Liability of education authorities for sexual abuse of a student by a teacher

This article looks at the High Court's treatment of vicarious liability in recent child sex abuse cases.

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LEPORE v STATE OF NEW SOUTH WALES

The facts

Angelo Lepore was a seven-year-old student in a government school in 1978 when he and several other students were taken from their classroom to an adjoining storeroom for allegedly misbehaving. While in the storeroom, Angelo's teacher assaulted him.

Angelo was made to remove his clothes and the assault allegedly had a sexual element. He claimed this happened on several occasions.

Four counts of common assault, including assault upon the plaintiff, were brought before a magistrate in 1978 and the teacher pleaded guilty.

The plaintiff sued the State of New South Wales (for the Department of Education) and the teacher for damages. At trial, District Court Judge Downs determined liability separately, and concluded that the second defendant (the teacher) had assaulted the plaintiff and that the Department of Education had not been negligent in its supervision of

its employee teacher.

Unfortunately, he made no findings as to the nature or number of assaults, meaning that the evidence would have to be reheard in order to make an assessment of damages.

Vicarious liability

Vicarious liability of the employer was pleaded but not pursued at first instance. This was unsurprising given the High Court's approach to the issue to date.

In *Deatons Pty Ltd v Flew*,[1] for example, a hotel owner was held not to have been vicariously liable for an unprovoked assault by a barmaid who threw a glass of beer into a customer's face. She was not in charge of the bar and did not throw the glass to maintain or restore order. 'It was a spontaneous act of retributive justice,...not within the course of her employment as a barmaid.'[2]

Non-delegable duty

The other issue in the *Lepore* case was whether or not strict liability arose from an education authority's non-delegable duty of care to a student.[3] In *Commonwealth v Introvigne*,[4] Justice Mason held the Commonwealth liable for the negligence of the teaching staff in an ACT school run by the New South Wales Department of Education.[5]

The plaintiff appealed on this point to the Court of Appeal. President Mason found the Department of Education had breached its non-delegable duty of care. Acting Justice of Appeal Davies generally agreed, while Justice of Appeal Heydon dissented. He did not think that *Introvigne* was sufficient authority for the proposition advanced. Thus, deliberate harm by a teacher to a student by sexual assault could not constitute a breach by the employer of its duty to ensure that reasonable care was taken.

However, Justice of Appeal Heydon believed the education department was open to vicarious liability based on the teacher's unlawful form of chastisement. But the plaintiff's lawyer had not argued this. Justice of Appeal Heydon thought the trial had wholly miscarried and would have ordered a retrial on all issues.

RICH v STATE OF QUEENSLAND; SAMIN v STATE OF QUEENSLAND

In *Rich v State of Queensland* and *Samin v State of Queensland*,[6] two plaintiff girls aged seven and ten had attended a one-teacher state school between 1963 and 1965 and were sexually assaulted in the classroom by William D'Arcy, a teacher employed by the Queensland Department of Education. He was convicted of sexual assault and gaoled.

The plaintiffs sued the State of Queensland for breach of a non-delegable duty of care by the education department. Vicarious liability was not pleaded. The State of Queensland unsuccessfully tried to strike out the Statements of Claim in the District Court.

It then sought leave to appeal to the Court of Appeal. Justices of Appeal McPherson, Thomas and Williams noted that no claim was made for vicarious liability, but asserted that the assaults were independent and personal acts of misconduct for which an employer could not be vicariously liable. They rejected the NSW Court of Appeal's approach in respect of non-delegable duties and adopted Justice of Appeal Heydon's findings.

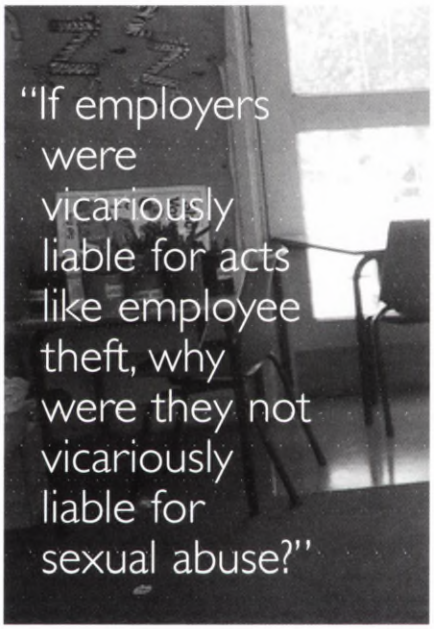
THE HIGH COURT APPEALS

All three cases went on appeal to the High Court and were heard together. The appeal was enlivened by recent superior court decisions in Canada and England.

