeasor; whether the tort was committed as a result of an activity undertaken by the tortfeasor on behalf of the 'employer'; whether the tortfeasor's activity is likely to be part of the business activity of the 'employer'; whether the 'employer' created the risk of the tort being committed by assigning a particular task to the tortfeasor and whether a tortfeasor was, to a greater or lesser degree, under the control of the employer.[20] From the Church's liability point of view, the most important is the fourth factor – the factor of a risk.

K. Calitz points at two important judgments of British courts, referring to the problem of the application of *respondeat superior* principle.[21] In the case *Maga v. Trustees of the Birmingham Archdiocese of the Roman Catholic Church*, the Court of Appeal held that

> a priest has a special role, which involves trust and responsibility in a more general way even than a teacher, a doctor, or a nurse. He is, in a sense, never off duty; thus, he will normally be dressed in 'uniform' in public and not just when at his place of work. (*Maga v. Trustees of the Birmingham Archdiocese of the Roman Catholic Church* 2010 EWCA Civ 256, 2010 All ER (D) 141)[22]

In *The Catholic Child Welfare Society & Ors v. Various Claimants & The Institute of the Brothers of the Christian Schools*, the UK Supreme Court analysed previous judgments to establish what would constitute a close connection and concluded that 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.(*Catholic Child Welfare Society & Ors v. Various Claimants & Institute of Brothers of the Christian Schools* 2012 UKSC 56).[23] The court further stated that the creation of risk in itself is not enough to give rise to vicarious liability for sexual abuse, but it is always an important factual element

19 A.K. Thompson, 'Vicarious Liability, Non-Delegable Duty and Child Sexual Abuse: Is There Another Solution for Sexual Abuse Plaintiffs in Australia after the "Maga" Decision in the UK?', *The West Australian Jurist*, Vol. 3, 2012, p. 187.

20 A.D. On, *Strict Liability and the Aims of Tort Law: A Doctrinal, Comparative and Normative Study of Strict Liability Regimes*, Maastricht University, 2020, p. 111.

21 K. Calitz, 'The Liability …', p. 2466.

22 www.casemine.com, also quoted by K. Calitz, 'The Liability …', p. 2466.

23 www.supremecourt.uk, also quoted by K. Calitz, 'The Liability …', p. 2466.

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in establishing vicarious liability – in the aforementioned case the children were vulnerable because they were school children living cloistered on the school premises and their personal histories made it less likely that they would be believed if they disclosed the abuse to anyone.[24]

IV South Africa

In the case of the rape of a young woman by the policemen on duty, the South African courts held that the police had a constitutional duty to protect the public and that the public needed to trust the police to enable them to do their duties – this was exactly what the victims did (see *Minister of Police v. Rabie* 1986 1 SA 117 (A)[25] and *K v. Minister of Safety and Security* 2005 9 BCLR 835 (CC)[26]). The fact that the perpetrators were provided with uniforms and an official vehicle played a role in persuading the victims to trust them and enabled them to rape them. They breached their duty by way of a commission (the rape) and an omission (failing to protect the victim in accordance with their constitutional duty).[27] The courts found that there was a sufficiently close connection between their wrongful acts and the business of their employer to hold the Minister vicariously liable as a superior of the perpetrators.[28]

V France

The French Civil Code holds that masters and employers are strictly liable for the damage caused by their servants and employees in the functions for which they have been employed.[29]

The doctrine points that France probably takes the most vigorous position by requiring solely an objective link between the employee's act and the work. This requirement is generally satisfied if the act took place during working hours and implies that, for example, the employer of a painter, asked to repaint the kitchen of a manor house, will be liable for the damage caused to the housemaid raped by the painter.[30] However, the employer may be exonerated if he proves that the employee acted outside the scope of his employment, without authorization and for a purpose unrelated to his job.[31] French civil courts favour a more restrictive approach which excludes liability where the injury arose due to an 'abuse of function', that is, where the employee was acting for his own ends.[32] In a famous case where a clerk defrauded a client while advising her on insurance policies on behalf of the defendant company, the court set a new legal test that liability for the acts of others will be presumed to exist unless the act of the employee is: without authorization; for his own ends and outside the normal duties of his job – nevertheless, the

24 K. Calitz, 'The Liability …', p. 2466.
25 www.safili.org.
26 https://collections.concourt.org.za/handle/20.500.12144/2228.
27 K. Calitz, 'The Liability …', p. 2468.
28 K. Calitz, 'The Liability …', p. 2468.
29 The French Civil Code of 1804, www.legifrance.gouv.fr.
30 C. Van Dam, *European Tort Law*, Second Edition, Oxford, Oxford University Press, 2013, pp. 515-516.
31 C. Van Dam, *European Tort Law*, pp. 515-516.
32 P. Giliker, 'Vicarious Liability or Liability for the Acts of Others in Tort: A Comparative Perspective', *Journal of European Tort Law*, Vol. 2, 2011, p. 51.

