

RECENT DEVELOPMENTS IN EDUCATION LAW IN AUSTRALIA

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WHO'S TO BLAME? - may a school be liable for the intentional torts of their employees?

Introduction

Following closely on the decisions of the Supreme Court of Canada, in *Bazley v Currie* and *Jacobi v Griffiths*,¹ and the House of Lords, in *Lister v Hesperley Hall Limited*², the High Court of Australia was recently required to consider the liability of school authorities for harm caused by teachers' sexual abuse of their students. Before the Court were three appeals from decisions of the appeal courts of New South Wales and Queensland, known as *New South Wales v Lepore*; *Samin v Queensland*; *Rich v Queensland*³. As they involved substantially the same issues and principles all three appeals were heard together. Their consideration led the High Court of Australia first, to undergo a comprehensive re-examination of the principle which has long been applied by courts in that country, known as a non-delegable duty of care. Secondly, in light of the Canadian and English decisions, the question of the vicarious liability of an institution, such as a school, for the intentional torts of its servants, was considered.

All three cases involved the sexual abuse of students by teachers. The U.S. Supreme Court had earlier decided cases which concerned sexually inappropriate behaviour by teachers towards students. Those cases, notably *Franklin v Gwinnett* and *Gebser v Lago*

¹ *Bazley v Curry* and *Jacobi v Griffiths* [1999] 2 SCR 534 and [1999] 2 SCR 570 respectively.

² [2002] 1 AC 215

³ (2003) 195 ALR 410

*Vista Independent School District*⁴ were founded on allegations of fault on the part of the school authorities. What the Court had to consider there was whether the school authorities had discriminated against the students in that they acted with “deliberate indifference” in the knowledge of the behaviour. In the Australian cases it was not alleged that the schools had acted in any way which was blameworthy. The allegations were not based on discrimination, nor on negligence on the part of the school. On the contrary, what the court was required to consider was the liability of blameless school authorities for the intentional torts of their employees.

In each case it was argued that the teacher’s sexual assault of students constituted a breach of a ‘non-delegable’ duty owed by the school authority to the students. There was a conflict of authority between the state appeal courts. In *Lepore* the majority of the Court of Appeal of New South Wales had decided that the school authority (the New South Wales State Government) was liable on the basis of a non-delegable duty of care. In *Rich* and *Samin* the Queensland Court of Appeal had decided against liability, holding that no such duty existed in respect of intentional torts committed by employees. Before the High Court, in the words of Gleeson CJ:⁵

The argument is that the [school] authority’s duty to take reasonable care for the safety of pupils, because it is non-delegable, may become a source of liability for any form of harm, accidental or intentional, inflicted upon a pupil by a teacher.

It is important to note that in the lower courts none of the plaintiffs had based their argument for liability on the vicarious liability of the school authority. In the intervening period since the proceedings had commenced, vicarious liability was argued as a basis for liability of employers for sexual assault committed by their employees. This was in the House of Lords in *Lister v Heselley Hall Ltd*, and the Supreme Court of Canada in *Bazley v Curry* and *Jacobi v Griffiths*. All these cases had supported that approach.⁶ As a result,

⁴ 503 U.S. 60 (1992) and 524 U.S. 274 (1998) respectively.

⁵ (2003) 195 ALR 410, 416.

⁶ [2002] 1 AC 215; [1999] 2 SCR 534 and [1999] 2 SCR 570 respectively. These cases are examined below in the context of vicarious liability.

leave was given by the High Court for the plaintiffs to argue vicarious liability as an alternative basis for school liability.

The appeals in these three actions were heard together by the High Court of Australia before Gleeson CJ, Gaudron, McHugh, Gummow, Kirby, Hayne and Callinan JJ. Judgment was delivered on 6 February 2003.

The facts and history of each Plaintiff's case is considered in turn.

The Cases

1. *State of New South Wales v Lepore*

Lepore had been a primary school pupil at a state school in New South Wales. He alleged that he was sexually assaulted on several occasions at the age of seven by a teacher at the primary school which he attended. The assault was committed in the context of corporal punishment in that it had occurred when he had been sent to a storeroom for misbehaviour. He had been told to remove his clothing, was smacked and then touched indecently by the teacher. The teacher had pleaded guilty to a number of offences of common assault. His sentence was deferred, he was fined and he resigned as a teacher.

The plaintiff sued the education authority for financial compensation for the acts of physical and sexual abuse committed by the teacher on the basis that the authority owed a non-delegable duty of care for the physical wellbeing of pupils at the school. In the New South Wales Court of Appeal⁷ the judges acknowledged that this was a novel case for which there was no direct authority. The majority judgment delivered by Mason P was that there were no policy reasons why the non-delegable duty should not extend to ensure the liability of an education authority for the intentional wrongdoing of teachers in the employ of the authority and entrusted by them with the care of pupils.

⁷ (2001) NSWLA 112, (2001) Aust Torts Reports (CCH) 81-609.

The State appealed.

