

The Lawyer's Question, the Law of Negligence and the Parable of the Good Samaritan

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Abstract:

The Parable of the Good Samaritan is associated with the modern law of negligence. There is a distinction between the strict limits of the law of negligence, to the expansive Great command to love your neighbour. The Samaritan Parable tells of the outsider Samaritan who shows mercy to the wounded stranger and the Levite and the priest who pass by the unknown victim. It is argued that secular state through its inquiries into child sexual abuse showed the compassion that was shown by the Good Samaritan, an outsider to the religious authorities. The religious organisations that ignored or silenced child abuse victims mirror the Levite and the priest of the Parable who, in the past, failed to show

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compassion to those victims. The Parable encourages us all to seek the whole healing of those who have been wounded.

Key Words: child abuse, law of negligence, the Good Samaritan, religious organisations, neighbour, compassion.

Love of Neighbour and the Lawyer's Question

Love of neighbour is derived from the second part of the Great Commandment that is repeated throughout the New Testament: “You shall love your neighbour as yourself”, although expressed in a variety of ways (Mark12:31; Matt. 7:12; John 15:12.) The Gospel of Luke demonstrates the breadth of love of neighbour in the Parable of the Good Samaritan, (Luke10:25 – 37). The narrative introduces the parable followinging a question by a lawyer to Jesus (Luke 10:25). Matthew's gospel also includes a lawyer as Jesus' interrogator in the context of loving God as the greatest and first Commandment (Matt.22:34-35).

The lawyer asks Jesus, “what must I do to inherit eternal life?” Jesus' answer is to ask a question in return. He asks the lawyer what is the law? The lawyer's answer introduces the idea of “neighbour”. The parable narrative leads to Jesus putting a final rhetorical question. He asks the lawyer which of the three do you think was a neighbour to the wounded suffering victim and the powerful answer is “the one who showed him mercy” (Luke10:37).

The Law of Negligence and the Parable of the Good Samaritan

Terry Veling (2005, pp.38-39) argues that scriptures can be repeatedly read without exhausting their significance. The Parable of the Good Samaritan is associated with the legal formulation of the modern law of negligence. This legal principle was first enunciated in the landmark case of *McAlister* (or *Donaghue*) (*Pauper*) -v- Stevenson and more particularly in the judgement of Lord Atkin in what is now known as the "neighbour principle". In his landmark judgement Lord Atkin stated *inter alia*:

But acts or omissions which any moral code would censure cannot in a practical world be treated so as to give a right to every person injured by them to demand relief. In this way the rules of law arise which limit the range of complaints and the extent of their remedy. The rule that you are to love your neighbour becomes in law, you must not injure your neighbour and the lawyer's question, Who is my neighbour? receives a restricted reply. You must take reasonable care to avoid acts or omissions which you can reasonably foresee would be likely to injure your neighbour. Who then is my

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neighbour? persons who are so closely and directly affected by my act that I ought reasonably to have them in contemplation as being so affected when I am directing my mind to the acts or omissions which are called in question. (AC 1932, 562, 580)

Since 1932, the law of negligence has expanded using this fundamental principle including the doctrine of vicarious liability at common law.

Although this landmark judgement refers to the moral imperative contained in the Great Commandment, the legal neighbour principle strictly limits the ambit of care for neighbour. It is not love of neighbour that the law requires but the duty not to injure your neighbour. It is not all who suffer who may seek a legal remedy, but only those who may be closely and directly affected by an act or omission by someone who has a relationship of proximity to someone who is injured. This legal principle involves those who are reasonably considered to be affected when someone is choosing to act or choosing not to act.

While *Donaghue -v- Stevenson* sets out the principles from which the modern law of negligence has evolved, subsequent legal cases confirmed the limits of that legal duty of care. In the Australian High Court case of *Hargrave -v- Goldman*, Justice

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Windeyer referred to the judgement of Lord Atkin in *Donoghue -v- Stevenson* and acknowledged the interaction between the Gospel and the law. He stated:

Lord Atkins' well-known generalization explains the scope of a duty of care, that is to say it states who can complain of a lack of care when an obligation of care exists ... it is a mistake to treat it as providing always a complete and conclusive test of whether, in a given situation, one person has a legal duty either to act or to refrain from acting in the interests of others. The very allusion shows that this has not this universal application. The priest and the Levite, when they saw the wounded man by the road, passed by on the other side. He obviously was a person whom they had in contemplation and who was closely and directly affected by their action. Yet the common law does not require a man to act as the Samaritan did. The lawyer's question must therefore be given a more restricted reply than is provided by asking simply who was or ought to have been in contemplation

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when something is done. The dictates of charity and of compassion do not constitute a duty of care. The law casts no duty upon a man to go to the aid of another who is in peril or distress not caused by him (110 CLR 40 (17)).

