SEXUAL ABUSE IN SCHOOLS - LEGAL AND PRACTICAL ISSUES IN CIVIL LITIGATION

Paper for the NSW State Legal Conference by Campbell Bridge SC – 19 August 2010

This paper will focus upon the legal, practical and other difficulties arising from situations where minors are subjected to sexual and other abuse from those to whose care they are entrusted. The law in this area has grown out of a large number of cases not only against schools but against religious organisations and other bodies who stand *in loco parentis*.

LEGAL CHALLENGES

There are a significant number of legal difficulties associated with the bringing of such cases. Those issues involve an analysis of principles of non-delegable duty, vicarious liability, intentional torts, the identification and constitution of an appropriate defendant and limitation issues. The difficulties confronting plaintiffs from a legal perspective are best exemplified by a number of cases.

In *Lepore v State of NSW* (2003) 212 CLR 511, the High Court heard three cases jointly (*Lepore, Samin and Rich*). All of them concerned sexual misconduct on the part of teachers and the liability of the respective employers. In *Lepore,* a seven year old student was allegedly physically and sexually assaulted by his teacher during a course of punishment for alleged misbehaviour. It was never proved that the school had actual or constructive knowledge of the offending behaviour. The teacher pleaded guilty to charges of common assault and resigned. The defendant succeeded at first instance before Downs DCJ on the basis that the Department of Education (as it then was) had not been negligent in the supervision of its employer teacher.

Before the Court of Appeal, the majority held that strict liability arose from a non delegable duty of care owed by an authority to a pupil. This was the finding of Mason P and Davies AJA. Heydon JA dissented but thought that vicarious liability was open although it had not been argued.

In *Samin -v- Queensland & Anor* and *Rich -v- Queensland & Anor* (heard at the same time), the plaintiffs were both young girls who attended a one teacher state primary school in rural Queensland. They had been sexually assaulted by their teacher during school hours and while at school. The teacher had been convicted and subsequently imprisoned. In that case, the Queensland Court of Appeal rejected the proposition that a non-delegable duty of care was owed to the girls in the circumstances and struck out the statement of claim (with leave to replead).

It is difficult to extract a ratio from the multiple judgments of the High Court. In that court, the majority comprised Gleeson CJ, Gaudron, Gummow, Kirby and Hayne JJ with Callinan J dissenting in part and McHugh J dissenting on the issue of non delegable duty of care. What can be distilled from the various judgments is the following:-

- A school authority, in certain circumstances, may be vicariously liable for the criminal actions (including sexual assault) committed by an employee;
- The doctrine of non delegability cannot of itself provide a basis for an employer being liable for the criminal act of its employee.

The Court ordered a new trial in the case of *Lepore.* In *Rich and Samin*, the appeals were dismissed with costs.

The issue involves a consideration of the relationship and connection between the offending acts performed and the nature and scope of the culprit's employment. As there was no unanimity between the various judges of the High Court precisely in relation to the nature of any such connection, it is convenient to look at the types of matters which are examined by the Courts in determining whether there is sufficient connection to attach liability to the principal.

Intentional criminal conduct of the employee, even where that conduct is contrary to the instructions given by the employer,[1] may not be sufficient to deny vicarious liability.[2] The most often cited formulations of the majority decision in *Lepore* is whether the wrongful act is an "*unauthorised mode of doing an authorised act*" as per the Salmond test approved by

[1] See especially *Bugge v Brown* (1919) 26 CLR 110.
[2] *Ffrench v Sestili* (2007) 98 SASR 28; *Blake v JR Perry Nominees Pty Ltd* [2010] VSC 272.

Gleeson CJ, Gaudron and Kirby JJ[3] or whether the wrongful act is done in "*the intended pursuit of the employer's interests or in the intended performance of the contract of employment*" or "*in the ostensible pursuit of the employer' business or the apparent execution of the authority which the employer held out the employee as having*" as expressed by Gummow and Hayne JJ.[4]

In *Klesteel Pty Ltd v Mantzouranis* [2008] NSWSC 194 at [28] McCallum J [5] identified a number of matters (by reference to *Lepore* and the judgment of Spigelman CJ in *Nationwide News Pty Ltd v Naidu* (2007) 71 NSWLR 471, [2007] NSWCA 337 at [88]) which one must look at in addressing these difficult issues:-

(a) whether the conduct was so closely connected with the employee's responsibilities as to be in the course of his employment ([85] per Gleeson CJ).