2. *Rich v Queensland; and
Samin v Queensland*

The two plaintiffs in this case had each brought separate actions against the State of Queensland and a teacher who it was alleged had sexually assaulted them whilst they were in his care. In each case the plaintiffs were young girls, aged between seven and ten years attending a one-teacher state primary school in rural Queensland. They alleged acts of serious sexual assault which occurred at the school during school hours in a classroom or adjoining rooms. The teacher concerned had been convicted and was sentenced to a lengthy term of imprisonment. As with *Lepore*, the plaintiffs' cause of action was essentially that the school had breached a non-delegable duty of care owed to them. The lower court had allowed the State of Queensland's application to strike out the plaintiff's statements of claim on the basis that they did not disclose a cause of action. Vicarious liability was not pleaded by the plaintiffs and Thomas JA of the Court of Appeal agreed with this omission. He said⁸:

Illegal acts committed by an employee which are wholly unauthorized and inimical to the purposes of the employment are regarded as falling outside the course of employment and no vicarious liability falls upon the employer in respect of such acts.

McPherson JA considered the House of Lords' decision in *Lister v Hesperley Hall Limited* and in his view the decision was not good law in Australia. He believed that an employer will not be vicariously liable when an employee has committed a tortious act which is not connected with, or incidental to the work that the employee is expressly or impliedly authorized to perform. On the issue of non delegable duty of care on which the plaintiffs' case rested, the Court of Appeal held that a school has a duty to exercise reasonable care to ensure the safety of its students. To hold that this duty is non-delegable simply means that it cannot escape responsibility by delegating that duty to another. It does not mean

that a school should be liable for harm caused to its students by an employee's performance of acts which amount to intentional torts. On this issue, the Queensland Court of Appeal disapproved of the NSW Court of Appeal's decision in *Lepore v New South Wales*.

The Plaintiffs appealed.

The extent of a 'non-delegable duty of care' owed by schools

With the exception of Gummow and Hayne JJ each of the Judges in the High Court delivered separate judgments. Essentially each reviewed at the outset the existing law relating to the non-delegable duty of care as it relates to personal injury as a result of negligence. They then considered the application of this in principle to damages for psychiatric harm as a result of the intentional tort of an employee.

It is firmly established as a general principle in negligence that a defendant's duty of care is limited to situations where their conduct gives rise to a foreseeable risk of harm. In general terms it requires the person engaging in the careless conduct to have been able to foresee the risk of harm and to therefore be liable when harm occurs. One departure from the personal nature of this duty is vicarious liability where, in the employer/employee situation an employer may be liable for a breach of that duty by an employee. In addition, and distinct from vicarious liability, courts have held that in certain situations there is a personal duty which has been described as 'non-delegable'.

One such situation in which courts, particularly in the U.K., have held that an employer cannot divest him or herself of responsibility by entrusting of performance of their duties to others, is in the relationship between hospital and patient. The identification of the extent of the duty arises out of the particular relationship as explained by Lord Greene MR *Gold v Essex County Council* as follows:⁹

⁸ [2001] QCA 295.

⁹ [1942] 2 KB 293, 301-302.

Apart from any express term governing the relationship of the parties, the extent of the obligations which one person assumes towards another is to be inferred from the circumstances of the case. This is true whether the relationship be contractual (as in the case of a nursing home conducted for profit) or non-contractual (as in the case of a hospital which gives free treatment). In the former case there is, of course, a remedy in contract, while in the latter the only remedy is in tort, but in each case the first task is to discover the extent of the obligation assumed by the person whom it is sought to make liable. Once this is discovered, it follows of necessity that the person accused of a breach of the obligation cannot escape liability because he has employed another person, whether a servant or agent, to discharge it on his behalf, and this is equally true whether or not the obligation involves the use of skill. It is also true that, if the obligation is undertaken by a corporation, or a body of trustees or governors, they cannot escape liability for its breach, any more than can an individual, and it is no answer to say that the obligation is one which on the face of it they could never perform themselves.

This principle was applied to schools in the Australian case of *The Commonwealth v Introvigne*¹⁰. This case concerned a student who had suffered physical injury while on the school ground but before the school day had begun. The plaintiff, a 15 year old boy, had been with some friends swinging on a flagpole in the school grounds, fallen on his head and suffered serious injury as a result. At the time the accident occurred all the teachers were attending a staff meeting to be advised of the death of the school principal. There were no teachers supervising in the playground, when in the normal course of events there would have been supervision at that time. The case was complicated by the fact that the particular high school involved, Woden Valley High School, was operated at the time by the New South Wales Department of Education, on behalf of the Commonwealth of Australia, pursuant to an inter-governmental arrangement. In support of Commonwealth liability the plaintiff pointed to the Education Ordinance Act 1937(ACT) whereby parents are obliged to have their children enrolled at a school 'by or on behalf of the Commonwealth'¹¹.

¹⁰ (1982) 150 CLR 258.

¹¹ ss 8 & 9.