There is a clear distinction between the legal duty of care and the theological duty to love your neighbour as you would love yourself.

The Parable begins with a lawyer's question to Jesus, "Teacher what shall I do to inherit eternal life?" (Luke 10:25). The lawyer's statement of the Great Commandment is confirmed by Jesus. "You shall love the Lord your God with all your heart, and with all your soul, and with all your strength and with all your mind; and your neighbour as yourself" (Luke 10:27). The Parable narrative establishes a call for compassion to an unknown wounded stranger and concludes with a question from Jesus to the lawyer, "Which of these three do you think proved to be neighbour to the man who fell among robbers?" (Luke 10:36). Finally Jesus commands the lawyer, "go and do likewise" (Luke 10:37).

The Parable forms the basis of the modern law of negligence. A tension exists between the Parable's standard of care to the wounded unknown "outsider" and the legal "neighbour"

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recognised by the law of negligence. The Parable symbolises the exclusion of outsiders from the call to Israel to care for suffering strangers, and thereby establishes the identity of the outsider Samaritan and the marginalised in God's redemptive plan. The wounded victim in the Parable is both a stranger and an outsider to the nation of Israel. The marginalised and dispossessed are the central concern of the Parable.

Wonchul Shin and Elizabeth Bounds (2017) argued that damage caused by the degradation and humiliation of sexual abuse are experienced as "forms of aggression, conveying detrimental symbolic messages of exclusion, rejection, and inferiority linked with the damage to wellbeing and self-esteem" (2017, p.161). They argued that "moral repair" aims to restore the moral harm of disrupted, distorted or damaged moral relationships and that there are certain groups of individuals who are "structurally located in an unprivileged, marginalized or unequal position in society" (Shin and Bounds, 2017, p.58). They referred to Christopher Marshall's characterisation of the Good Samaritan as the "marginalized outsider" and the 'hated enemy" and as the one who upholds covenant commitments, fulfils the love commandments and who exemplifies divine compassion (Shin and Bounds, 2017, p.164).

The Parable was intended to be provocative by introducing violence and the contrast between the response of Jewish leaders

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to a wounded "stranger" and that of a despised Samaritan outsider. The analysis of "neighbour" in the Parable is derived from the Hebrew Bible (Deuteronomy 6:4) and (Leviticus 19:18) and links to the Great Commandment of love of neighbour in the New Testament. Luke's account of the Great Commandment, that uses the Parable, is the only gospel narrative that links the love of God with love of neighbour. The gospels of Mark, Matthew and John do not include the Parable. However, in contrast to contemporary Jewish Mosaic law, the Parable in Luke's gospel establishes the new breadth of love of neighbour required by Jesus (Luke 10:25-37).

The Parable in Luke's account of the Good Samaritan arises from a lawyer's question (Luke 10:25). Arland Hultgren (2017) suggests the "lawyer" is an expert in Mosaic law and this hostile encounter is a "test" for Jesus. Hultgren argues that, inherent in this lawyer's interrogation, is the question "Who is my neighbour?" Michel Gourges (1998) analysed the Parable according to the social-religious order of contemporary Jewish society and the Old Testament formulations of priests, Levites and the Jewish people. The Priests and Levites were upper members of the post exilic Jewish society. These were "law observant people" aware of the sanction of being defiled by contact with a dead man. The Parable introduces the unexpected Samaritan "outsider" to demonstrate to whom the duty of love of neighbour is owed. There are no

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separate categories of people to whom love of neighbour is directed, and no separate categories of people to whom a duty to love a neighbour is owed (Hultgren, 2017, p.75). The central challenge posed by the Parable is not “who is a neighbour”, but that care and mercy should be extended to anyone in need. The Great Commandment links the care of neighbour to the duty to love God. This seamless ethical obligation links love of God to love of neighbour and creates the distinction between the secular legal obligation and the ethical obligation of love of neighbour.

The law of negligence defines a neighbour as “those persons who are so closely and directly affected by my act that I ought reasonably to have them in contemplation as being so affected when I am directing my mind to the acts or omissions which are called in question.” (*McAlister (or Donoghue) (Pauper) -v- Stevenson* (1932) AC 562. Atkins J.)

The neighbour in the Parable is the unknown unnamed wounded stranger to the outsider Samaritan.

A critical issue in the Parable is the legal limits placed on the gospel “love of neighbour” command. As understood in contemporary Jewish society the love of neighbour was limited to

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priests, Levites, and "true members of Israel" and thereby excluded the outsider Samaritans (Gourges, 1998, p.713).