(b) Whether the conduct was the 'doing of an authorized act in an unauthorised way' and vicarious liability can be justified 'on the basis of ostensible authority', a species of estoppel (at [108] per Gaudron J and see [130]).

(c) Whether there is 'a close connection between what was done and what that person was engaged to do' (at [131] per Gaudron J).

(d) Whether 'the identification of what the employee was actually employed to do and held out as being employed to do' encompassed the conduct complained of (at [232] per Gummow and Hayne JJ).

(e) Whether the conduct complained of was done in the ostensible pursuit of the employer's business or in the apparent execution of the authority which the employer held out the employee as having (at [239] per Gummow and Hayne JJ)… [including] *whether the conduct complained of was done in the intended pursuit of the employer's interests or in the intended performance of the contract of employment.*

(f) Whether there was a sufficiently close connection between the conduct which was not authorised and the acts which were authorised (at [315] per Kirby J).

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[3] See Gleeson CJ at [51], but noting that it was not definitive and "*has its limitations"*; Gaudron J at [107] and [132]; and Kirby J at [315]-[316], though noting the test must be interpreted in light of judicial authorities at [331]. See also Gummow and Hayne JJ at [226] referring to the test with approval, though noting its limitation.

[4] See at [239] (Gummow and Hayne JJ).

[5] *Klesteel Pty Ltd v Mantzouranis* [2008] NSWSC 194 at [28], paraphrasing the formulations set out by Spiegelman CJ in *Nationwide News Pty Ltd v Naidu* (2007) 71 NSWLR 471 at [88].

Clearly the above formulations overlap, and where all 6 formulations are met in any given fact scenario, vicarious liability will more likely be found to exist.[6]

In *Ryan v Ann St Holdings*[7] Williams JA attempted to highlight the overlaps and distil a broad 'test' as outlined below (emphasis added):

> *"What emerges from the various judgments in Lepore is that the critical test, in broad terms, involves a comparison between the intentional wrongful conduct and the type of conduct the employee was engaged to perform. If there was a "**sufficient connection**" (Gleeson CJ at [40], [42], [52], [54], [67] and [74]), or a "**sufficiently close connection**" (Kirby J at [315], [316], [319] and [320]), or a "**close connection**" (Gaudron J at [131]-[132] and Gummow and Hayne JJ at [213]), it will be open to the tribunal of fact to conclude that **the wrongful act was done in the course of employment, albeit in an improper mode**. The connection is of critical importance, and as Gummow and Hayne JJ noted at [217], where the opportunity for abuse becomes greater, so the risk of harm increases. Essentially that means that where an employer clothes an employee with authority which, if abused, could lead to great harm, then (the risk being known to the employer) the easier it will be for a court to draw the conclusion that the wrongful act was done in the course of employment."*

All of the above formulations of the test above assume, as a first step, the identification of what the employee was actually employed to do, or is held out as being employed to do. The scope of the employment is not limited to any contract of employment, as noted by Gummow and Hayne JJ:[8]

> *First, vicarious liability may exist if the wrongful act is done in **intended pursuit** of the employer's interests or in **intended performance** of the contract of employment. Secondly, vicarious liability may be imposed where the wrongful act is done in **ostensible pursuit** of the employer's business or in the **apparent execution of authority** which the employer holds out the employee as having.*

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[6] See for example, in the decisions of *Nationwide News Pty Ltd v Naidu* (2007) 71 NSWLR 471.
[7] (2006) 2 QdR 486 at [18].
[8] *Lepore* at [231] (original emphasis). See also at [239]. See also: Gleeson CJ at [51] and Higgins J in *Bugge v Brown* (1919) 26 CLR 110 at 132.

If the relevant conduct[9] can be characterised as being for the purpose of employment, or falling within the scope of authority that employee was vested with by the employer to pursue business objectives, then a court will more easily draw the conclusion that the wrongful act was closely connected to acts done in the course of employment. With the Gummow and Hayne JJ test in mind, the greater the discretion permitted to an employee, the greater the scope of employment may be viewed and thus, the greater the risk of vicarious liability being found.