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liability would arise when the job gave the opportunity and means for the tort to take place.[33] Therefore, the French judicature recognizes the dominance of risk-based reasoning in justifying the imposition of strict liability, here underpinned by the theory of risk and profit, that is, if you profit from another's actions, you must accept the risks associated with these actions.[34] This reflects parallel developments in French public law, whereby public bodies are generally held strictly liable for state employees committing the so-called *faute de service* and is supported by a background of liability insurance and legislation which requires insurers to meet claims for damage caused by both negligent and intentional misconduct for which the employer is held liable.[35]

VI Spain

The Spanish Civil Code states that the owners and directors of an establishment or company are equally liable in respect of the harm caused by their dependants in the execution of the service for which they were employed or while they function.[36]

To determine whether the misconduct was caused during the performance of the service for which the dependants were employed (scope of employment), the following are taken into consideration: (i) the nature of the misconduct (in other words, the degree of coincidence or similarity to the nature and characteristics of the activity entrusted; (ii) in case of intentional harm, how foreseeable it was; (iii) its occurrence in spatial-time coordinates more or less close to those of the entrusted activity.[37]

In Spanish case law it is traditional to consider the principle of the prohibition of reimbursement and exonerate the liability of the employer in those cases in which their employee has caused intentional tort by using the instruments from work or under the cover of the tasks they have been told to execute.[38]

The principal is liable, however, for the deceitful deviation of behaviour of their agent if these were foreseeable, even more so if the activity they were asked to perform was dangerous to others – similarly, if the action of the agent was executed with the apparent authority of their principal or the image that their position in the company gave them.[39] The most usual example in Spanish law is that of subsidiary civil liability of the state for the crimes or misdemeanours committed with official weapons by State Law Enforcement Officials.[40]

VII Poland

Poland is one of the countries which is just starting to deal with the increasing number of reported sexual crimes of priests – therefore, such cases are starting to

33 P. Giliker, 'Vicarious Liability …', p. 52.
34 P. Giliker, 'Vicarious Liability …', p. 52.
35 P. Giliker, 'Vicarious Liability …', pp. 52-53.
36 P.S. Coderch & C.I. Gomez Liguerre, 'Vicarious Liability and Liability for the Actions of Others II', *InDret*, Vol. 3, 2002, p. 12.
37 P.S. Coderch, C.I. Gomez Liguerre, J.A. Ruiz Garcia, A. Rubi Pug & J. Pineiro Salguero, 'Vicarious Liability and Liability for the Actions of Others I', *InDret*, Vol. 2, 2002, p. 5.
38 P.S. Coderch & C.I. Gomez Liguerre, 'Vicarious Liability …', pp. 16-17.
39 P.S. Coderch & C.I. Gomez Liguerre, 'Vicarious Liability …', p. 17.
40 P.S. Coderch & C.I. Gomez Liguerre, 'Vicarious Liability …', p. 17.

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appear in the courts. According to Article 430 of the Polish Civil Code of 1964,[41] anyone who, on his own account, entrusts an act to a person who, while performing the act, is under his management and is obliged to follow his instructions, is liable for any damage caused by a fault on that person's part when performing the act. With regard to the responsibility of the Catholic Church, however, the most controversial issue may arise from the use of the phrase 'while performing the act', which is one of the conditions for liability under Article 430 of the Civil Code. Legal persons often claim that regarding a church, the damage is done not 'while performing' pastoral activities entrusted to the priest, but only 'when the opportunity arose' during the performance of actual activities covered by scope of the contract, for example, while caring for minors, their education, treatment or spiritual formation.[42]