In *Bazley v Curry*,[7] the Canadian Supreme Court considered a claim by a sexually abused child against a non-profit children's foundation which operated residential care facilities for emotionally troubled children. The foundation had unknowingly hired a paedophile.

Assuming the foundation had not been negligent, the issue was whether it was vicariously liable for the employee's tortious conduct. At first instance and in the Court of Appeal, the foundation was held vicariously liable.

An appeal to the Supreme Court of Canada was rejected. Justice McLachlin said the court had agreed to apply the *Salmond* test, under which employers can sometimes be found vicariously liable for unauthorised employee conduct. She noted cases where employers were held liable when employees stole from customers. If employers were vicariously liable for acts like employee theft, why were they not vicariously liable for sexual abuse?



The underlying principle is that employers may be liable if the tortious conduct falls within the ambit of risk created or exacerbated by their enterprise. Where the risk is closely associated with the wrong that occurs, the entity engaging in the enterprise should internalise the full cost of potential torts.

The fundamental question was whether the wrongful act was sufficiently related to conduct authorised by the employer to justify the imposition of vicarious liability. Relevant considerations include the opportunity given to the employee, the extent to which the wrongful act may have furthered the employer's aims, the extent to which the wrongful act was related to friction, confrontation or intimacy inherent in the ▶

enterprise, the degree of power conferred on the employee in relation to the victim, and the vulnerability of potential victims to wrongful exercise of the employee's power.

In *Jacobi v Griffiths*,[8] the question was argued before an identical court, but in a slightly different context. An employee of a children's not-for-profit recreational club sexually assaulted a brother and sister on an outing away from the club. The assault took place at the employee's home outside working hours. By narrow majority, the Canadian Supreme Court held there was insufficient connection between the activity and the enterprise to justify the imposition of vicarious liability.

In *Trotman v North Yorkshire County Council*[9] in England, the council operated a school for mentally handicapped children attended by the plaintiff. On a holiday trip to Spain organised by the council's employees, the school's deputy headmaster indecently assaulted one of the students with whom he shared a bedroom. The English Court of Appeal held that the County Council was not vicariously liable.

In *Lister & Ors v Hesley Hall Ltd*,[10] the plaintiffs were residents at a school for boys with emotional and behavioural difficulties. The defendant owned the school. An employee warden systematically sexually abused the plaintiffs and he was ultimately convicted of multiple criminal offences.

The trial judge concluded that he was bound by *Trotman* to find the defendant not vicariously liable, but found vicarious liability for the defendant's failure to report his intentions and acts of abuse. But the Court of Appeal held that an employee's failure to report wrongful conduct could not automatically render the employer vicariously liable.

The plaintiffs appealed to the House of Lords, which unanimously held that the plaintiffs should succeed and that the defendant was vicariously liable for the acts of criminal and sexual assault. It referred to the *Salmond* test, under which employers can sometimes be found vicariously liable for unautho-

rised employee conduct.

The House of Lords also referred to *Lloyd v Grace, Smith & Co*,[11] where a firm of solicitors was held liable for the dishonesty of its managing clerk who persuaded a client to transfer property to him, and then disposed of it for his own advantage. This established that vicarious liability was not necessarily defeated by criminality.

In *Rose v Plenty*,[12] a milkman deliberately disobeyed his employer's order not to allow children to help him on his rounds. The Court of Appeal held that the milkman did not go beyond the course of his employment when he allowed a child to assist. It was a mode of conduct, albeit an unauthorised mode, of doing the job with which he was entrusted. The employer was held vicariously liable for injury to the child.[13]

THE HIGH COURT DECISIONS

The High Court was left to reconcile the inconsistent approaches in the Courts of Appeal of New South Wales and Queensland regarding non-delegable duties, and to give some guidance on vicarious liability, given the superior court decisions in Canada and England.

In *State of New South Wales v Angelo Lepore & Anor*,[14] New South Wales's appeal was allowed in part. A retrial was ordered and Justice Heydon's reasoning in the NSW Court of Appeal was adopted by the majority.

In *Samin v State of Queensland & Ors* and *Rich v State of Queensland*, the plaintiffs' appeals were dismissed. But the High Court confirmed the Queensland Court of Appeal's order that the plaintiffs could replead in vicarious liability.

