
The Legal Liability of an Employer for Acts of Sexual Abuse Committed by an Employee: Recent Developments in Australian Law

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Abstract

Sexual abuse has been a much publicised issue in Australia recently, particularly in the context of schools and churches. A very recent decision of the High Court of Australia has considered two grounds upon which an education authority might be held liable for acts of sexual abuse committed by teachers against students: the non-delegable duty of care owed by an education authority and the principle of vicarious liability which governs whether an employer can be liable for the wrongs done by employees. In the judgment, some members of the High Court draw parallels between how the two grounds of liability might apply in the context of sexual abuse by teachers at schools and how they might apply in the context of sexual abuse by employees in institutions such as nursing homes, old people's homes, geriatric wards and daycare centres. The decision therefore raises important questions for those who are involved in the allied health industry.

Introduction

Sexual abuse has been a much publicised issue in Australia during the past decade. Media reports about sexual abuse committed against children in particular have been common, and there has been much critical comment about how various religious and educational authorities have managed – or, indeed, have failed to manage – the problem. It is not surprising, then, that some of the victims of sexual abuse inevitably turn to the courts in their quest for a remedy, including financial compensation.

The problem of sexual abuse is not, however, the exclusive domain of schools, nor of some churches. The risk of sexual abuse of other vulnerable people, such as the infirm and elderly in institutions such as nursing homes and geriatric wards, is also an abhorrent reality. In the recent English court case of *Lister & Ors v Hesley Hall Limited*¹ (*Lister's case*) in which the

employer of a warden of a residential boarding annex for children with emotional and behavioural difficulties was sued for financial compensation for acts of intentional sexual abuse committed by the warden against a number of the children, one of the judges commented:

Experience shows that in the case of boarding schools, prisons, nursing homes, old people's homes, geriatric wards, and other residential homes for the young or vulnerable, there is an inherent risk that indecent assaults on the residents will be committed by those placed in authority over them, particularly if they are in close proximity to them and occupying a position of trust.²

In the case, the House of Lords, the highest court in England, decided that the employer of the warden could be held liable for the intentional acts of the

¹ [2001] 2 All ER 769; [2001] UKHL 22 (3 May 2001). For a discussion of *Lister*, see P Giliker, 'Rough Justice in an Unjust World' (2002) 65 *The Modern Law Review* 269-

279; A Knott, 'School Liability for Intentional Wrongs – Trends and Significance' (2002) 8 *ANZELA Reporter* 3-16; P Williams, 'Case Note – *Lister & Others v Hesley Hall Limited* [2001] 2 All ER 769; [2001] UKHL 22 (3 May 2001)' (2001) 6 (1 & 2) *Australia & New Zealand Journal of Law & Education* 101-106.

² Per Lord Millett at 800.

warden on the basis of the principle of vicarious liability (see below).

As coincidence would have it, the High Court of Australia has also recently examined the legal principles upon which liability might be sheeted home to an employer of an employee who has committed acts of sexual abuse against another. In *New South Wales v Lepore; Samin v Queensland; Rich v Queensland*³ (the *Lepore*, *Samin* and *Rich* cases), two grounds of liability were examined by the High Court: the nature and content of the non-delegable duty of care owed by an education authority to students entrusted to its care (see below), and the liability of an education authority, as employer, for wrongs committed by an employee against students, commonly known as vicarious liability (see below). While each of the three cases involved acts of sexual abuse committed by a teacher against children attending schools, at least two members of the High Court expressed the view that the grounds of liability raised by the cases could extend to situations where acts of sexual abuse had been committed against persons other than students, by persons other than teachers. In his examination of vicarious liability for example, one member of the High Court commented:

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 workers. It might also have to extend to employers of gynaecologists, psychiatrists and university tutors. Nor would it easily be confined to

³ (2003) 77 ALJR 558; [2003] HCA 4 (6 February 2003). In the case, the High Court was hearing three separate appeals together. *Lepore's* case was an appeal against a decision of the New South Wales Court of Appeal, while the *Samin* and *Rich* cases were appeals against decisions of the Queensland Court of Appeal. For comments on the High Court's judgment, see A Knott & D Stewart, *Schools Alert*, 'Vicarious Liability under the High Court Microscope' (2003) 2 CCH 3-4; R Price, *Industrial Law News*, 'A New High Court Policy for Vicarious Liability?' (2003) 5 CCH 5-6.