Although involving different considerations concerning the nature and extent of duty, it is useful to look at the progression of the law with respect to recent cases where intentional torts can result in vicarious liability to one's employer. Cases include *Naidu* (supra) and a number of cases involving bouncers and security guards including the following:

- *Ryan v Ann St Holdings Pty Ltd* (2006) 6 QdR 486
- *Sandstone DMC Pty Ltd v Trajkovski* [2006] NSWCA 205
- *Zorom Enterprises Pty Ltd v Zabow* (2007) 71 NSWLR 354
- *Sprod bnf v Public Relations Oriented Security Pty Limited* [2007] NSWCA 319

In 2009 the High Court decided *Adeels Palace Pty. Ltd v Moubarak* [2009] HCA 48. That case is mentioned for the purposes of completeness because it emphasises the significance of the *Civil Liability Act 2002* in the context of determining nature and extent of duty, breach and causation. To the writer's knowledge, no case involving an analysis of these issues in the context of sexual assaults in an education context has been run post *Adeels Palace*.

The Roman Catholic Church is the largest educator in NSW after the State Government. According to the Catholic Education website, Catholic schools enrol 20% of Australian school students and there are 615 Catholic secondary and primary schools across NSW and the ACT. Thus, not surprisingly, the Catholic Church features prominently in litigation of this type, as do many other religious institutions.

Suing the Catholic Church presents its own procedural difficulties which are exemplified by the case of *Ellis v Pell & The Trustees of the Roman Catholic Church for the Diocese of*

[9] Note the relevant conduct is the conduct occasioning harm, not just that class of conduct generally – see especially *Klesteel Pty Ltd v Mantzouranis* [2008] NSWSC 194 at [33].

Sydney [2006] NSWSC 109, [2007] NSWCA 117, [2007] HCA Trans 697. Although *Ellis* was not a case strictly involving a school – pupil relationship, it demonstrates some of the difficulties which can confront a would-be Plaintiff suing the Catholic Church. Mr. Ellis sought damages alleging that he was sexually assaulted by a Father Duggan while he was an altar server in the parish at Bass Hill in NSW.

Because of difficulties in identifying a correct defendant, he sought a representative order against Cardinal Pell on behalf of the Church as an unincorporated association and also sought to sue the trustees of the Church who hold its property under the *Roman Catholic Church Trust Property Act 1936.* A principal defence was that there was no one to sue in fact because the trustees merely held the property of the Church which was not of itself a legal entity. At first instance, Patton AJ found that he could not make a representative order against Cardinal Pell because membership of the Church was so vaguely defined. His Honour did find that there was an arguable case that the trustees could be sued.

On appeal to the Court of Appeal, it was held that neither the current Archbishop nor the trustees could be sued in respect of the alleged negligence and supervision of the priest who is said to have allegedly sexually abused an altar boy in the 1970s. The relevant legislation was subject to significant amendment in 1986. Both the Church and the Catholic Education office were an unincorporated association and the trustees who held the property of the Church in each diocese and were only liable in respect of property matters for at least the period prior to the 1986 amendments and possibly thereafter. Thus, at least until 1986, there was no one to sue for negligence or abuse by teachers in Roman Catholic parochial schools in NSW. And in the case of priests, there was no one to sue after 1986 as well.

In a paper entitled *"Legal Challenges in Bringing Sexual Cases Against Schools and Religious Institutions"* by Dr. Andrew Morrison SC, Dr. Morrison expresses the following view in the context of this case:-

> *"The Roman Catholic Church in NSW and the ACT seems to have so organised its affairs that there is no liability on the part of the Church for the conduct of priests and no liability in its parochial schools for the conduct of its teachers prior to 1986 and, the Church argues, even after that. The implications are obviously very serious for those who have injury or abuse or negligence by the Roman Catholic Church."*

The position with respect to different Orders within the Roman Catholic Church may be different. Similar arguments have not been conducted in the Courts to date on behalf of a number of those Orders or groups who are also involved in such litigation.