According to Hultgren (2017, p.76), the Parable demonstrates that there is no limit to the extent of love of neighbour and the Parable demands the crossing of religious and ethnic barriers.

The Wounded Strangers: Child Sexual Abuse Victims

The comparison between the Levite and the priest who "pass by" the wounded stranger, mirrors the responses by some faith-based organisations to child sexual abuse victims. Child sexual abuse victims were treated as "outsiders" of diminished importance compared to the reputation of churches and individual clergy. The Final Report of the Royal Commission (2017, p.55) states:

In some cases, it is clear that leaders of religious institutions knew that allegations of child sexual abuse involved actions that were or may have been criminal, or perpetrators made admissions. However there was a tendency to view child sexual abuse as a forgivable sin or a moral failing rather than a crime.... Many leaders of religious institutions demonstrated a

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preoccupation with protecting the institutions “good name” and reputation.

There are a variety to reasons for the failure to recognise and prevent child sexual abuse in the past. Eileen Munro and Sheila Fish (2015, p.7) point out the factors that influence child safety within the culture of an organisation. There is the problem of constantly “maintaining vigilance to combat the activities of predatory abusers”. The challenges for the effective prevention of child sexual abuse include the ability to conceal predator abuser activities, the reluctance of victims to ask for help, and vulnerable worker decision making. A detailed investigation into all the cultural factors that contributed to the concealing of child sexual abuse is beyond the ambit of this examination. There is little explanation why, upon the discovery of such abuse, cultural factors encouraged the cover up of the offending in faith based organisations.

Despite statements setting out child safe policies, Palmer, Feldman and McKibbin (2016, p.11) pointed out “the difficulty of transforming high level policies into regular daily work routines and that this requires a continuous process to improve the detection and responding to child sexual abuse”. The ongoing compliance with new child safe regulations in day to day parish practice remains an ongoing challenge.

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In terms of the Parable, the secular investigations conducted by the Royal Commission and the Victorian Betrayal of Trust inquiry constitute the "outsiders" to churches. These state sponsored inquiries conducted an exercise of monumental pastoral care listening to the voices of the injured child sexual abuse victims whom religious organisations had "passed by". The Victorian Betrayal of Trust Inquiry and the Royal Commission acted as outsiders to the church in the journey on Luke's "road to Jericho" (Luke 10:30). The spirit and influence of the Parable is enlivened in hearings, findings and recommendations of the Royal Commission and the Victorian Inquiry. It is the Royal Commission and the Victorian Inquiry that acted as the caring "outsiders" and the neighbours of the victims of child sexual abuse, and who contributed to the nurtured "recovery" of child abuse victims in the spiritual sense of the word.

The recommendations flowing from both state sponsored inquiries stimulated the far reaching Victorian statutory reforms that established organisational liability for child sexual abuse and extended the ambit of liability in common law negligence and vicarious liability. There are parallels that exist between the Parable and the Victorian statutory reforms that allowed improved access for child abuse victims to seek legal compensation for such abuse.

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First, the wounded stranger of the Parable, being naked and nearly dead is a silent victim (Luke 10:30). He is stripped of social identity indicating a mark of humiliation (Knowles, 2004). The silence is inflicted by unknown robbers. Similarly the silence of victims of child sexual abuse and the associated shame for such victims has been well documented. As Helen Blake (2018, p.38) stated, "the imposed coercive silence is always a transaction between a powerful agent and a weaker subordinate". Secondly, within the Parable narrative there is a profound inequality of bargaining power between the silent, wounded stranger and the priest and the Levite. The respective status of individual child abuse victims and religious leaders is decidedly unequal. One is a powerless marginalised silenced victim, in contrast to the priest and the Levite, who hold higher social positions and hold superior bargaining power. Third, the priest and Levite "see" the silent wounded victim, and "pass by" the victim (Luke 10:31-32).

The Royal Commission (2017, p.53) concluded there was "insufficient consideration of victims at the time they disclosed child sexual abuse, frequently responding with disbelief, denial or attempts to blame or discredit the victim". Timothy Jones argued that for some time there existed a general denial of the phenomena of child sexual abuse and victims of such abuse were silenced by the internal social pressures in some churches. Jones (2015, pp.237, 254) stated:

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The silence of the age of Anglican bishops' governance of sex offenders might thus equate to what Cohen termed "interpretive denial": not a denial that offences took place, but that they involved children....

Anglican bishops did act to surveil, discipline and treat clerical child sex offenders.