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 ...⁴

And in his examination of the non-delegable duty of care, another member of the High Court commented:

[I]ts significance extends beyond schools, and beyond activities involving the care of children. The ambit of the duties that are regarded as non-delegable has never been defined, and the extent of potential tort liability involved is uncertain, but it is clearly substantial.⁵

The *Lepore*, *Samin* and *Rich* cases thus raise important questions for those employers and employees in the allied health industry. This article explores some of those questions.

The *Lepore*, *Samin* and *Rich* cases

In the *Lepore* case, at the age of seven years and while attending a state primary school, Lepore was sexually and physically assaulted by his male teacher on a number of separate occasions. On being accused of misbehaviour, the student had been sent to a storeroom where he was told by the teacher to remove his clothing. He was then smacked and indecently touched by the teacher. On some occasions, other boys were also present. He sued the teacher, as well as the NSW Education Department as the employer of the teacher, for financial compensation. Following the initial findings and decision of the trial court, Lepore appealed to the NSW Court of Appeal on the ground that the trial court had not addressed the issue of the non-delegable duty of care owed by the NSW Education Department.⁶ The NSW Court of Appeal held that the education authority was liable for breach of its non-delegable duty of care owed to its students to

⁴ Per Kirby J at 617.

⁵ Per Gleeson CJ at 561. In addition see his comments at 567-568.

⁶ For an account of the trial judge's findings, see the judgment of Gleeson CJ in the *Lepore*, *Samin* and *Rich* cases at 561-562, or that of Gaudron J at 576-577.

ensure that they were not injured physically by an employed teacher, whether acting negligently or intentionally.⁷ The NSW Education Department appealed to the High Court against the decision.

In the *Samin* and *Rich* cases, both Samin and Rich had, on a number of occasions, been sexually assaulted by the teacher in a one-teacher government primary school in rural Queensland. The sexual assaults had taken place during school hours and in a classroom or adjoining rooms. Both students sued for financial compensation, alleging that the teacher had sexually assaulted them at school and that this amounted to a breach of the non-delegable duty of care owed to them by the Minister for Education and the State of Queensland as the education authority concerned. The trial court gave judgment for the students,⁸ holding that the duty owed to the students was non-delegable and that breach of that duty would be established simply if the assaults by the teacher were proved. The Minister and the State of Queensland successfully appealed to the Queensland Court of Appeal where the court held that breach of the non-delegable duty of care owed by an education authority was not established simply by proving the assaults.⁹ The plaintiffs appealed to the High Court.

In the three cases before the High Court, the primary argument was that by virtue of the non-delegable duty of care owed by an education authority, the education authorities concerned were liable in negligence simply upon proof that the assaults alleged by the students had occurred and that the students had thereby suffered damage for which they should be financially compensated. In all three cases it was also argued that

in view of recent court decisions in Canada and England, the students should also be entitled to argue their cases on the basis that the education authorities as employers could be held liable for the actions of the teachers pursuant to the principle of vicarious liability. These quite distinct arguments thus gave the High Court, the highest court in Australia, the opportunity to examine in some detail the nature and extent of the so-called non-delegable duty of care as well as the principles governing vicarious liability.

The non-delegable duty of care

Where a person (commonly called the defendant) is sued by another person (commonly known as the plaintiff) for a claim in negligence, essential to establishing the claim against the defendant is the element of fault. In the *Lepore*, *Samin* and *Rich* cases, the claim for breach of the non-delegable duty of care, which is essentially a claim in negligence, had been argued by the plaintiffs on the basis that the simple fact that they had been assaulted by an employee was enough to establish breach of the non-delegable duty of care owed to them by the Education Department as the education authority. In other words, liability for breach of the non-delegable duty of an education authority was not dependent upon establishing fault on the part of that authority. While there was disagreement in the decision of the High Court as to whether the liability of the education authorities concerned might be argued on the basis of breach of the non-delegable duty of care,¹⁰ all seven justices did examine, in varying degrees, the principle of the non-delegable duty of care. In general terms, a number of propositions relating to such a duty seem to emerge from that examination:

⁷ For an analysis of the decision of the NSW Court of Appeal, see Knott, above n 1.