A further significant difficulty with respect to the conduct of such litigation concerns the limitation issues which will arise. In many such cases the events complained of would have occurred many years ago and the limitation period having long since expired. Thus the proceedings are prima facie statute barred.

In a legal sense, the lapse of time and consequent loss of recall and records of witnesses gives rise to strong arguments on behalf of the would-be defendant on the issue of prejudice. The issue will always come down to whether there was prejudice and consequently an inability to conduct a fair trial. In *Brisbane South Regional Health Authority v Taylor* (1986) 186 CLR 541, the High Court stated that the onus of establishing that the discretion to extend time lies upon the applicant and that delay results in presumptive prejudice even if no actual prejudice can be established.

In *Rundle v Salvation Army (South Australia) Property Trust and Keith Ellis* [2007] NSWSC 443; [2008] NSWCA 447, Simpson J at first instance thought that while there was some prejudice, the defendant would be able to mount an adequate defence and that a fair, although not perfect trial was still possible. The decision of Simpson J was upheld by the Court of Appeal.

Other cases in which limitation periods have been extended despite lengthy delays include *Lloyd v Bambach & The Trustees of the Catholic Church for the Diocese of Newcastle/Maitland* [2005] NSWSC 80 and *BMT v The Corporation of the Synod of the Diocese of Brisbane and Anor* [2007] Aust Torts Reports 1-909.

PRACTICAL PROBLEMS

All of the difficulties which give rise to the legal problems outlined above create very great practical problems which are both forensic and emotional in origin for those wishing to represent the parties in such cases. On both sides of the record, the cases may be so old that witnesses will have died or disappeared, trails of enquiry will have gone cold, or

witnesses, when located, will have significant impairment of memory. Self evidently, loss of witnesses and evidentiary materials will be extremely prejudicial. The trauma suffered by plaintiffs as a result of such incidents will introduce extraordinarily strong emotions. They will have very strong feelings of anger and resentment brought about by their perception of betrayal by somebody to whose care they were entrusted. Assessing the reliability of witnesses can be especially difficult in such cases.

The actual running of a trial, assuming one overcomes the limitation period can be very difficult for reasons associated with the above factors. From a strictly forensic perspective, as much of the damage will be of a psychiatric nature, there will usually be very significant arguments about history and causation. The disentangling of these issues will ensure a very lengthy and expensive trial. Every detail of the plaintiff's past life and history and all aspects of causation will the subject of a thorough examination. The practical and legal difficulties associated with the disentangling exercise are apparent from an examination of the authorities such as *Bendix Mintex Pty Limited v Barnes* (1997) 42 NSWLR 307, *Wallaby Grip (BAE) Pty Limited (In Liq.) v Macleay Area Health Service* (1998) 17 NSWCCR 355, *Watts v Rake* (1960) 108 CLR 158, *Purkess v Crittenden* (1965) 114 CLR 164 and *TC v State of New South Wales* [2000] NSWSC 292.

It is not unusual for defendants in such circumstances to be able to prove that plaintiffs have many stressors in their lives and the question becomes one of disentangling potential causes of the plaintiffs' problems with a view to ascertaining whether the offending conduct of the defendant was a materially contributing cause entitling the plaintiff to damage. This exercise is time consuming and expensive to run and a great deal of evidence about history, much of it very remote in time and place. The debate between psychiatrists which inevitably ensues will in turn depend in part upon establishing which version of the history one accepts. The upshot of all this is to ensure a complex trial which is potentially disastrous for both sides in a personal and financial sense. Often a number of individuals will be forced to face the trauma of reliving a very dark period of his or her past.

It is unfortunately the case that in many such cases, the financial cost of preparing for and running a trial will be inordinately high. Even without having to mount a limitation application, an enormous amount of time will be spent conducting research and exploring matters of past history. This will involve looking at large numbers of documents and

interviewing a great number of witnesses, many of whom will have a poor recollection of the events involved.

Any limitation application in cases of this nature which the plaintiff is forced to undertake will usually be a time consuming and strongly contested event. It will only add to the cost and uncertainty of litigation.

WHAT IS THE BEST WAY TO RESOLVE THESE ISSUES – TRIAL OR MEDIATION?