Citing Stanley Cohen, Jones (2015, p.241) pointed out that the "sociology of denial" is a way of not knowing, including interpretative denial that denies facts and includes "denial being individual, official or cultural". The grades of denial are the modern demonstration of "passing by" a silent victim by the people vested with the power and authority to act with the compassion demanded by the Parable. Blake (2018, p.39) pointed out that the Royal Commission has broken an enduring silence surrounding child sexual abuse within institutions.

The elements of silence and outsiders are prominent in scripture. It is through the medium of an "outsider" that the nature of Christ's sacrifice accompanied by his silence is expressed in Acts and Isaiah. "As a sheep is led to the slaughter or a lamb before its shearer is dumb, so he opens not his mouth" (Isaiah 53:7). In his humiliation justice is denied to him. Luke's narrative of the eunuch stranger in the Acts of the Apostles invokes Isaiah's suffering servant to guide the "outsider" towards baptism. (Acts 8:32-33).

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In both accounts, silence is at the heart of suffering, but the quality of silence is different. Jesus' silence is a personal sacrificial choice. Isaiah's servant suffering arises from an imposed silence.

Silence is a theological element at the heart of the church's response to allegations of child sexual abuse. The silencing of child abuse victims identified by John Harrower (2018) in discouraging reports of abuse and the failure to listen, forms a category of coercive silence that echoes the priest and Levite who "pass by" the silent wounded stranger in the parable. Except that in the case of victims of child sexual abuse the victim is known yet remains ignored, disbelieved and "by the roadside".

Diarmaid MacCulloch (2014) examined silence in terms of "categories of silence". These include events or things that are casually or deliberately forgotten and of institutions that "create their own silences at the expense of people when the individual needs are outweighed by institutional needs" (MacCulloch, 2014, p.203). MacCulloch argued that the concealing of child abuse is an "act of forgetting". He suggests that their silence can be the result of justified shame either because they have realised at the time that shame is appropriate, or because they have come to realise it later (MacCulloch, 2014, p.191).

Similarly, Walter Brueggemann (2001, p.22) wrote about "imposed coercive silence" meaning silence between "a powerful

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agent and a weaker subordinate, a transaction between the powerful and the powerless." He referred to Judith Lewis Hermann as she argued that recovery from trauma is related to speech in a safe context which is the only way to get past brutality (Brueggermann 2001, p.23). All three commentators examined silence as a pastoral issue. MacCulloch (2014, p.191) argued that for victims of child sexual abuse, "silence was an act of deliberate forgetting arising from shame, (and) that the Church is not living up to its own standards of truth and compassion".

It is not only churches that have been silent on this issue. In a report to the Royal Commission dealing with the history of Australian inquiries into institutions providing child care, Shurlee Swain (2014) concluded that there was an inability or unwillingness to recognise child sexual abuse by state sponsored inquiries dating from the mid nineteenth century. There was evidence of "blindness to sexual abuse" in earlier investigations. Swain pointed out, from about the 1980s, there was a shift in inquiry methodology that sought survivor testimony, rather than institutional self-reporting. This was accompanied by a willingness of victims to speak out. Although, institutional "blindness" is the reason for ignoring criminal actions, it is not an excuse for the legal and spiritual failures by some churches. That cultural failure is associated with the ecclesiology of the Anglican Church and the structure of power and authority within it. In terms of the Parable,

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it is the outsider Samaritan who shows mercy to the silent wounded stranger. Likewise, it is the secular state organisations, (the Royal Commission and the Victorian Inquiry) that are the "outsiders" to Australian churches and demonstrate the compassion to listen to the silent victims of child sexual abuse.

Martyn Percy (2018, p.103) stated:

the most striking thing, as always, is the inability of the church to listen, to see, to feel. The Royal Commission has listened, it has seen; it has felt. It has noted those things that for years were hiding in plain sight. In that sense the Royal Commission's work is properly prescient and prophetic.

The state inquiries gave child abuse victims a voice whereas faith-based organisations, by engaging in the cover up of such abuses, "passed them by". The secular state inquiries acted as "outsider Samaritans" that exercised compassion for victims of child sexual abuse and refused to "pass by" the suffering that had been traditionally denied, suppressed or silenced by church organisations. The exercise of listening with compassion occurred within the private sessions of the Royal Commission, the commissioning of research reports, the conduct of public case

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study hearings and the extensive recommendations for legislative reform.²

The Parable sets the measure of care due to the silent wounded stranger. The Samaritan, bound up his wounds, pouring oil and wine, then he set him on his own beast and brought him to an inn and took care of him (Luke:10:33-34). The Samaritan handed over ten denarii and instructed the innkeeper to “take care of him and whatever you spend I will repay you when I come back” (Luke 10:33-36). The Samaritan's personal cost for the care of the unknown silent victim is limitless. The Samaritan's compassion is measured by the restoration of the unknown victim to full health. The Samaritan's compassion is the measure by which compensation or redress for victims of child sexual abuse should be ethically determined. It is a formidable challenge for churches.