Such a standing may be supported by views expressed in the doctrine and jurisdiction, according to which actions might have been taken because an opportunity arose and the circumstances were right to commit an offence on one's own behalf and on one's own account, and are not understood as actions taken 'while performing the act'. The consequences of adopting such a position can be illustrated by the following example: a supervisor (employer) who hires some subordinates (employees) to carry out renovation work in the client's apartment would only be responsible for damages resulting from the performance of this work contrary to construction standards but would not be liable for damage caused by the employee who capitalized on the opportunity and stole goods from the apartment.[43] Thus, because no one has entrusted the paedophile priest with sexual exploitation of minors but with other tasks which are in line with the mission of the Church (*e.g.* teaching religion and taking care of altar boys), the effects of a possible 'excession' of the priest, that is, exceeding the limits of entrusted tasks and entering into sexual conduct with children to commit sexual offences to their detriment would not burden their superior.[44]

However, there are also opinions in the literature emphasizing the unjustification of making a restrictive, narrowing interpretation of the concept of 'while performing the act' and supporting the liberal interpretation. For example, E. Łętowska, when referring to Article 430 of the Civil Code indicates that it is not very important whether a specific harmful act was 'entrusted' (since it is obvious that no one entrusts subordinates with committing a crime) but whether the performance of the entrusted activities was a factor locally and temporarily enabling a typical course of action which resulted in damage being done.[45] M. Nesterowicz indicates that

41 www.sejm.gov.pl.
42 A. Wilk, 'Is the Catholic Church Liable …', p. 62.
43 A. Wilk, 'Is the Catholic Church Liable …', p. 65.
44 A. Wilk, 'Is the Catholic Church Liable …', p. 65.
45 E. Łętowska, 'Odpowiedzialność Kościoła za szkody wyrządzone przez księży', *Państwo i Prawo*, Vol. 3, 2015, p. 18; E. Łętowska, 'Odpowiedzialność "za" księży – dyskusja ciągle niezakończona', *in* W. Robaczyński (Ed.), *Czynić postęp w prawie. Księga jubileuszowa dedykowana Profesor Birucie Lewaszkiewicz-Petrykowskiej*, Wydawnictwo Uniwersytetu Łódzkiego (Łódź University Press), Łódź, 2017, pp. 302-303.

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> the assumption of the responsibility of the Church (diocese) for molesting minors by priests is primarily due to the fact that the perpetrators of sexual abuse – priests, use their position of a public figure with great authority among minors as representatives of God on the Earth. […]. If the perpetrators were not priests, the harassment would not have happened because minors would not have encountered them. The priest's position created opportunities for contact with minors and either encouraged harassment or facilitated it, which was related to the incardination of the priest.[46]

In the case of the sexual abuse of a girl (now adult) by a priest, the Polish Supreme Court confirmed the liability of the Church legal person (a convent) and stated that

> the superior may not defend himself with the accusation that the subordinate, while teaching, healing, saving, caring for or performing the duties of a clergyman, committed sexual abuse not in the performance of the entrusted activity of teaching, healing, saving, caring, and priestly service, but only on their occasion. Such behavior of a subordinate should be classified as causing damage as part of the performance of the entrusted activity, which fully falls under the premise of 'when performing the entrusted activity' within the meaning of Art. 430 of the Civil Code. Damage to a third party by a subordinate 'as part of an entrusted activity', *i.e.* as a result of the performance of this activity, sufficiently reflects the essence of the premise of causing damage while performing an entrusted activity. The third party suffers damage due to incorrect and culpable performance by the subordinate of the entrusted activity. In such a situation, the behavior of a subordinate causing the damage cannot be considered as an independent activity, but as a result of the performance of the entrusted activity (judgment of the Polish Supreme Court of 31.3.2020r., II CSK 124/19).[47]

The Supreme Court pointed to the fact that

> the perpetrator (priest) falsely manifested outside with his attitude that his goal was to provide disinterested help to the claimant both in her education (the girl came from a poor and dysfunctional family – Author) and in religious life. In this way, he caused the plaintiff, her parents and her superiors, as well as outsiders, to feel the purity and sublime of his intentions; the religious practices that he forced on the claimant were to pretend that he exercised only spiritual direction. […] Due to the priest's prestige, especially in the small environment where he performed his pastoral service, the priest had to impress the claimant that he wanted to help her and in this way she was awarded. The priest became someone close to her and at the same time even more than before, an idealized representative of the priesthood. […] The factual findings show that when she refused to have sexual intercourse, the