Mason J. of the High Court of Australia in *Introvigne* considered the hospital relationship to be analogous with that relationship which exists between school authorities and students. He based this analogy on the immaturity and inexperience of students and their need for protection. Thus he imposed on school authorities the same non-delegable duty of care as described by Lord Greene MR above in *Gold v Essex County Council*¹². While in essence this is more stringent than a duty to take reasonable care, but is a duty to ensure reasonable care is taken, the standard to be applied has proved difficult. In imposing such a duty on school authorities, Mason J took the lead from an earlier decision of the House of Lords, *Carthmarthenshire County Council v Lewis*¹³. There the fundamental basis of imposing liability on a school for injury caused by a child running out of an unlocked school gate, was that the duty extended further than simply appointing competent staff, to a duty to ensure that reasonable care is taken of the children. This, he said, was a duty which could not be delegated. In *Introvigne* Murphy J of the High Court of Australia found that as the Commonwealth had assumed the role of conducting the school:¹⁴

In terms of the prevailing concepts of duty, the Commonwealth became fixed with certain non-delegable duties:

1. To take all reasonable care to provide suitable and safe premises. The standard of care must take into account the well-known mischievous propensities of children, especially in relation to attractions and lures with obvious or latent hazards.
2. To take all reasonable care to provide an adequate system to ensure that no child is exposed to any unnecessary risk of injury; and to take all reasonable care to see that the system is carried out.

In *Lepore*, Gleeson CJ, considered the principle of the non-delegable duty of care as established by *Introvigne* then made a fundamental distinction between that case and the present case as follows¹⁵:

¹² [1942] 2 KB 293.

¹³ [1955] AC 549.

¹⁴ (1882) 150 CLR 258, at pp.274-275.

¹⁵ (2003) 195 ALR 410, 423.

A responsibility to take reasonable care for the safety of another, or a responsibility to see that reasonable care is taken for the safety of another, is substantially different from an obligation to prevent any kind of harm ... Intentional wrongdoing, especially intentional criminality, introduces a factor of legal relevance beyond a mere failure to take care. Homicide, rape and theft are all acts that are inconsistent with care of person or property, but to characterise them as failure to take care, for the purpose of assigning tortious responsibility to a third party, would be to evade an issue.

The judge then pointed to the courts of the U.K. and Canada which have analysed the problem of liability of a school authority for sexual abuse by their employees, in terms of vicarious liability. For the High Court to accept that schools owe a non-delegable duty of care, irrespective of notions of vicarious liability, in his view would be to impose a much more onerous standard than in those other common law jurisdictions. The potential responsibility of an employer who owes a non-delegable duty of care would be imposed irrespective of whether the employee was acting within the course of his or her employment. Accepting that a non-delegable duty of care has ready application to the tort of negligence which relies on a duty to take care or to see care is taken, he said:¹⁶

The proposition that, because a school authority's duty of care to a pupil is non-delegable, the authority is liable for any injury, accidental or intentional, inflicted at school upon a pupil by a teacher, is too broad, and the responsibility with which it fixes school authorities is too demanding.

He then considered matters of policy relating to tortious liability which argue against imposing a non-delegable duty of care on a blameless school for the intentional torts of its employees. In looking at the range of organizations on which liability has rested, and is likely to rest he said:¹⁷

It would be wrong to assume that the persons or entities potentially subject to this form of tortious liability have "deep pockets", or could obtain, at reasonable rates, insurance cover to indemnify them in respect of the consequences of criminal acts of their employees or independent contractors. Whether the organization providing care is public

¹⁶ (2003) 195 ALR 410, 424.

¹⁷ (2003) 195 ALR 410, 425.

or private, commercial or charitable, large or small religious or secular, well-funded or mendicant, its potential no-fault tortious liability will be extensive.

He then considered further reasons of policy which in his view argued compellingly against imposing a non-delegable duty in such cases:¹⁸

Furthermore, if deterrence of criminal behaviour is regarded as a reason for imposing tortious liability on innocent parties, three things need to be remembered. First, the problem only arises where there has been no fault, and therefore no failure to exercise reasonable care to prevent foreseeable criminal behaviour on the part of the employee. Secondly, it is primarily the function of the criminal law, and the criminal justice system, to deal with matters of crime and punishment...Thirdly, by hypothesis, the sanctions provided by the criminal law have failed to deter the employee who has committed the crime.

He thus concluded that there could be no liability in these cases through the existence of a non-delegable duty of care. As a final point he said that were such a duty to be imposed in respect of acts of teachers there would be an inconsistency between that and the test for liability of a school employed in respect of a criminal act by another pupil or by a stranger. In the latter, liability is imposed only where it can be shown that there is some act or omission, some breach of a common law duty of care, by the school authorities or a person for whom they are vicariously liable.

McHugh J held that in this case the schools owed a non-delegable duty of care. On this issue his was the only dissenting judgment. He did not differentiate between the present case, where the tort was intentional, and the negligence situation in *Introvigne*. Instead he considered that the question in this case concerned the extent and nature of that duty. He said that the law of negligence from which *Introvigne* arose, is concerned with a duty to take reasonable care to avoid a foreseeable risk of injury to another. It is not outside that ambit to then say that within the case of certain relationships, more precise duties of care exist. Examples are the duty of an employer to provide a safe place of work, and, in the case of school authorities, a duty to provide a safe educational environment. This is a

positive duty and thus can be described as non-delegable. He extensively reviewed the Australian cases in which the duty of a school authority and thus, its liability for harm suffered by students had been considered as follows. In *Introvigne* the court said that a school owes its pupils a duty to ensure that reasonable care is taken of them while they are on the school premises during school hours. In *Ramsay v Larsen*¹⁹ Kitto J said that the duty of a school authority does not depend on the 'loco parentis' concept of delegation of authority, but rather arises from the exercise of government power in setting up a system of compulsory education. In *Richards v Victoria*²⁰ Winneke CJ of the Supreme Court of Victoria, seemingly gave as rationale for the duty the 'in loco parentis' principle also. That Judge said that it arises from the vulnerability of the child in the school environment away from the care and protection of the parent, which role the school assumes.

