KEITH TRONC, QLD

A plaintiff lawyer's *guide* to suing sexual predator teachers

Vicarious Liability, Direct Liability, Or No Liability?

If a teacher sexually abuses his or her students during the time he or she is on duty as a teacher, is the educational employing authority vicariously liable, or not? Is there a direct non-delegable duty of care on the part of the employer, or not? Is it the case that the employing authority cannot be held responsible for personal acts of criminal misconduct by teachers?

Because teachers are often "straw persons", with inadequate assets to meet major personal injuries claims by students, it is tactically important for plaintiff lawyers that the employing authority be joined as a party in the action because of its deeper pockets.

If the employing authority can be held responsible for criminal assaults at school by teachers on students, then there are huge financial implications looming for non-government school authorities in particular who will need to look very closely at their insurance policies; and also for government school systems and their allocated public budgets for settlement of litigation.

Dr Keith Tronc is a Barrister at Inns of Court **PHONE** 07 3236 2770

The answers are not presently clear. There are two recent conflicting judgments within the Australian jurisdiction, and a new ground-breaking House of Lords decision which conflicts with tradition as well as with one of the Australian judgments. The issue awaits resolution by the High Court of Australia.

The Conflicting Decisions

The present uncertainty arises mainly from the following three cases:

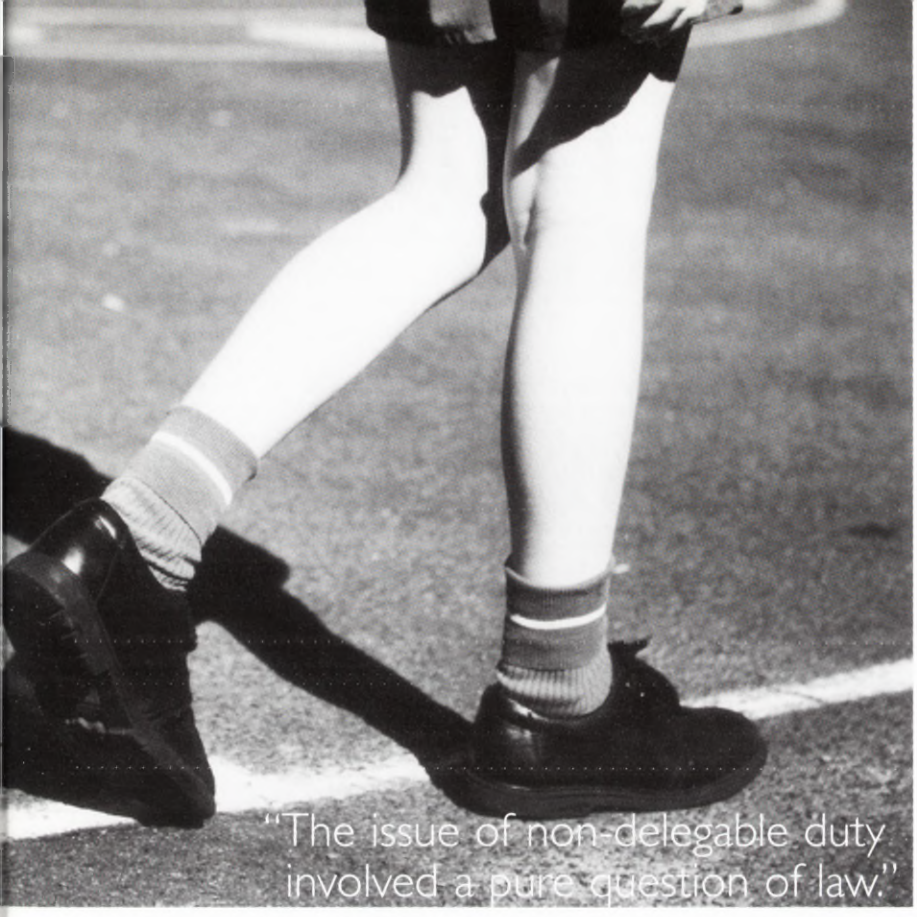
1 *Lister & Ors v Hesley Hall Limited*[1]
2 *Lepore v State of New South Wales*[2]
3 *Rich v State of Queensland & Ors; Samin v State of Queensland & Ors*[3]

The Traditional View of "In the Course of Employment"

In English and Australian law, if an employee commits a tort "in the course of employment", the employer has traditionally been held liable.[4]

To determine whether or not the employee's tort has occurred "in the course of employment", the *Salmond* test was traditionally applied, wherein the wrongful act was deemed to be done by the employee in the course of employment if it was either authorised by the employer, or constituted a wrongful and unauthorised mode of doing some act which had been authorised by the employer.