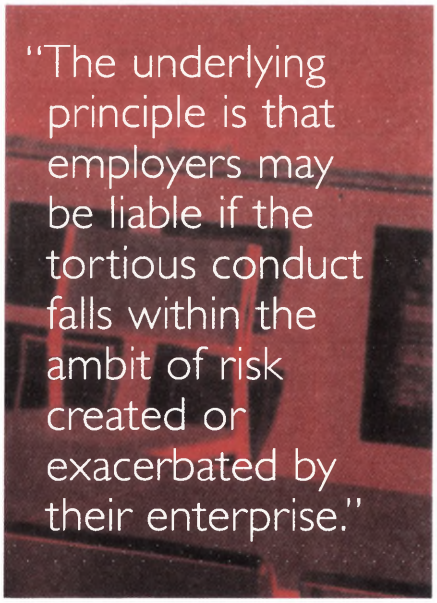
In respect of *Lepore*, Chief Justice Gleeson said: 'Chastisement of a pupil is within the course of a teacher's employment... The inappropriate conduct seems to have taken place in the context of punishment for misbehaviour.'

Interestingly, Chief Justice Gleeson added that Justice Mason in *Introvigne* did not reject the possibility that the Commonwealth might have been vicariously liable for the negligence of the teachers.

However, he rested his decision on non-delegable duty. He said it was clear that Justice Mason intended to make no distinction between a duty to ensure that reasonable care was taken and a duty to see that reasonable care was taken.

Chief Justice Gleeson considered that intentional wrongdoing, especially intentional criminality, introduces a factor of legal relevance beyond a mere failure to take care. He said the proposition that the authority is liable for any injury, accidental or intentional, inflicted at school upon a student by a teacher, is too broad and the duty too demanding.[15] He preferred the reasoning of Justice of Appeal Heydon and the Queensland Court of Appeal. Thus, non-delegable duties extend to negligence, but not to intentional (especially criminal) torts.

As to vicarious liability, Chief Justice Gleeson noted that an act of intentional criminal wrongdoing, solely for the benefit of the employee, could be easy to characterise as an independent act, but not necessarily. He concluded:



'I do not accept that the decisions in *Bazley*, *Jacobi*, and *Lister* suggest that, in Canada and England, in most cases where a teacher has sexually abused a pupil, the wrong will have been found to have occurred within the scope of the teacher's employment. However, they demonstrate that, in those jurisdictions, as in Australia, one cannot dismiss the possibility of a school authority's vicarious liability for sexual abuse merely by pointing out that it constitutes serious misconduct on the part of a teacher.'[16]

He referred to a sufficient connection test. It is not sufficient to say that teaching involves care. Where there is a high degree of power and intimacy, the use of that 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.[17] He said the fact-finding at the *Lepore* trial was so deficient that it was not possible to determine this issue.

However, the maintenance of discipline was clearly within the teacher's employment responsibilities, and much, perhaps all, of the alleged misconduct appeared to have taken place in the context of administering punishment for supposed misbehaviour. It may be possible that some or all of it could properly be regarded as excessive chastisement, for which a school authority would be vicariously liable.

Justice Gaudron held that the only principled basis upon which vicarious liability could be imposed for the deliberate criminal acts of another is if the person against whom liability was asserted was estopped from asserting that the person whose acts were in question was not acting as his or her servant, agent or representative when the acts occurred.[18]

To this extent, vicarious liability might extend to an independent contractor in a similar or employment-like relationship. Such estoppel will not occur unless there is a close connection between what was done and what that person was engaged to do.[19] However, these issues must await a new trial.

As far as the non-delegable duty was concerned, it does not extend beyond taking reasonable care to avoid a foreseeable risk of injury.

Justice McHugh concluded that *Introvigne* established that there was ▶

a non-delegable duty to ensure that the education authority's teacher did not assault or sexually assault a student. The wrongful act is a breach of the duty owed by the person who cannot delegate the duty.[20]

For the same reason, Justice McHugh would have upheld the plaintiffs' appeals in *Rich* and *Samin*. He did not find it necessary to determine whether a state is also vicariously liable for the tort of a teacher who assaults or sexually assaults a student in those circumstances.[21]

Justices Gummow and Hayne noted that in *Lepore*, the primary judge did not resolve the issues of liability joined in the action. They said the primary judge's conclusion that there was no evidence the state had breached the duty it owed the plaintiff (because the assaults were isolated acts of abuse) could not be sustained.[22] The plaintiff was at liberty to amend the pleadings in any respect, and is unlimited as to the issues to be raised on a retrial.[23]

In *Rich* and *Samin*, their Honours criticised Justice McLachlin's approach in *Bazley* regarding vicarious liability, saying it gave insufficient significance to three factors - the intentional conduct of the employee, its breach of the employment contract, and the fact that the teacher was not deterred by the sanctions of the criminal law.

Vicarious liability for an intentional tort of an employee should not be extended to cases such as *Lloyd v Grace, Smith & Co*, where the wrongful act was done in ostensible pursuit of the employer's business or in the execution of authority which the employer holds the employee as having.[24]

This meant that while their Honours would have found against the plaintiff in *Lepore* on vicarious liability, they opened the door to the possibility of re-litigating the issue of negligence by the education department and finding in favour of the plaintiff on that count.