McHugh referred also to Gaudron J in *Geyer v Downs*²¹ and *Victoria v Bryar*²² who said that the court had accepted that the test for imposition of the duty was not 'reasonable foreseeability' but it simply arose through the relationship of the parties. In determining the extent of that duty, he pointed to the cases of *Richards v Victoria*²³ and *Victoria v Bryar*²⁴ in both of which the school authority had been held liable on the basis of a non-delegable duty for harm caused by one student by another. In both cases it was held that the school authority was liable as reasonable care in supervision had not taken place. The extent of the duty went even further, he said, in *Geyer v Downs*²⁵ when a school was liable for injury to a pupil in the playground even though there was no requirement for supervision at that time; and in *Watson v Haines*²⁶ when a school authority was liable for not devising an effective system to prevent injury to the plaintiff. In concluding that there was no material difference in considering the extent of the duty between liability for

¹⁸ (2003) 195 ALR 410, 425.

¹⁹ (1964) 111 CLR 16.

²⁰ [1969] VR 136.

²¹ (1977) 138 CLR 91.

²² (1970) 44 ALJR 174.

²³ [1969] VR 136.

²⁴ (1970) 44 ALJR 174.

²⁵ (1977) 138 CLR 91.

²⁶ (1987) Aust Torts Reports 80-094.

negligence and for the intentional torts of others, he held that the schools in these cases owed a non-delegable duty of care. He said (in relation to *Lepore* but later holding the same in *Rich* and *Samin*)²⁷:

In the present case, the State of New South Wales by reason of its compulsory education system had a duty to ensure that reasonable care was taken in supervising the activities of the plaintiff and protecting him from harm while he was on the school premises during the times that students were known to be on school grounds. The State purported to perform this duty in a number of ways, one of which was to employ the second respondent, Michell, to teach and supervise the plaintiff during particular school periods. If Michell had failed to take reasonable steps to prevent injury to the plaintiff by another pupil or stranger, the State would have been liable on the principles laid down by this Court in *The Commonwealth v Introvigne*. Likewise, the State would have been liable if by some negligent conduct on the part of Michell himself, the plaintiff had been injured. It makes no difference that the injury in this case was sustained by an assault even if the assault had sexual overtones ... The duty of the State was to take reasonable care for the safety of the plaintiff, and the assault by his teacher breached the duty to take reasonable care of him.

In response to the 'floodgates' argument against the imposition of such liability McHugh J said²⁸:

Education authorities can:

- institute systems that will weed out or give early warning signs of potential offenders;
- deter misconduct by having classes inspected without warning;
- prohibit teachers from seeing a pupil without the presence of another teacher, particularly during recesses;
- encourage teachers and pupils to complain to school authorities and parents about any signs of aberrant or unusual behaviour on the part of a teacher.

Gummow and Hayne JJ, in essence, concentrated their decision on the vicarious liability issue. They considered, primarily in light of the Canadian cases, the liability of the employer in the context of the relationship between acts done 'in the course of

²⁷ (2003) 195 ALR 410, 455.

²⁸ (2003) 195 ALR 410, 456.

employment' and intentional torts committed by the employee. After examining the parameters of the principle of the non-delegable duty as contended in other jurisdictions in cases involving the duties of hospitals towards patients, landowners towards visitors and employers towards employees,²⁹ they then considered the Australian cases where the High Court has held that the relationship of the parties led to such a stringent duty being owed.³⁰

They said that it was clear that in all of the cases where the extent of a non-delegable duty had been considered the plaintiff had suffered injury as a result of negligence. Unlike McHugh J they believed this case to be distinguishable. Here it was argued that that the non-delegable duty extended to injury caused by deliberate criminal conduct. In all the previous cases where such strict liability had been imposed, they appeared as a species of vicarious liability. That is, where an institution employed persons to perform the task of caring for a third person, they would be liable for the negligence of that employee. The common thread in all the cases was the undertaking of care, supervision or control of another, and the justification for such duty rested on the assumption of that care. However, in their view, that duty relates to the conduct of that care, supervision or control and was not a duty to protect against all harm which befalls the third party while that role is being performed. In support of this argument they gave two examples:³¹

Is a school authority to be held liable if, without any negligence on the part of it or its employees or contractors, a child is injured on school premises, during school hours, when the child stumbles and falls in the perfectly maintained and supervised school yard? Is the authority to be held liable if, without negligence on the part of it, or its employees or contractors, a child is struck and injured by a bottle thrown into the school yard by a passer-by? In each the answer "no" should be given.

²⁹ *Hillyer v Governors of St Bartholomew's Hospital* [1909] 2 KB 820; *Dalton v Angus* (1881) 6 App Cas 740; *Wilson and Clyde Coal Co v English* [1938] AC 57 respectively.