The common law system under which we operate, for all its benefits, does not perform well in the area of sexual assault cases involving students who were victims of the education system, individual teachers, or religious institutions. The issues starkly confronting the parties in these cases go far beyond a collection of pleadings, particulars and medical reports which are presented to a court before and during a hearing. Very few cases are concluded by way of hearing in a way which is satisfactory to both sides and the toll which is taken in a personal and financial sense on both sides is great.

Obviously, fighting a lengthy trial to the bitter end in cases involving the sorts of issues and emotions at play here is usually not the most desirable outcome in such cases. These matters are best dealt with by way of mediation. This is now the most common way of resolving these disputes. The reasons why a contested hearing is most often an unsatisfactory way to resolve such matters can include but is not limited to the following matters:-

- Litigation involving allegations of sexual abuse and misconduct on the part of education authorities is quite different from most other tort based or commercial disputes. More so than most disputes, there is a rare combination of extreme emotional issues, multiple factual, legal and medical difficulties.
- Even in less serious cases, the significant costs of preparing, gathering evidence and bringing such a case to trial can be entirely disproportionate to the likely verdict.
- In the most serious claims, the legal costs are horrendous and are usually beyond the means of individual litigants.
- The personal cost to all involved (particularly plaintiffs, their families and witnesses) can be equally damaging in an emotional sense.

- From a perspective of an educational authority or a Church, there are severe impacts upon reputations and upon public perceptions of the role of such institutions in society. The moral authority of such institutions will be undermined by the events and by the subsequent often lurid publicity. In the case of government schools, the resultant publicity generates its own political damage as well. The benefits of confidentiality are apparent for all concerned.

For these reasons, such litigation is best resolved by mediation as opposed to a trial. These days it is becoming easier to persuade a defendant to mediate. In any event, courts will tend to regard mediation as almost mandatory (in a practical sense) in such cases. In many cases, given the somewhat institutionalised nature of sexual misconduct allegations, it may be possible to persuade the defendant to mediate early and in a relatively informal basis. Such an approach should always be encouraged and not impossible to utilise if the lawyers and those instructing them are sufficiently experienced in such matters.

The real benefits of any mediation, and particularly mediations in such matters is that it fulfils a number of fundamental needs:-

(a) It is fast – most mediations take place on one day or less;
(b) It is economical;
(c) In most instances, the parties perceive it to be fair;
(d) It minimises the risk for the parties, whether the risk be financial or personal given the nature of the matters which are the subject of discussion in a contested hearing in this matter
(e) The whole process and the outcome will remain confidential unless the parties otherwise agree.

Mediation tends to be more successful in such cases because it recognises that that the interest of a plaintiff will be both financial and personal. While the legal and procedural issues and the evidence are important, there will be many other underlying issues which must be addressed in the mind of the plaintiff before he or she can frankly discuss let alone resolve such a case. In many types of common law litigation, the matters important to a defendant are somewhat more limited – often confined to just money and risk.

In litigation of this nature, both sides have a great personal interest in the outcome and matters of reputation and vindication become very important. Self evidently, from a plaintiff's perspective, feelings of being aggrieved and sometimes even feeling especially guilty about what has occurred after are far more common than they might be in what can be often described as *"normal"* personal injury litigation. Both sides may have very strong views and both sides have much to lose from such litigation from the perspective of collateral costs and also from the perspective of personal distress and damage to reputation. One of the matters which make resolution of such cases particularly difficult is that parties have often been well known to each other for many years and the imposition of a relationship of trust creates great difficulties in enabling a resolution to be reached.

Parties to such litigation will often have a strong psychological need to be heard and have their grievance understood. The strict nature of more formal litigation and its rules of evidence often leaves parties (who may be, from the perspective of their lawyers and the judge) excellent witnesses feeling intensely personally dissatisfied. Witnesses are simply not able to give their version of events as they see it, they are required to respond to a series of questions in a restrictive context.

The result may well be that they feel they fail to get their message across and they harbour strong feelings of dissatisfaction. Such feelings are a significant impediment to settlement. In a context of a mediation, the parties will have an opportunity to say how they really feel (if they wish). The issue of acknowledgement is a particularly powerful one in the minds of the plaintiffs. If plaintiffs feel that their grievance has been acknowledged in some fashion, they may often easily come to a decision to resolve the case.