John Harrower (2018, p.60) stated:

The consequences of child sexual abuse in the life of a survivor are lifelong and no amount of compassion drawn from a bishop would be able to restore the life opportunities lost. I was to learn that compensation was not possible for victims of

² Part 5A Reportable Conduct Scheme. Part 6. Division 1 Monitoring, *Child Wellbeing and Safety Act 2005.(Vic)*. Enforcement and Compliance with Child Safe Standards.

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child sexual abuse. Nothing could ever compensate for the suffering and damage done to lives from childhood to adulthood.

Robert Greenleaf (1977, p.36) suggested that the full meaning of healing is "to make whole" and that "implicit in the compact between servant-leader and the led, is the understanding that the search for wholeness is something they share". The acknowledgement of the extent of the suffering of child abuse victims is the starting point to measure the ethically based compassion. It is in stark contrast to the legal response in the case of *Trustees of the Roman Catholic Church for the Archdiocese of Sydney -v- Ellis* (2007, 70 NSWLR 565.).

It is the ethical measure to make a victim whole again, by which the *Ellis* defence is to be judged. In a claim for compensation arising from a priest's sexual abuse of John Ellis when he was a child, Ellis was denied compensation on the basis that he could not establish tort liability against an unincorporated association. Applying the standard of compassion set by the Parable, the defendant church in the *Ellis* case was legally entitled to refuse compensation for the child sexual abuse suffered by John Ellis. The Levite and the priest in the Parable were legally entitled to "pass by" the silent wounded stranger. The *Ellis* case mirrors the "passing by" of a wounded victim by a religious organisation. In contrast, the legislative response to this case reflects the spirit of

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the Parable. The state legislature acts as the outsider Samaritan that provides an avenue for compensation and healing to a victim of child abuse previously denied by the law.

The Victorian statutory response to the *Ellis* defence is contained in the *Legal Identity of Defendants (Organisational Child Abuse) Act 2018* (Vic) (*The Legal Identity Act*). In a child sexual abuse proceeding, this legislation allows a court to order, if there is no defendant capable of being sued (as in the *Ellis* case), that trustees or an associated trust of a charitable organisation (including a church), be added as a proper defendant in the proceeding. The legal commentaries of these reforms are comprehensive (G Blake, 2020; Joachim and Field, 2020; Geary, 2020a; Geary, 2020b; Landrigan, 2020; Griffen and Briffa, 2020).

Recent Victorian statutory reforms echo the ethical influence of the Parable that sets the standard for compassionate response to victims of child sexual abuse. It is the secular legislation and its interpretation and implementation by the courts that act as the outsiders to churches and church based organisations. Pursuant to the *Child Safety and Wellbeing Act 2005* (Vic), the Commission for Children and Young People is the statutory authority that administers the Victorian Reportable Conduct Scheme and the amended Victorian Child Safe Standards (Landrigan, 2020). This Act requires the reporting of allegations of child sexual abuse to this statutory body and authorises this Commission to establish

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and monitor Victorian Child Safe Standards for any organisation charged with the supervision of children.

The “*Ellis* Defence” arose because the Roman Catholic Church is an unincorporated association with fluctuating membership. Tort liability cannot be established against an unincorporated association. The property trust that holds the assets of the Roman Catholic Church was not liable for child sexual abuse suffered by John Ellis, as it had no responsibility for an offending priest (*Trustees of the Roman Catholic Church for the Archdiocese of Sydney -v- Ellis* (2007) 70 NSWLR 565.). Despite the legal recognition of the *Ellis* defence, it is the state, through legislative reform and the courts empowered by reforming legislation, that now act as secular outsider Samaritans for child sexual abuse claimants.

The actions of the Royal Commission and the Victorian Betrayal of Trust inquiry marked a monumental broadening of the “continuum of care” reflected in the Parable. The findings and recommendations from both state inquiries are the driving force behind the Victorian statutory reforms designed to prevent child sexual abuse and to encourage the creation of child safe organisations. The recommendations stimulated the reform of civil litigation in relation to child sex abuse (ss 90 & 91 *Wrongs Act*, and Part 5A *Child Wellbeing and Safety Act 2005* (Vic)) and established the civil organisational liability whereby any

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organisation that is responsible for the supervision of children must take reasonable precautions to prevent child sexual abuse within an organisation.