In the UK as recently as 1999, in the case of *Trotman v North Yorkshire County Council*, the English Court of Appeal considered whether an act of sexual abuse perpetrated by a deputy headmaster whilst caring for a handicapped teenage student with him on holiday was "within the course of employment" or not.[5] The English Court of Appeal was concerned primarily with deciding whether the sexual assault could possibly be regarded as "a wrongful and unauthorised mode of carrying out an act authorised by the employer". The answer was "No". The court held that the sexual assault was an independent, self-indulgent act, far removed from being an unauthorised mode of carrying



out the teaching and supervisory duties assigned by the employer. Accordingly, it was held that there could be no vicarious liability on the part of the North Yorkshire County Council for the tort of its employee deputy headmaster.

In *Lister*, the House of Lords overruled *Trotman*, applying for the first time a "close connection" test arising out of the *Salmond* principles, to determine whether an employee's tort was or was not "within the course of employment", and whether consequently the employer was vicariously liable. All five of the Law Lords held that the *Trotman* decision had previously interpreted the *Salmond* principles far too narrowly.

Lister involved a school boarding house warden sexually abusing a number of male students who were boarders at the school. The abused students claimed against the corporation running the school on the basis that the employers had been negligent in their selection and control of the boarding house warden and were therefore vicariously liable for the torts he had committed.

The *Lister* defendants were initially held to be not vicariously liable because of the *Salmond* principles as interpreted and applied in *Trotman*. In essence, there could be no vicarious liability, it was said, when acts of personal self-indulgent sexual gratification had been committed by the employee boarding warden.

This, of course, was the kind of defence also relied upon recently by the Anglican Church in the much-publicised Toowoomba Preparatory School case, made notorious by reports that the Australian Governor-General, while in his former position as Anglican Archbishop, had allegedly placed financial and insurance considerations before concern for the female boarding school student who had been sexually abused by a boarding master. In the first instance here, at jury trial, the "no vicarious liability defence" was rejected and over $800,000 damages were awarded. According to newspaper reports, the Anglican Church, as employer, will not be appealing.

The Close Connection Test for "In the Course of Employment"

In *Lister*, an almost forgotten element of the *Salmond* principles was resurrected. Lord Salmond himself had said:

" ... a master ... is liable for acts which he has not authorised, provided they are so connected with acts which he has authorised, that they might rightly be regarded as modes - although improper modes - of doing them".

On that basis, according to Lord Steyn in *Lister*, there should now henceforth be applied a crucially important "close connection test", which examines the "closeness of the connection between the act of the employee and the duties he is engaged to perform, broadly defined"[6].

In Lord Clyde's view, the employers in the *Lister* case should be held vicariously liable, because they had specifically entrusted to the warden the general duty of supervising and caring for the boarding house students, and it was within that context that the sexual abuse had occurred. In his view, a broad approach had to be adopted when considering the "scope of employment" issue.

Lord Steyn was also of the view that "acts authorised by the employer" did not just refer to the individual tasks comprising employment, but rather to the employee's whole job, as broadly described. He said:

"... there is a very close connection between the torts of the warden and his employment. After all, they were committed in the time, and on the premises of the employers, while the warden was also busy caring for the children."[7]

Lord Millett drew on *Morris v C W Martin & Sons Ltd*[8] (a bailment case), and summed up as follows:

"If the boys in the present case had been sacks of potatoes and the defendant, having been engaged to take care of them, had entrusted their care to one of its employees, it would have been vicariously liable for any criminal damage done to them by the employee in question, though not by any other employee. Given that the employer's liability does not arise from the law of bailment, it is not immediately apparent that it should make any difference that the victims were boys, that the wrongdoing took the ▶

form of sexual abuse, and that it was committed for the personal gratification of the employee."[9]

Lepore - A New Solution Through "Non-Delegability"

The first of the two Australian cases, *Lepore*, was decided by the New South Wales Court of Appeal soon before *Lister* in England. In *Lepore*, the plaintiff was a primary student at a government school, who had been sexually abused at school by a government employee teacher.