³⁰ *The Commonwealth of Australia v Introvigne, Kondis v State Transport Authority* (1984) 154 CLR 672; and *Burnie Port Authority v General Jones Pty Ltd* (1994) 179 CLR 520.

³¹ (2003) 195 ALR 410, 479.

In holding that there was no justification for extending the ambit of the non-delegable duty of care from the negligence into the present scenario, Gummow and Hayne JJ made the following points:

1. To hold that such a duty exists in the absence of fault of any kind on the party on whom it is imposed, would remove it from any connection with the law of negligence;
2. Because there is no allegation that the state lacked reasonable care, for example, in selecting or supervising the teachers, there can be no deterrent effect flowing from the imposition of such a strict duty.
3. Extending a non-delegable duty of care into the ambit of intentional torts would give no room for the development of the principle of vicarious liability. It would, in effect, make any consideration of liability on the basis of vicarious liability irrelevant in such a context. This seems to be a reference to the attitude taken by the same Court in *Sullivan v Moody*³² where an action in negligence was dismissed on the basis that to allow it in such circumstances would cut across the tort of defamation.

The approach of Kirby J was essentially based on policy considerations. He began by stating that in general terms the English and Canadian decisions, whatever their basis, were led by the guiding principle that an employer of an employee who committed sexual abuse of children in the employer's care, should be treated, even in the absence of fault, as vicariously liable if there was a sufficiently 'close connection' between the employer's enterprise and wrongful acts of the employee. He said that these decisions addressed the problem of the increase in incidents of sexual abuse of children by persons in whose care they were placed and afforded effective civil remedies for the harm suffered by those children. Kirby J disagreed with the view of McHugh J (discussed earlier) who opined that the non-delegable duty of care principle established by *Introvigne* provided 'a simpler and strict test of liability'. He said that in his view there was no legal foundation for the plaintiffs' actions based on the principle of a non-delegable duty of school

³² (2001) 183 ALR 404.

authorities to ensure the reasonable care of their students. He considered that as the question raised by all three cases was essentially concerned with whether liability for intentional wrongs of employees should be brought home to a superior party who was best able to bear the risk, it was best dealt with by applying the principles of vicarious liability. He said that this was how the matter was approached in the House of Lords in *Lister v Heselley Hall Ltd*³³ and the Supreme Court of Canada in *Bazley v Curry* and *Jacobi v Griffiths*³⁴, and this was the approach he would adopt here.

Vicarious liability

In light of the decisions of the House of Lords and the Supreme Court of Canada, the High Court of Australia granted leave for the plaintiffs to amend their pleadings to introduce vicarious liability as an alternative basis for liability. So, having essentially dismissed the plaintiffs' contentions that they were owed a non-delegable duty of care, the judges then proceeded to consider liability on this basis.

Gleeson CJ began by restating the test formulated in Salmond's *Law of Torts*.³⁵ This is that an employer is liable for unauthorized acts only if they are so closely connected with authorized acts that they could be considered to be improper modes of performing them, but is not liable for a wholly independent act of the employee. He then noted the extension of the principle provided by the House of Lords in *Lloyd v Grace, Smith & Co*³⁶ to impose liability on an employer where an employee who was a clerk of a firm of solicitors defrauded a client of the firm. There Lord Macnaghten said that the employer, having put the employee in his place to do certain acts, must be answerable for the manner in which that employee conducted himself in doing those acts. This however had still not strayed into the area of wholly independent acts. This situation was considered by the High Court of Australia in *Deatons Pty v Flew*³⁷ where an off-duty barmaid had intentionally injured a patron. The Salmond test was once again applied there. It held

³³ [2002] 1 AC 215.

³⁴ [1999] 2 SCR 534, and [1999] 2 SCR 570 respectively.

³⁵ First Edition 1907, 83.

³⁶ [1912] AC 716.

there to be no liability on the part of the employer when the act complained of could not be said to be incidental to employment but was an act of personal retribution. In considering the present case Gleeson CJ remarked that:³⁸

It is the element of protection involved in the relationship between school authority and pupil that has given rise to difficulty in defining the circumstance in which an assault by a teacher upon a pupil will result in vicarious liability on the part of a school authority.

He said that prior to the Canadian cases,³⁹ sexual abuse would have been considered to be so wholly inconsistent with the responsibilities of anyone employed for the care of children that it could only have been looked on as a wholly independent act of an employee. However, now it appears that, in line with those cases, it needs to be considered whether there is the sufficiency in the connection between the employment and the wrongdoing, with reference to the scope of employment. In this context he said:⁴⁰

It is regrettable that the more intensive the care provided by an educational or recreational organization, the more extensive will be its risk of no-fault liability for the conduct of its employees.

In his view, the Canadian and the English decisions did not convey a general rule that in most cases of sexual abuse by a teacher, the school would be vicariously liable, rather a school cannot dismiss itself from liability by categorizing it as independent conduct. In his statement which encapsulates his reasoning he said:⁴¹

If there is sufficient connection between what a particular teacher is employer to do, and sexual misconduct, for such misconduct fairly to be treated as in the course of the teacher's employment, it must be because the nature of the teacher's responsibilities, and of the relationship with pupils created by those responsibilities, justifies that conclusion. It is not enough to say that teaching involves care. So it does; but it is necessary to be more precise

³⁷ (1949) 79 CLR 370.