⁸ At trial in the District Court of Queensland, the Minister and the State of Queensland applied to have the statements of claim of the plaintiffs struck out as disclosing no cause of action against them. The court dismissed the strike-out applications.

⁹ For an analysis of the decision of the Queensland Court of Appeal, see Knott, above n 1.

¹⁰ The entire judgment of McHugh J (584-590) is taken up with an examination of the non-delegable duty of care, and he concludes that in all three cases, breach of the non-delegable duty of care could be argued against the education authorities. Kirby J at 611-612, on the other hand, concludes that in all three cases it was not necessary to resort to breach of the non-delegable duty of care in order to find the education authorities liable. He relies ultimately on the principle of vicarious liability.

- It is accepted in Australian law that in some relationships, the duty to take care is ‘non-delegable’ or ‘primary’.¹¹
- The relationships that attract this non-delegable duty traditionally include, but are not necessarily limited to, master and servant, adjoining landowners, hospital and patient, and education authority and student; indeed, in situations where the care of vulnerable people, such as the elderly, the mentally infirm, the very young and so on, is involved, it is difficult to envisage a relationship that would not give rise to this non-delegable duty of care.¹²
- The underlying reason for the imposition of the non-delegable duty of care is the vulnerability or special dependence of the person to whom the duty is owed and the accepting of responsibility for the safety of such persons by the person or organisation who is said to owe the duty.¹³
- The duty is ‘non-delegable’ in the sense that the person subject to the duty has the ultimate and personal responsibility to perform the duty himself/herself or to make sure it is carried out; the legal obligation to provide the required level of care inherent in the non-delegable duty always remains that of the person owing the duty, but while the duty itself cannot be discharged by entrusting or delegating the duty itself to another, others can be employed to carry out tasks associated with performing the duty.¹⁴
- Whether the non-delegable duty is described as a duty ‘to ensure that reasonable care is taken’ or as a duty ‘to see that reasonable care is taken’, it is a stringent duty in the sense that it imposes sole responsibility for its discharge on the person owing the duty.¹⁵
- The non-delegable duty does not impose strict liability in the sense that the person owing it will be automatically liable simply on proof of injury, accidental or intentional, incurred by the person to whom the duty is owed; to be found liable for breach of the non-delegable duty, there must be some fault, or failure to carry out the duty, or negligent conduct, established on the part of the person owing the duty that results in injury or damage to the person to whom the duty is owed.¹⁶

The High Court essentially held that the argument based on the non-delegable duty of care could not be maintained by all three students, given that there was no evidence of fault on the part of the education authorities concerned.¹⁷

Comment

While the *Lepore*, *Samin* and *Rich* cases were concerned with the liability of education authorities for acts of sexual and physical abuse committed by teachers against students, the propositions outlined above do appear to raise important issues about the liability of a business in the allied health industry for acts of sexual abuse committed by an employee of the business against persons under the care of the business.

¹¹ See, for example, Gleeson CJ at 563-564, Gaudron J at 577-578, and Kirby J at 610-612. These three justices refer in particular to the High Court’s decision in *The Commonwealth v Introvigne* (1982) 150 CLR 258 where the High Court accepted that an education authority does owe its students a non-delegable duty of care.

¹² See, for example, Gleeson CJ at 567-568, and Gummow and Hayne JJ at 605. Interestingly, Gummow and Hayne JJ at 605 also express the caution that not all relationships displaying these characteristics will necessarily bring about the non-delegable duty of care.

¹³ See, for example, Gleeson CJ at 567-568, and Gaudron J at 578. Callinan J at 620 agrees to a large extent with the views of Gleeson CJ on the matter of the non-delegable duty of care.

¹⁴ See, for example, Gleeson CJ at 564, and McHugh J at 586.