While court pleadings define solutions in terms of money, as anyone has acted for plaintiffs knows, the needs of litigants are quite different. Such cases are usually about feelings of grievance and betrayal where issues of acknowledgement and apology will be foremost in the plaintiffs' mind. The usual court processes do not accommodate these needs. For psychological reasons, much *"conventional"* litigation cannot be resolved until these needs are met.

Apologies are a vital part of the resolution process of litigation arising from sexual assaults or abuse in a school or educational setting. The emotional reasons are obvious, and lawyers acting for defendants must be aware of the extreme difficulty of giving an

appropriate apology which will not have the effect of making an extremely difficult emotional situation much worse. An apology should virtually always be given. If an apology is given, whoever gives it must make it a good one. The identity and authority of the representative of the Defendant who attends the mediation and gives apology will have a great bearing on how well it is received. An apology which is not well received will usually make a difficult situation much worse.

The advantage of mediation is that a skilled and experienced mediator has the ability to allow the parties engaged in such litigation to address the matter in a relatively detached, confidential and non-judgmental atmosphere, which is completely different to normal litigation. Such a mediator will allow parties if they wish to air (if they wish) their strong sense of grievance which stems from a sense of betrayal by someone in a position of trust.

The sentiments of acknowledgement and apology must be utilised in the course of such litigation to enable the matter to be resolved. It is best done in a course of mediation. In many cases, the feelings of the plaintiff will be so strong that there is a revenge element in their psychological perception of the litigation. There may also be a strong feeling that the matter must be litigated and publicised in order to ensure all others who have been as harshly dealt with come forth and extract their revenge from the person or institution concerned. To successfully mediate such disputes, these feelings must be diffused by the mediator.

The issue of publicity and the undermining of confidence in the institution which the defendant represents is a very significant factor. However badly some individuals have behaved, the organisations behind the defendant usually perform a great deal of good and the somewhat media intensive circus which follows the conduct of such cases is not in the interest of anybody. The harm which is done to plaintiffs, even if successful as a result of a contested hearing can be great and the conduct of a mediation in a confidential setting is always more desirable.

From a psychological point of view, the issue of apology and the atmosphere in which mediations are conducted is usually far more conducive to settlement than contested hearings. Plaintiffs often need to get feelings off their chest in a way that cannot be done in

a conventional litigation setting. Often the plaintiff will be less interested in money but will have a strong desire to have his or her grievances to be appropriately addressed.

The practical advice for lawyers appearing in such cases is to carefully and fastidiously gather all evidence which is available in any such case. While this is true in any matter which is to be litigated, the difficulties become not only exponentially more difficult but exponentially more demanding in such cases.

PREPARATION FOR HEARING OR MEDIATION

In terms of preparation, it is impossible in this paper to go through all of the things that can be done to prepare such a matter for hearing or mediation as the variety of cases which fall within the ambit of sexual misconduct cases of education authorities are almost unlimited in their variety.

Particularly careful statements must be taken from all potential witnesses, however long ago the events might have taken place. Care and thought must be given to ascertaining what documents will either be in the public domain by way of criminal or other proceedings taken against the offending individual from the defendant's side. Plaintiffs must ensure that the defendant produces all of its records dealing with the events surrounding or other issues concerning the actual perpetrators of the misconduct. Sadly, it is not uncommon for particular individuals to have been involved in other incidents or have been the subject of other complaints, often in other jurisdictions. It is essential that such matters be thoroughly investigated and appropriate documentation obtained by subpoena or otherwise to unearth what might be an essential part of the plaintiff's case.

CONCLUSION

Few areas of legal work combine forensic difficulties, legal complexities, and are so emotionally draining on whatever side of the record you appear. Every effective practitioner in these matters must be part lawyer, part psychologist and part counsellor. The professional and effective conduct of these matters requires a highly skilled, effective and compassionate approach which ensures that all parties are appropriately dealt with as

quickly and as efficiently as can be done to minimise the tragic consequences of events which have led to the litigation.

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19 August 2010