³⁸ (2003) 195 ALR 410, 429.

³⁹ *Bazley v Currie* [1999] 2 SCR 534 and *Jacobi v Griffiths* [1999] 2 SCR 570.

⁴⁰ (2003) 195 ALR 410, 432.

⁴¹ (2003) 195 ALR 410, 434.

about the nature and extent of care in question. Teaching may simply involve care for the academic development and progress of a student. In these circumstances, it may be that, as in *John R* [the U.S. case], the school context provides a mere opportunity for the commission of an assault. However, where the teacher-student relationship is invested with a high degree of power and intimacy, the use of the power and intimacy to commit sexual abuse may provide a sufficient connection between the sexual assault and the employment to make it just to treat such contact as occurring in the course of employment. The degree of power and intimacy in a teacher-student relationship must be assessed by reference to factors such as the age of students, their particular vulnerability if any, the tasks allocated to teachers, and the number of adults concurrently responsible for the care of students. Furthermore, the nature and circumstances of the sexual misconduct will usually be a material consideration.

Gleeson CJ applied these criteria to the present case. He found that, in *Lepore*, the fact that the alleged sexual misconduct occurred during the process of chastisement, which is part of the teacher's duties, provided a potential basis for vicarious liability. In *Rich* and *Samin* he found that there was no such connection between the teacher's scope of employment and the abuse. Accordingly, he dismissed the plaintiffs' appeals on that basis.

Gaudron J preferred to approach the issue of vicarious liability by applying as its justification the principles of ostensible authority. The effect is that the employer is estopped from denying the employee/agent's authority where the employee does an authorized act in an unauthorized way. She said this was the case in the English cases such as *Lloyd v Grace, Smith & Co*⁴² where the employer was held to be vicariously liable for the criminal acts of his employee (in that case, fraud).

She then turned to the Canadian and U.K. decisions. First, she considered the test which asks whether the employer's enterprise has materially increased the risk of such conduct. She found that while that was directly relevant to deciding questions in relation to a duty of care, it had no bearing on whether there should be liability imposed on a blameless employer. She said that the imposition of vicarious liability on an employer who is

⁴² [1912] AC 716.

without fault could only be justified by reference to legal principle. She returned to her ostensible authority argument and said that the only basis of principle on which vicarious liability could be imposed for the criminal act of an employee is where, because of its close connection with the employee's duties, the employer is estopped from denying the agency. For the same reasons as Gleeson CJ, she found that to be the case in *Lepore* but not in *Samin* and *Rich*.

McHugh J held that as he found the State to owe a non-delegable duty of care, it was unnecessary to consider whether it was vicariously liable in addition.

Gummow and Hayne JJ began their analysis of vicarious liability in this context by reference to the House of Lords decision in *Lister v Hesley Hall Ltd*⁴³. They found that no single principle could be identified as underpinning the decision to impose such liability and that in fact the decision had 'strong echoes of non-delegable duties'.⁴⁴ They then referred to a recent examination of the principles of vicarious liability by the House of Lords in *Dubai Aluminium Co Ltd v Salaam*⁴⁵ where their Lordships had difficulty with establishing the degree of closeness of connection which would render an employer liable. There Lord Nicholls suggested that:⁴⁶

Perhaps the best general answer is that the wrongful conduct must be so closely connected with acts the partner or employee was authorized to do that, for the purpose of the liability of the firm or the employer to third parties, the wrongful conduct *may fairly and properly be regarded* as done by the partner while acting in the ordinary course of the firm's business or the employee's employment (original emphasis).

The judges referred to the three policy considerations in the Canadian cases, saying that the main approach of the Canadian cases was essentially *should* vicarious liability be

⁴³ [2002] 1 AC 215.

⁴⁴ (2003) 195 ALR 410, 465.

⁴⁵ [2002] 3 WLR 1913; [2003] 1 All ER 97.

⁴⁶ [2002] 3 WLR 1913, 1920; [2003] 1 All ER 97, 105-106.

found whereas in the House of Lords the question seemed to be, was it *fair and just* to hold the employer liable. They said:⁴⁷

We would accept that an important element in considering the underlying policy questions in cases such as the present is the nature and extent (the “sufficiency”) of the relationship between the employee’s authorized conduct and the wrongful act, or, as was said in *Dubai Aluminium*, “the closeness of the connection” between the employment relationship and the wrongful act.⁴⁸ But adopting either of these tests simply restates, in other words, the problem presented by the concept of “course of employment”.

They then considered the approach based on analysis of risk, applying the test in *Bazley* which was to ask whether a school authority creates a risk of sexual assault (or enhances that risk) by operating a school. This is so to the extent that a teacher is given authority over a pupil who is in turn vulnerable to abuse of that power. They said that abuse of that power is often preceded by a period of ‘cultivation or grooming’ of the child, the opportunity for which is provided by the teacher’s task of ‘guiding and leading the child through the journey of learning’.⁴⁹ But in the view of the judges this ignores three facts: that the conduct is intentional by the employee, that it directly contravenes the contract of employment, and that the teacher is not deterred from engaging in it by criminal law sanctions. This being the case, there can be little deterrent value in holding the employer liable. In consideration of whether it could ever be said that an intentional tort was committed in the ‘course of employment’, the judges were firmly of the view that the imposition of vicarious liability should not be extended beyond where either the conduct was done in the intended pursuit of the employer’s interests, or in the apparent execution of authority which the employer held out the employee as having. They concluded, in these cases that:⁵⁰

The wrongful acts of the teacher in these cases were not done in the intended pursuit of the interests of the State in conducting the particular school or the education system more generally. They were not done in intended performance of the contract of employment.