¹⁵ See, for example, Gleeson CJ at 565, and McHugh J at 586.

¹⁶ See, for example, Gleeson CJ at 567, Gaudron J at 578, McHugh J at 588-590, Gummow and Hayne JJ at 606, Kirby J at 619, and Callinan J at 620.

¹⁷ McHugh J, however, held that the principle of non-delegable duty of care could be argued in all three cases.

It is certainly arguable, for example, that those owning or operating a business in the allied health industry, such as a nursing home or an old persons' home, owe a non-delegable duty of care to the elderly, the mentally infirm, the very feeble, and so on, who have been placed under their care and responsibility. Given the acknowledged risks of sexual abuse in such cases, it is clear that such a duty requires the business itself to put in place processes and procedures to minimise any opportunity for sexual or physical abuse by the employees of the business. There are suggestions in a number of the judgments in the *Lepore*, *Samin* and *Rich* cases about what an education authority might do, given its non-delegable duty of care to students. One such suggestion is that the authority should not only be careful to employ reliable, carefully screened and properly trained employees but should also instigate efficient systems for the prevention and detection of acts of sexual misconduct by teachers.¹⁸ Another is that the education authority can 'institute systems that will weed out or give early warning signs of potential offenders; deter misconduct by having classes inspected without warning; ... encourage teachers and pupils to complain to school authorities and parents about any signs of aberrant behaviour on the part of the teacher.'¹⁹ No doubt, similar suggestions could equally be directed at the owner or operator of a nursing home or old persons' home as the case may be. Indeed, as onerous as it might appear, it is suggested in the *Lepore*, *Samin* and *Rich* cases that

[a] residential institution ... that does not take reasonable steps to institute a system such that its employees do not come into personal contact with a child or other vulnerable person unless supervised or accompanied by another adult should be held directly liable in negligence if abuse occurs in a situation in which there is neither supervision nor an accompanying adult.²⁰

¹⁸ Per Callinan J at 620.

¹⁹ Per McHugh J at 590.

²⁰ Per Gaudron J at 582.

It seems clear, then, that the non-delegable duty of care is managerial in nature, remaining at all times the personal duty of the business as employer. Essentially, the non-delegable duty requires a business subject to the duty to put in place appropriately structured and workable systems to make sure the risk of sexual abuse to those under the care of the business is minimised. To effectively carry out that non-delegable duty, the business can employ staff to carry out tasks associated with implementing those systems, but it is not sufficient for the business to simply employ staff in the hope there will be no sexual abuse by those employees – the business must take every reasonable step to put in place systems addressing such matters as the screening of potential employees and the supervision of employees when working, to make sure that the risk of sexual or physical abuse of any kind does not eventuate. As on-going and as constant as the duty might be, that is what the law requires.

Vicarious liability

The principle of vicarious liability states that an employer is liable for the torts committed by an employee in the course of his or her employment, even though the employer has done nothing wrong in the circumstances.²¹ In the allied health industry, it may be crucial for a victim of sexual abuse to establish vicarious liability since it will be the employer who pays the compensation rather than the employee, who may have no financial resources to compensate the victim.²²

In the context of sexual abuse committed by an employee, such as a teacher, against another, such as a student, the *Lepore*, *Samin* and *Rich* cases address two issues pertaining to the principle of vicarious liability:

²¹ See, generally, D Gardiner and F McGlone, *Outline of Torts* (2nd ed, 1998) 394-406.

²² In some circumstances, the employer can seek to be indemnified by the employee. See, generally, Gardiner and McGlone, above n 21, 405-406.

- i. Because sexual abuse invariably amounts to a criminal offence, can an employer be held vicariously liable for a criminal offence committed by its employee?
- ii. Because sexual abuse committed by an employee would be the antithesis of any employee's job, can it ever be considered to have occurred in the course of the employee's employment?

All justices of the High Court in the *Lepore, Samin* and *Rich* cases, with the exception of one of them,²³ explored the principle of vicarious liability and its application in the three cases. It is difficult to find a consensus in the judgments of the six justices,²⁴ but it is possible to identify two opposing viewpoints that emerge from the decision.