46 M. Nesterowicz, 'Odpowiedzialność…', p. 16.
47 www.sn.pl.

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> priest threatened her that he would tell in her environment that she wanted to be with him, and no one would believe her version. In the fight with the authority of a priest in the local community, she would not have had a better chance. Therefore, her fears of shame and ostracism were well-founded. This was confirmed by the reaction of the parents and the local community after the disclosure of the priest's criminal practice (initially the claimant was not believed, even by her family – Author) (judgment of the Polish Supreme Court of 31.3.2020r., II CSK 124/19).[48]

D 'Enhanced Risk' Theory

As we can see, the approaches towards the problem in various countries may differ. However, there is one common point that may connect most views advocating the vicarious liability of the Church – this point may be called an *enhanced risk theory*.

It is noted in literature that in cases where the employee caused the damage by his intentional criminal conduct, this conduct (fighting, killing, theft, rape) does not necessarily fall outside the scope of the employer's liability, particularly if the risk of committing a crime is enhanced by the work or by the way work was organized.[49]

The characteristic features of sexual offences are often a relationship of particular trust or dependence on the perpetrator, usually associated with the perpetrator's position as a 'person of public trust' (it may not be only a clergyman, but could also be, for example, a doctor or a teacher) with trust in the institution represented by the perpetrator (church, school, hospital).

In case of the Church, it is frequently indicated that the factor conducive to sexual abuse is a specific understanding of the priesthood and a certain way of functioning in the priesthood, referred to as the so-called *clerical culture* ('clericalism'), the main feature of which is the belief in practice that the clergy is superior to other 'states' in the Church. Emphasizing the unique role of the priest gives him a sense of power, especially spiritual, which makes it difficult for the victim to oppose him, and in turn it is difficult for the society to believe that the priest could have committed sexual abuse – in this climate it is the victim who becomes 'guilty'.[50] It is very difficult for a person sexually abused by a priest to disclose the incident because of the associated shame and guilt greater than that of victims of sexual abuse by other perpetrators outside the church context. This is related to the role of the priest in a given local community and in the victim's family, supported by a consistently built unblemished reputation.[51] The person

48 www.sn.pl, *see also* A. Wilk, 'Odpowiedzialność kościelnych osób prawnych za szkody wyrządzone wskutek przestępstw seksualnych popełnionych przez duchownych. Glosa do wyroku Sądu Najwyższego – Izba Cywilna z dnia 31 marca 2020r., II CSK 124/19', *Orzecznictwo Sądów Polskich*, Vol. 10, 2020, p. 52 and next).

49 C. Van Dam, *European Tort Law*, p. 515.

50 *See* T.P. Doyle, 'Clericalism: Enabler of Clergy Sexual Abuse', *Pastoral Psychology*, Vol. 54, No. 3, 2006, pp. 189-213; E. Kusz, 'Wykorzystanie seksualne małoletnich przez osoby duchowne: analiza zjawiska', *Dziecko krzywdzone. Teoria, badania, praktyka*, Vol. 14, Nr. 1, 2015, p. 42.

51 E. Kusz, 'Wykorzystanie …', p. 42.

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abused by a priest finds it unbelievable and is afraid that no one will believe him or her. The victim is also concerned about the stigma to which he or she could be exposed, especially in small communities, or in religious communities where the perpetrator was their leader. The more a priest was perceived as someone special, because he belongs to a different, holy world, the more the victim 'takes the blame' and may be seen by the local community as 'guilty'.[52]

There are six identifiable factors involved in any spiritual counselling relationship between the cleric and parishioner that aggravate the imbalance of power between the parties: the counselee's initial vulnerability; the counsellor's control of the environment; the confidentiality of the relationship; the leverage gained from unilateral self-revelation; the spiritual superiority or worthiness associated with the clergy; and finally, the counselee's desire to achieve salvation.[53] The situation may be similar (except for the desire of salvation) within other relations based on a trust and authority – for example, P. Hornbeck cites judgments in cases of sexual abuse by a psychologist, a teacher and a tutor of a group home for children in crisis, pointing that the courts stated that in these situations the risk of sexual abuse is a 'well-known hazard' and a 'foreseeable risk of employment'.[54]

Therefore, it appears that in case of the Church, we can say that the risk of committing a sexual crime by the priest is enhanced by the character of his work – a special position in the society, an authority and the fact that the victims trust him. These factors increase the risk of abuse of the power not only by a priest, but also by every other person whose work is connected with public trust (*e.g.* a teacher, tutor, doctor, psychologist, nurse and policeman).