⁴⁷ (2003) 195 ALR 410, 467.

⁴⁸ [2002] 3 WLR 1913, 1920,1943; [2003] 1 All ER 97, 105-106, 128.

⁴⁹ (2003) 195 ALR 410, 467.

⁵⁰ (2003) 195 ALR 410, 474.

Nor were they done in the ostensible pursuit of the interests of the State in conducting the school or the education system. Though the acts were, no doubt, done in abuse of the teachers' authority over the appellants, they were not done in the apparent execution of any authority he had. He had not authority to assault the appellants. What was done was not in the guise of any conduct in which a teacher might be thought to be authorized to engage.

Kirby J began by remarking that in *Lister*, *Bazley* and *Jacobi*, in holding the institutions vicariously liable, the highest courts in the United Kingdom and Canada did not consider that they had departed from basic doctrines of the common law. Rather they viewed their conclusions as a clarification and application of these doctrines to a significant new problem, the high instance of sexual abuse of children by employees of organizations in whom parents had placed their trust. In his opinion, the court in the present case should be influenced by the reasoning in those cases. In his emphasis on policy as the determining factor in imposing vicarious liability in such cases, he said⁵¹:

When a final court is called upon to respond to a new problem for society (such as civil liability for widespread complaints of sexual abuse of school pupils) it is inevitable that, as in the past, the common law will give an answer exhibiting a mixture of principle and pragmatism. The principle of vicarious liability, and its application, have not grown from a single, logical legal rule but from judicial perceptions of individual justice and social requirements that vary over time⁵². In any re-expression of the common law in Australia, it is normal now⁵³ to have regard to considerations of legal principle and policy, as well as any relevant legal authority⁵⁴. This is all the more relevant in these appeals where the focus is vicarious liability, the justification for which has long been accepted as ultimately based on legal policy⁵⁵.

He then proceeded to consider the primary rationales for the imposition of vicarious liability, as suggested by the leading authorities such as *Bazley*. First, the provision of

⁵¹ (2003) 195 ALR 410, 488.

⁵² *Imperial Chemical Industries Ltd v Shatwell* [1965]AC 656, 685.

⁵³ Contrast *Rootes v Shelton* (1967) 116 CLR 383, 386-387 per Kitto J.

⁵⁴ *Oceanic Sun Line Special Shipping Co Inc v Fay* (1988) 165 CLR 197, 252; *Northern Territory v Mengel* (1995) 185 CLR 307, 352; cf Feldthusen, "Vicarious Liability for Sexual Abuse", (2001) 9 Tort Law Review 173, 178.

Imperial Chemical Industries Ltd v Shatwell [1965] AC 656, 685; *Rose v Plenty* [1976] 1 WLR 141, 147; [1976] 1 All ER 97 at 103; *Hollis v Vabu Pty Ltd* (2001) 207 CLR 21,37-38 [33]-[35]; *Lister* [2002] 1 AC 215, 243-244 [65]-[66].

'fair and efficient' compensation requires a solvent defendant. In applying the 'enterprise risk' analysis to the liability of public schools, he made the following points:⁵⁶

At first glance it may seem difficult to accept that non-profit enterprises (such as public schools) should be made the subject of such a burden, as the cost to them is not balanced by any financial gain. However, upon closer analysis, "enterprise risk" can be extended justifiably to such enterprises as public schools, with the result that the community bears the cost. The reasoning is essentially the same as for profit-driven enterprises. Schools undoubtedly benefit the community, with the education and development services they provide for students. In that way, the broader tax-paying community that "profits" from the enterprise should also bear the cost of any particular risks which evidence establishes would be closely associated with the functioning of such an institution.

Kirby J then considered the second rationale for vicarious liability, that of deterrence. While accepting that the potential for liability of employers serves as an effective way of encouraging them to take effective precautions and initiatives to reduce risks, he agreed with Gummow and Hayne JJ that as criminal sanctions had failed to act as a deterrent to the perpetrator, there seemed little more the school could do to prevent the conduct. However, in his view this factor is just part of the picture to be considered, overarched by a 'candid acknowledgement the vicarious liability is a loss distribution device'.

He dismissed the argument that vicarious liability should not be imposed for intentional criminal acts, in his view:⁵⁷

It is appropriate to acknowledge the intermittent resistance (including in Australia) to the imposition upon another person of civil liability for the wrongs committed by an employee, especially when such wrongs amount to a deliberate criminal act. However, in the face of so many decisions upholding vicarious liability in such circumstances, a general exemption from civil liability based on the deliberate or criminal character of the employee's conduct cannot stand as good law. It is overwhelmed by too many exceptions. A different principle must therefore be found to differentiate the cases where vicarious liability is upheld from those where it is denied.