Mason P, drawing upon previous English decisions (prior to *Lister*), offered the view that "in a proper case, a non-delegable duty will overcome the limitations of the 'course of employment' test, and lead to liability being visited upon an employer for the intentional and dishonest acts of a delinquent employee". Mason P thus virtually foreshadowed the ground-breaking views soon to be advanced in *Lister* when he said:

"It sometimes happens that a court is faced with a specific new situation, in which there is no direct authority. Yet one step back, there are authoritative statements of principle and policy considerations that tug in opposite directions. I believe this to be such a case".

The majority of the NSW Court of Appeal held as follows:

1. The school authority owed a non-delegable duty of care to the appellant. The scope of this duty extended to acts of intentional wrongdoing by an employee placed in charge of school students.
2. The issue of non-delegable duty involved a pure question of law. Although it was not advanced at trial, the fact that no evidence could have been called to meet such an argument (in the event that it had been raised) meant that it could be argued by way of re-hearing on appeal, without occasioning any injustice to the school authority.
3. The duty is not breached unless there is an element of tortious conduct involved. However, there is no reason in principle for limiting the scope of the duty to negligent, and not wilful, wrongdoing on the part of the authority's agents and employees.

Heydon JA, dissenting, held while supporting the traditional "course of employment" principles:

4. There was considerable doubt as to whether the actions of the teacher could be regarded as "performed in the course of his employment duties", as they clearly constituted flagrant breaches of his contract with the school authority. The appellant was obliged to explain why the law ought to hold the authority liable for such wilful misconduct, in circumstances where there was no evidence that it had breached its direct duty of care. As the appellant failed to properly address this question at trial, the proceedings against the authority should be re-heard by way of a second trial.[10]

The "Bill Darcy" Case, Queensland

In *Rich v State of Queensland* and *Samin v State of Queensland*, cases with generally similar facts to *Lepore*, the Queensland Court of Appeal rejected the majority view in *Lepore*, accepted the dissenting judgment by Heydon JA, and laid the foundations for a final word on the issues to be delivered eventually by the High Court of Australia.

In the *Rich/Samin* claims, the plaintiffs sued the State of Queensland for sexual assault, including rape, perpetrated by state parliamentarian William Darcy, when he had been their teacher at Alleroi State Primary School years before. In this case, the plaintiffs did not plead vicarious liability, but relied instead on the state having a non-delegable duty of care to ensure that reasonable care was taken whilst they were at school. The plaintiffs were successful at first instance, but the decision was overruled at appeal. McPherson JA held that it was going too far to suggest, as in *Lepore*, that a defendant's non-delegable duty of care applied even in instances where there has been no fault demonstrated on the part of the defendant. Williams JA and Thomas JA took similar positions, when they explained that while the duty of a school to its students was non-delegable, this did not mean it was an absolute duty, or constituted no-fault liability.

According to McPherson JA, the law in Australia still remained that an employer was not vicariously liable for an employee's tortious assault which was an independent personal act of misconduct not connected with, or incidental in any way to, the work the employee was authorised to perform.[11]

Next Stage?

Plaintiff lawyers, insurance companies, and educational authorities will now await, with great anticipation, the definitive expression of Australian law as to whether or not teachers acting criminally towards their students during the school day, or in the setting of their contracted duty, either fix their employers with vicarious liability or cause the non-delegable duty principle to be legitimately invoked in litigation. PL

Footnotes:

1. [2001] 2 All ER 769.
2. (2001) Aust Torts Reports 81-609; [2001] NSWCA 112.
3. (2001) Aust Torts Reports 81-626; [2002] QCA 295.
4. see Fleming J, *The Law of Torts*, 9th Ed, LBC, 1998, pp 409-438.
5. *Trotman v North Yorkshire County Council* [1999] LGR 584.
6. p 799.
7. at para 778.
8. [1966] 1 QB 716.
9. at para 799.
10. The Commonwealth of Australia v Introvigne [1982] 150 CLR 258 distinguished.
11. Deatons Proprietary Limited v Flew [1949] 79 CLR 370.