The Parable demands a broadening of the narrow legal Mosaic call to love of neighbour in Deuteronomy and Leviticus. Likewise the state sponsored inquiries and consequent statutory reforms, constitute a broadening of legal responsibility through the reversal of the onus of proof in a child abuse claim against an organisation. Both inquiries are reminiscent of the powerful role "outsiders" played in the history of Israel and their prominence in Christ's ministry. In addition there is a transformation in the church state relationship and the consequent transformation in the ethical authority of churches.

The theological themes of shame, lament, the exercise of power, and the power to silence were evidenced in the reporting of historical child sexual abuse in the Royal Commission's Final Report. The exercise of power by leaders within some churches is directly associated with the failure to care for child abuse victims. It is the nature of this leadership response in terms of the Gospel that is examined.

State Authorities and Ethical Leadership

One consequence of the recent Victorian statutory reforms is that Australian churches are no longer regarded as "special institutions" that are entitled to exemptions from human rights legislation (McPhillips, 2020). The churches and church based organisations are now subject to civil and criminal penalties for child sexual abuse. The assumption that standards of ethical behaviour are set by churches no longer holds true. In the case of child safety, it is state organisations that set the standards of behaviour and consequently the ethical standards for child safe organisations.

In part, this role now belongs to the Victorian Commission for Children and Young People that supervises the standards for child safety and monitors compliance with Working With Children Check Cards.³ There has been a transformation of the church state relationship that echoes the transformation of the roles between the outsider Samaritan and the priests and Levite in the Parable. It mirrors the direct influence of the Parable on the development of the modern law of negligence and hence its ongoing influence in the organisational liability created by s 90 of the *Wrongs Act*.

³ Part 6 Division 1, *Child Wellbeing and Safety Act 2005*. (Vic) established Child Safety Standards. Division 3 s 26 *Child Wellbeing and Safety Act 2005*. (Vic) empowered the Commission for Children and Young Persons to monitor and enforce compliance with Working With Children Check Card regulations

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In 1932, the case of *McAlister (or Donoghue) (Pauper) -v- Stevenson* represented a major redirection in the then existing law of negligence. Likewise, the Parable signalled a profound challenge to the then existing legal boundaries inherent in Jewish mosaic law. Likewise, the landmark judgement in *Donoghue -v- Stevenson* marked a revolutionary legal change in the relationship between the remote acts of individuals and someone suffering loss and damage caused by those acts. That transformed legal relationship continues to develop to this day. The reference to the term "love of neighbour" in *Donoghue -v- Stevenson* used the cultural authority of the Great Commandment and the Parable to add persuasive authority to the judicial expansion of the then existing negligence law. It acknowledged the authority and social value of the Parable whilst reformulating a new legal duty of care that formed the basis of the modern law of negligence. It is the restricted measure of the legal "neighbour principle" that acts as a limit to legal liability and transforms the principle of "love your neighbour" to "do no harm to your neighbour". Similarly, s 90 of the *Wrongs Act* constitutes a reformulation and redirection in the common law of negligence, vicarious liability and non-delegable duty regarding child sexual abuse.

Section 90 of the *Wrongs Act* creates a statutory organisational liability that builds on the principle of the legal duty of care in common law negligence. It establishes a statutory duty to prevent

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the child sexual abuse by any individual associated with a relevant organisation. That is organisational liability that arises out of an omission or failure to act in addition to the commission of a negligent act.

The recommendations of the Royal Commission to the reform of civil litigation relating to child sexual abuse, led to re-balancing the inequality of bargaining power between individual victims of child sexual abuse (the silent wounded victim) and the church organisation within which child sexual abuse occurred. The effect of the recommendations of the Royal Commission and the Victorian Betrayal of Trust Report have caused a major transformation in the church state relationship.

The Transformed Church State Relationship

A theological reflection requires an Australian church to “read the signs of the times” and interpret those signs in the light of the gospel (Flannery, 1966). What are “signs of the times” that are relevant to the Australian church in the first quarter of the twenty first century? The church state relationship has been transformed by the increase in secularity, the accelerating decline in the numbers of Christian believers, and new power and authority for secular institutions (Hynd, 2022). These institutions include the Courts and the Victorian Commission for Children and Young People that now have the power to critically examine the internal

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affairs of religious organisations. Further, it is the function of Victorian state legislation to establish the legal standards through statutory Child Safe Standards and by imposing an ongoing duty to improve child safe standards within organisations that are responsible for children.⁴ Inherent in these legal standards are ethical standards now required for organisations in relation to child safety. The churches no longer hold a unique social licence to set ethical standards for the Australian community. That authority was diminished by the findings of the Royal Commission.