Interestingly, no member of the court dealt with the issue argued in the lower courts in *Trotman* and in *Lister*, namely whether or not there could be vicarious liability for the negligent breach of a duty by the teacher to report his own wrongdoing. However, since a retrial is to be a retrial on all issues, that argument might be re-litigated against the education authority.

Their Honours dealt with non-delegable duties by saying that the education authority is not the insurer of the pupil who might suffer injury on the premises.[25] It does not extend to include responsibility for intentional defaults by delegates.[26]

Justice Kirby noted that intentional wrongdoing by an employee does not necessarily rule out vicarious liability.[27] He said he would use the 'sufficiently close connection' test adopted in Canada and England[28] and held that the decision in *Deatons* did not stand in the way of that conclusion.[29]

Justice Kirby noted that in the case of *Lepore*, at least some of the assaults might fall within the scope of the teacher's authority to discipline a pupil.[30] He considered that even where inappropriate corporal punishment merges with unauthorised and criminal conduct, such as sexual assault, it remains conduct for which the employer might be liable. This is because the employer's enterprise introduced the risk of such misconduct.

Justice Kirby accepted in all three claims that the state authorities could be held vicariously liable for the legal wrongs done to the students.

Justice Kirby also leant towards the view that intentional wrongdoing did not preclude a non-delegable duty. But he reserved final judgement because he did not need to determine this.[31] He concluded that because the teacher in each case was an employee, the applicable law was that of vicarious liability, not non-delegable duty. The occasion for considering the scope of non-delegable duties did not arise.[32]

Justice Callinan took a much narrower view on vicarious liability than most members of the court. In his opinion, deliberate criminal misconduct lies outside - indeed, often far outside - the scope of an employed teacher's duty.[33] Accordingly, he would have found against all three plaintiffs in respect of vicarious liability.

CONCLUSION

With the exception of Justice McHugh, the court would deny non-delegable liability in these cases. It would seem that the scope of non-delegable duties has been dramatically reduced from Justice Mason's views in *Kondis* and in *Introvigne*.

Regarding vicarious liability, Justice Callinan was the only one who would exclude liability for an employee's criminal actions. Justices Gummow and Hayne would exclude much, but not all, criminal conduct.

Chief Justice Gleeson seemed inclined to believe that the greater the criminality, the less likely it would be for a sufficient connection for vicarious liability. However, criminality of itself did not exclude vicarious liability. Nor would Justice Gaudron exclude vicarious liability because of criminality, but said

the nature of the act would be relevant.

Justice Kirby would maintain the close connection test, and say that criminality would not necessarily exclude recovery. Justice McHugh did not need to decide the limits of vicarious liability.

It is noteworthy that a majority of the court gave the plaintiff in *Lepore* some encouragement to think that on a rehearing a proper finding of facts might well bring him within the scope of vicarious liability.

Justices Gaudron, Gummow and Hayne offered encouragement that there could be real prospects of establishing the education authority's negligence, with regards to the provision of the storeroom and the opportunity it provided for private abuse.

The court did not address the issues raised in *Trotman* and *Lister* as to whether or not a teacher's failure to report his or her own misconduct might of itself establish vicarious liability. No doubt this issue also will be raised on a rehearing.

It is apparent from the divergence of views on the nature and scope of vicarious liability that we have not heard the end of this issue in the High Court. PL

Endnotes:

1 (1949) 79 CLR 370.
2 ibid, pp 381-82.
3 *Kondis v State Transport Authority* (1984) 154 CLR 672 at 686.
4 (1982) 150 CLR 258.
5 See also *Port of Burnie Authority v General Jones Pty Ltd* (1994) 179 CLR 520, p 273 at 550-552.
6 [2001] QCA 295.
7 (1999) 174 DLR (4th) 45.
8 (1999) 174 DLR (4th) 71.
9 [1999] LGR 584 (CA).
10 [2001] 2 All ER 769.
11 [1912] AC 716; see also *Morris v C W Martin & Sons Ltd* [1965] 2 All ER 725.
12 [1976] 1 All ER 97.
13 See also *Williams v A & W Hemphill Ltd* [1966] SC(HL) 31.
14 [2003] HCA 4 (6 February 2003).
15 para 34.
16 at 72.
17 at 74.
18 at 130.
19 at 132.
20 at 136.
21 at 136.
22 at 185.
23 at 189.
24 at 239.
25 at 262-63.
26 at 265.
27 at 312.
28 at 315.
29 at 325.
30 at 329.
31 at 293.
32 at 295-96.
33 at 342.