Vicarious liability for a criminal offence?

In the vast majority of cases, where an employer is held vicariously liable for the wrongdoing of an employee, the wrongdoing is a tort, i.e. a wrongdoing done by the employee to another, entitling that other to sue for financial compensation. Thus, where an employee has been negligent or has committed a battery (the voluntary application of direct force, whether intentional or negligent, to the person of another),²⁵ the wrongdoing is a tort for which the employer will be vicariously liable if the remaining elements of that principle are established. However, if the wrongdoing by the employee is a criminal wrongdoing rather than a tort, does the principle of

vicarious liability apply to make the employer liable for the employee's criminal conduct?

One of the stances adopted in the *Lepore, Samin* and *Rich* cases is what might be termed the 'narrow' view. That view held:

Negligent, even grossly negligent conduct is one thing, intentional criminal conduct is, and always has been altogether another ... Nothing could be further from the due performance of a teacher's duty than for him to molest children in his care. To make an employer vicariously liable for such gross and improper departures from the proper performance of a teacher's duties as sexual assault and molestation are, would be to impose upon it a responsibility beyond anything that ... it should reasonably bear.²⁶

On this view, because the plaintiffs had been the victims of a criminal act it was therefore not open to any of the students to argue a case on the basis of vicarious liability. On this view, because the commission of a criminal act by a teacher would be so far removed from his duties as an employee, vicarious liability cannot and should not be imposed on the employer on the basis of the commission of that criminal act. Thus, if an employee in a nursing home or geriatric ward, for example, was to criminally sexually abuse an elderly or infirm patient, as a matter of principle the employer would not be held vicariously liable for that criminal conduct.

The opposing viewpoint is what might be termed the 'broad' view. In addressing the specific issue of whether vicarious liability can apply to criminal conduct of an employee, another member of the High Court, after reviewing past court decisions that in his view dealt with the issue, concluded that '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

²³ Seven justices heard the appeal. Only McHugh J based his decision entirely on the issue of the non-delegable duty of care. With reference to the *Lepore* case, he commented at 590 that it was unnecessary to examine the principle of vicarious liability and its application in the case, given that '[t]he Australian common law ... has adopted a simpler and stricter test of liability', viz. the non-delegable duty of care.

²⁴ See the comments of Kirby J at 612 where he acknowledges the diversity of opinion about vicarious liability in the judgments in the *Lepore, Samin* and *Rich* cases.

²⁵ Gardiner and McGlone, above n 21, 59.

²⁶ Per Callinan J at 620-621.

overwhelmed by too many exceptions.²⁷ On this view, where an employee's conduct is a criminal offence, that fact by itself is not a bar to the injured person's seeking to argue vicarious liability. Similarly, where a nurse or carer employed by a nursing home criminally sexually abuses an elderly patient, the classification of that conduct as a criminal offence would not deny a claim for compensation by the patient under the principle of vicarious liability.

Sexual abuse and 'in the course of employment'

Vicarious liability holds that an employer is liable for the wrongdoings of an employee if those wrongdoings take place in the course of the employee's employment. The principles often used in determining the meaning and operation of the phrase 'in the course of employment' state that conduct takes place in the course of employment where it is -

- a wrongful act authorised by the employer, or
- a wrongful and unauthorised mode of doing some act authorised by the employer.²⁸

An act of sexual abuse by an employee, whether classified as a criminal offence or otherwise, is a wrongful act by the employee and as such would hardly be an act authorised by an employer. It would therefore be an act outside the scope of the employee's employment, sometimes referred to as a 'frolic' of the employee for which the employer is not liable. Therefore, an employer could only be vicariously liable for an act of sexual abuse by an employee if the act can be said to be 'a wrongful and unauthorised mode of doing some act authorised by the employer'.

²⁷ Per Kirby J at 616. Gleeson CJ at 5745 also acknowledges that vicarious liability can apply to intentional criminal conduct of an employee.

²⁸ These principles are commonly known as the Salmon principles and are referred to in the judgments of Gleeson CJ at 569, Gaudron J at 579, Gummow and Hayne JJ at 600, and Kirby J at 614-615.