A further sign of the times is the recent steady decline in church attendance in Australia. The Australian 2021 census, indicates that the number of Australians identifying with a Christian denomination has declined from 12.2 million people in 2016 to just over 11.1. million people in 2021: a decline of 8.6 percent (Hughes, 2022). Those people who identified as Christians are ageing with more than one quarter aged over sixty five years. Some commentators argue “too many people have found religious faith irrelevant or antagonistic to their way of life” (Hughes, 2022, p.11). Hugh Mackay (2016, p.51) observed, “as in most comparable Western societies churchgoing is simply off the agenda for the majority of contemporary Australians”. Mackay (2016, p.86) stated:

⁴ Part 5A Reportable Conduct Scheme. Part 6. Division 1 Monitoring, *Child Wellbeing and Safety Act 2005*. (Vic). Enforcement and Compliance with Child Safe Standards.

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Child sex abuse scandals, more than any other single form of institutional corruption, have tarnished the reputation of the church to the extent that many churchgoers have either drifted away in disgust, or now either don't attend church or adopt a rather cynical less respect for the clergy.

The Victorian statutory reforms, are evidence that the church state relationship has been transformed. It is suggested that this transformation is partly caused by the destruction of the moral standing and authority of churches. The title of the Victorian Betrayal of Trust Report sums up the parliament's judgement on the incidence of historical child sexual abuse and the coverup of that abuse by churches. Douglas Hynd (2022, p.xvii) suggested the churches' position of privilege and entitlement was taken away while they weren't looking.

The direct intervention of the state, through the statutory right to scrutinize and evaluate internal church procedures, transforms the state and the courts into the arbiters of not only the legal standards but also the ethical standards inherent in those legal standards.

The starting point for a betrayal of trust is associated with the reasons people are primarily drawn to faith based communities.

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Whatever the personal reasons for coming to an Australian church there is an implied understanding that the spiritual welfare of people of faith is paramount. That promise of spiritual safety, was relied upon by the victims of child sexual abuse. To those who have suffered harm arising from the abuse of authority and power within an Australian church the liturgy becomes an empty rhetoric. The Parable viewed in the context of the documented history of child sexual abuse, by the Royal Commission is the starting point for the betrayal of trust experienced by victims of child abuse. That betrayal is concurrent with the self-destruction of the church's integrity, arising from "the corporate responsibility for the harm that has happened in the Church's name".

Conclusion

This analysis examined the transformation of the church state relationship. The state now sets the ethical standards for child safety and child safe organisations. A theological reflection used the Parable to demonstrate the outsider Samaritan status of the Royal Commission and the Victorian Betrayal of Trust Inquiry, and how they assisted those who had been abused, but who had been left "by the side of the road" by churches, similar to the actions of the priest and the Levite in the Parable.

There is a distinction between the ethical standards derived from scripture which command "love of neighbour" and the legal duty

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of care that requires to do no harm to one's neighbour". It is argued that the churches, no longer enjoy the exclusive right to set ethical standards in relation to child safety. The state, through legislative reforms and statutory bodies such as the Commission for Children and Young People, now sets the ethical standards for child safety and child safe organisations. Ethical standards underlie the statutory reshaping of the law of negligence, to create organisational liability for child sexual abuse under ss 90 and 91 of the *Wrongs Act*.

The Parable calls the churches to a higher ethical level in seeking healing and wholeness for those who have been abused and damaged. As the Samaritan paid the innkeeper for the care of the wounded unknown stranger, so the churches are ethically bound to provide the physical, psychological and spiritual healing of those who have been harmed. Indeed, the ethical responsibility of the churches is not just the avoidance of future harm, but the building of a child-safe environment through which children will find the fullness of life offered by the gospel.

References

- Blake, Garth (2020). "Civil Liability for Child Sexual Abuse". Conference Paper presented at the 1st Annual Law of Religious Institutions Conference. Melbourne. July 2020. 29-30.
- Blake, Helen (2018). "Finding voice: What it means to "be the church" after the Royal Commission". *St Mark's Review* 245 (3): 38

Peer Reviewed Articles

Brueggemann, Walter (2001). "Voice as Counter to Violence". *Calvin Theological Journal* 36: 22.

Flannery, Austin (ed) (1966) *Vatican Council II: The Basic Sixteen Documents*. Dublin: Dominican Publications.

Geary, Luke (2020a) "Current Issues Civil Law Claims for Historical Sexual Abuse". Conference Paper presented as a webinar at the 2nd Annual Law of Religious Institutions Conference. 16 September.

Geary, Luke (2020b) "Permanent Stays and Setting Aside Settlement Agreements". Paper presented as a webinar at the *Legalwise Seminar. Civil Claims for Institutional Abuse: Settlements, Stays and Damages*. 21 October.