⁵⁶ (2003) 195 ALR 410, 492.

Moving to the criteria based on the relationship between the conduct and the employer's enterprise, Kirby J approved of a broad application of the 'close connection' analysis adopted in Canada and the U.K. In opining that it was a matter to be determined by fact and degree, the judge was prepared to accept that an application of this criterion, underpinned by considerations of fairness, could lead to a wider imposition of liability. He said:⁵⁸

It could not be supposed that a legal principle of vicarious liability expressed to apply to cases of physical and sexual assaults upon pupils could be confined to teachers. Depending on the circumstances, any such principle might extend to the clergy, to scoutleaders and to daycare workers⁵⁹. It might also extend to employers of gynaecologists, psychiatrists and university tutors. Nor would it easily be confined to potential victims who were school pupils. It might expand to other groups vulnerable to physical and sexual abuse, including the old, the mentally ill, the incarcerated, the feeble and so on. Liability might extend to incidents outside school premises occurring on sports days, vacations⁶⁰ and other events involving potential intimacy, made possible by the employment relationship.

And significantly:⁶¹

The potential breadth of possible liability does not detract from its existence where it is just and reasonable that it should apply. That is why the determination of liability, on the basis of the connection between the enterprise and the wrong, is inescapably a question of fact⁶² and degree.⁶³

In his belief, while the enterprise must provide more than just the occasion for the conduct, in the case of a school which involves immature and vulnerable pupils, the risk may be inherent in the conduct of that enterprise. He concluded that he saw no reason why the common law of Australia should be less protective of the child victims of sexual

⁵⁷ (2003) 195 ALR 410, 492.

⁵⁸ (2003) 195 ALR 410, 494.

⁵⁹ Giliker, "Rough Justice in an Unjust World", (2002) 65 *Modern Law Review* 269 at 277.

⁶⁰ eg *Trotman v North Yorkshire County Council* [1999] LGR 584, cited in *Lister* [2002] 1 AC 215, 227-228 [21].

⁶¹ (2003) 195 ALR 410, 494.

⁶² *Dubai Aluminium Co Ltd v Salaam* [2002] 3 WLR 1913, 1918-1919 [16], 1919 [18], 1939-1940 [112]; cf at 1920 [24]; [2003] 1 All ER 97, 104, 104-105, 124; cf at 106.

⁶³ *Lister* [2002] 1 AC 215,230 [28].

assault on the part of teachers and carers than in Canada and the U.K. Accordingly, he ordered a retrial of *Lepore* on the issue of vicarious liability, and granted leave to *Rich* and *Samin* to replead on that basis. This was in line with the decision of the majority of the court.

Callinan J agreed with Gummow and Hayne JJ on the issue of vicarious liability. His opinion was based simply on the belief that negligence is one thing for which an employer may be vicariously liable but deliberate criminal conduct by an employee is totally another matter. In his view it lies so far outside the scope or course of a teacher's employment duty that the employer should not be liable.

Conclusion

While there are some general themes, it is difficult to extract any definitive principles from the High Court of Australia decision, which stretches to some ninety pages.

It is clear from all the judgments that the concept of a non-delegable duty of care, established in relation to negligence by *Introvigne*, survives. However, with the exception of McHugh J, the judges were definite that this principle should not be extended to embrace school liability for the intentional torts of others. However, it is suggested that it is still open for a claim relating to sexual abuse in the school situation to be framed in negligence where it could be argued that a school breached a common law duty of care as it knew or ought to have known of the intentional tort and took no remedial action. This action would be against the school seeking direct liability. While founded on a different basis, essentially the same principles which apply in U.S. cases such as *Gebser v Lago Vista Independent School District*⁶⁴ and *Davis v Monroe County Board of Education*⁶⁵, could apply. A school's liability for harm caused by peer or employee harassment or sexual abuse could be based on similar principles. This is that

⁶⁴ 524 U.S. 274.

⁶⁵ 526 U.S. 629.

the school knew or ought to have known, and failed to take action, and thus breached a duty of care owed to the student.

However, in the situation where it is difficult for a plaintiff to attribute blame to school authorities, it is most probable that an action would be founded in vicarious liability. From the opinions of a narrow majority of the judges on the issue of vicarious liability for intentional torts, it is likely that an Australian court would in all probability follow the principles established by the cases decided by the Canadian Supreme Court, *Bazley v Curry* and *Jacobi v Griffith*. In a changing world, how these principles will be applied and the extent to which decisions will be influenced by policy considerations, only time will tell. Unfortunately, this decision gives little certainty for either future plaintiffs or defendants.

The authoritarian-based system, under which schools operated when the events behind these cases took place, still exists in many schools today. That this climate clearly assists in the occurrence of teacher to student sexual abuse was recognized by the judges, particularly Gummow and Hayne JJ and Kirby J. While few would disagree with the sentiment behind the suggestions for preventative measures made by some of the judges, particularly McHugh J⁶⁶, their practicality is questionable in busy, and often understaffed, schools. Furthermore, these measures are generally reactive rather than proactive. Perhaps it is time for a new approach to be adopted. Those schools which still operate under the old system should be encouraged to work towards an atmosphere characterized by equality, openness and mutual trust.

⁶⁶ At p.11 above.