E Conclusions and Potential Solution

The above reflections lead to a conclusion that the most controversial issue regarding the vicarious liability of the Church is the issue of the 'scope of employment/entrusted duties' because some courts are keen to state that sexual abuse is never within the scope of duties of priests and so the Church superior is not vicariously liable. However, there is also a liberal interpretation, according to which it is not necessary to confirm that sexual misconduct was within the scope of entrusted activities (because no superior can order anybody to commit a crime), but the superior will be vicariously liable if the entrusted activities facilitated committing a crime, for example, by creating a relation of trust or authority between the perpetrator and the victim.

The liberal interpretation of the 'scope of entrusted duties' is obviously more favourable for the victims but, in my opinion, it should only be used in situations where entrusting the performance of activities has created a dependency relationship or a relationship of trust between the perpetrator and the victim, which the perpetrator then abused. Therefore, this would especially apply to cases

52 E. Kusz, 'Wykorzystanie …', p. 42.

53 J.D. Villiers, 'Clergy Malpractice Revisited: Liability for Sexual Misconduct in the Counseling Relationship', *Denver Law Review*, Vol. 47, No. 1, 2021, p. 46.

54 P. Hornbeck, 'Respondeat Superior …', pp. 1005-1006.

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where the entrusted activities are performed in relation to persons with special features, for example, minors, disabled persons, who are in a critical position or are in a subordinate relationship to the perpetrator. The specific features of these people, the state of their dependence on the perpetrator who performs the activity (and thus indirectly also on the person entrusting the performance of the activity), as well as the authority and social trust that the perpetrator enjoys, significantly hinder them, and sometimes even make it impossible for them to either effectively defend themselves against sexual abuse or report it to law enforcement authorities. In such a situation, there is considerable risk that the denounced perpetrator or the institution employing him may take revenge for the effects of the negative image caused by the accusation and make decisions that 'make life difficult' for the aggrieved party (*e.g.* remove from school, prevent access to an exam or to the sacraments), while the environment may just not believe the accusations against a person of special authority.[55]

In such cases, the extended risk borne by the superior is justified, because by entrusting the subordinate not with a thing (*e.g.* a car to be repaired), but a person with special features and characteristics (*e.g.* a minor, sick, disabled), dependent on the perpetrator and trusting him, he should exercise particular diligence over the subordinate's activities and try to prevent him from causing damage. According to the above concept, the supervisor would be liable, for example, for damages caused by sexual crimes of a clergyman, teacher, or educator with paedophile tendencies, directed to work with children, but not for example, for damages resulting from rape committed by a sales representative during a visit to a client's house, because there was no dependency relationship between these people, and the perpetrator did not perform functions traditionally associated with special social trust and care for other people, such as a clergyman, a doctor, a teacher, an orphanage tutor, a caretaker in the centre for the elderly or disabled and so on. In other words, the responsibility of the superior will be justified when entrusting duties to the perpetrator will mean the emergence of a relationship of dependence between the victim and the perpetrator, usually associated with special social authority and trust, or the perpetrator while taking care of the victim, facilitates sexual abuse.[56]

However, it is hard to resist the feeling that the resolution of the problem rests only on the judicature. But, as the problem of sexual abuse is worldwide, we can never expect a judicature from different countries to be uniform. This may cause tensions, if, for example, victims from Europe lose their cases and those from the United States win or vice versa. The world is globalized and the victims often look at the experiences from other countries. Furthermore, even within one country, the courts' views may differ significantly. Therefore, in my opinion, even in the common law systems, it is not a good solution to let the problem of the 'scope of entrusted duties' be solved only by the judicature. The state should react and issue legal acts confirming the meaning of this term and the conditions of vicarious liability in case of sexual abuse, for example, in the way proposed above.

55 *See* A. Wilk, *Odpowiedzialność odszkodowawcza z tytułu szkód wyrządzonych przez cudze czyny zabronione o charakterze seksualnym*, C.H. Beck, Warszawa, 2021, pp. 274-275.

56 *See* A. Wilk, *Odpowiedzialność odszkodowawcza …*, pp. 274-275.

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