Gourges, Michel (1998). "The Priest, the Levite and the Samaritan Revisited: A Critical Note on Luke 10:31-35. *Journal of Biblical Literature* 117 (4): 710-713.

Greenleaf, Robert K. (1977) *Servant Leadership. A Journey into the Nature of Legitimate Power and Greatness*. New York: Paulist Press.

Griffen, Laura and Briffa, Gemma (2020) "Still Awaiting Clarity: Why Victoria's New Civil Liability Laws for Organisational Child Abuse are Less Helpful Than They Appear". *University of New South Wales Law Journal* 43 (2): 452-483.

Harrower, John (2018). "How Australian Churches might respond individually and collectively to the Royal Commission and its findings". *St Mark's Review* 245: 56-71.

Hughes, Philip (2022) *Australia's Religious and Non- Religious Profiles. Analysis of the 2021 Census Data*. Box Hill, Victoria: Christian Research Association.

Hultgren, Arland (2017) "Enlarging the Neighborhood: The Parable of the Good Samaritan (Luke 10: 25-37)". *Word & World* 37(1): 72.

Peer Reviewed Articles

- Hynd, Douglas (2022) *Community Engagement After Christendom*. Eugene, Oregon: Cascade Books.
- Joachim, Dietrich and Field Iain (2020) "Statute and Theories of Vicarious Liability". *Melbourne University Law Review* 43 (2): 515-544.
- Jones, Timothy (2015) "Sin, Silence, and States of Denial: Canon Law and the "Discovery" of Child Sexual Abuse". *Australian Feminist Law Journal* 41 (2): 237-251.
- Knowles, Michael (2004) "What was the Victim Wearing? Literary, Economic and Social Contexts for the Parable of the Good Samaritan". *Biblical Interpretation* 12 (2): 145.
- Landrigan, Mitchell (2020) "Ellis: A post Royal Commission Analysis". *St Mark's Review* 252: 38-62.
- MacCulloch, Diarmaid (2014) *Silence. A Christian History*. London: Penguin Books.
- Mackay, Hugh (2016) *Beyond Belief. How we find meaning with or without religion*. Sydney: Pan Macmillan Australia.
- McPhillips, Kathleen (2020). "Religion after the Royal Commission: Challenges to Religion- State Relations". *Religion* 11(44).
- Munro, Eileen and Fish, Sheila (2015). *Hear no evil, see no evil: Understanding failure to identify and report child sexual abuse in institutional contexts*. Sydney: Royal Commission into Institutional Responses to Child Sexual Abuse.
- Percy, Martyn (2018)."Risk, Responsibility and Redemption: Remembering our Future". *St Mark's Review* 245: 99-115.103.
- Palmer, Donald, Feldman, Valerie, and McKibbin, Gemma (2016) *Final report: The role of organisational culture in child sexual abuse in institutional contexts*. Canberra: Commonwealth of Australia.

Peer Reviewed Articles

Shin, Wonchul and Bounds, Elizabeth (2017) "Treating Moral Harm as Social Harm: Toward a Restorative Ethics of Christian Responsibility". *Journal of the Society of Christian Ethics* 37 (2):153-169.

(<https://www.jstor.org/stable/44987556>).

Royal Commission Into Institutional Responses to Child Sexual Abuse (2017) *Final Report. Preface and Executive Summary*. Canberra: Commonwealth of Australia.

Swain, Shurlee (2014). *History of Australian Inquiries reviewing Institutions providing care for children*. Sydney: Royal Commission into Institutional Responses to Child Sexual Abuse. October.

Veling, Terry (2005) *Practical Theology. On Earth as It Is in Heaven*. Maryknoll, New York: Orbis.

Table of Cases

Bishop Paul Bird -v- DP (2023) VSCA 66.

Ermogenous -v- Greek Orthodox Community of SA Inc. (2002) 209. CLR 945.

Hargrave -v- Goldman 110 CLR 40.

Hollis -v- Vabu Pty Ltd (2001) 207 CLR 21.

McAlister (or Donaghue) (Pauper) -v- Stevenson (1932) AC 552

Prince Alfred College Incorporated -v- ADC. (2016) CLR 258.

State of New South Wales -v- Lepore and Anor. 212 CLR 511.

Trustees of the Roman Catholic Church for the Archdiocese of Sydney -v- Ellis (2007) 70 NSWLR 565.

Chronological Table of Victorian Statutes.

Child Wellbeing and Safety Act 2005.(Vic).

Legal Identity of Defendants (Organisational Child Abuse) Act 2018 (Vic)

Wrongs Amendment (Organisational Child Abuse) Act 2017.(Vic)

Wrongs Act 1958 (Vic)