It is simply not logical to describe an act of sexual abuse by any employee as a wrongful and unauthorised mode of performing an act authorised by the employer. But in any event, according to the narrow view discernible from the judgments in the *Lepore*, *Samin* and *Rich* cases, an employer can never be vicariously liable for an act of sexual abuse committed by an employee in the course of the employee's employment:

[D]eliberate criminal misconduct lies outside, and indeed will lie far outside the scope or course of an employed teacher's duty ... [D]eliberate criminal conduct is not properly to be regarded as connected with an employee's employment: it is the antithesis of a proper performance of the duties of an employee.²⁹

Pursuant to this view, as a matter of principle any criminal act, even one that in a practical sense is intricately connected with the very task that an employee was employed to do, will not amount to conduct in the course of employment. If a nurse or carer, for example, was to intentionally sexually fondle an elderly patient while bathing the patient as a part of his/her job, the employer could not be found vicariously liable for the criminal conduct of the nurse or carer simply because by definition the conduct is outside the course of the employee's employment.

But according to the broad view, it might be a different matter. In the *Lepore*, *Samin* and *Rich* cases the broad view draws heavily on *Lister's* case, the decision of the English House of Lords referred to above, and a decision of the Supreme Court of Canada in which an employer of a childcare counsellor, working in a not-for-profit residential home for children with behavioural disorders, was held vicariously liable for acts of sexual abuse by a counsellor against a child at the home.³⁰ In the judgments of two members of the High Court in the *Lepore*, *Samin* and *Rich* cases there

²⁹ Per Callinan J at 620-621.

³⁰ *Bazley v Curry* (1999) 174 DLR (4th) 71; [1999] 2 SCR 534 (*Bazley's* case).

is the suggestion that, given the significant new problem of sexual abuse and the need to provide victims of sexual abuse in Australia with a right to compensation, it is important for Australian law to march in step with the highest courts of England and Canada.³¹

The broad view suggests the following propositions:

- A wrongdoing of an employee will be in the course of employment if there is a 'sufficient connection' between the specific duties and responsibilities assigned to the employee within the enterprise and the wrongdoing.
- Relevant to determining the existence of the sufficient connection will be the nature of the teacher's duties and responsibilities with respect to the victim, and the degree of power and intimacy in the relationship between teacher and victim brought about by those responsibilities and duties; the degree of power and intimacy must be assessed by reference to such factors as the age of students, their particular vulnerability, and the nature and circumstances of the sexual misconduct.³²
- The fact that the employment provides the opportunity or occasion for the act of sexual abuse is not, of itself, sufficient to establish the sufficient connection.³³

³¹ See Kirby J at 609. In his examination of vicarious liability, Gleeson CJ at 568-575 also relies, to a lesser extent than Kirby J, on the decisions of English and Canadian courts.

³² See, for example, the views of Gleeson CJ at 571-575. Kirby J prefers a 'close connection' test and ties it to the 'enterprise risk' analysis proposed in *Bazley's* case, above n 30. He also expresses the view that the 'close connection' test is always 'a question of fact and degree' and that it involves 'value judgments and policy choices' requiring an answer to the question of 'whether, in the particular circumstances, it is just and reasonable to impose on the enterprise in question legal liability for the particular civil wrong done by its employee' (at 617).

³³ See, for example, Gleeson CJ at 574-575, 576, and Kirby J at 618.

The broad view is reflected in the judgment of one of the members of the High Court when, after quoting the views of several members of the House of Lords who had introduced and applied a 'close connection' test in *Lister's* case, he says:

If there is sufficient connection between what a particular teacher is employed to do, and sexual misconduct, for such misconduct fairly to be regarded 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 relationships, justifies that conclusion. It is not enough to say that teaching involves care. So it does; but it is necessary to be more precise 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 ... 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 that power and intimacy to commit sexual abuse may provide a sufficient connection between a 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.³⁴

Given this broad view, and because of the varying views expressed by other members of the High Court as to the principles that should determine the outcomes of the cases based on vicarious liability,³⁵ it was generally agreed that the three students in the *Lepore*, *Samin* and *Rich* cases should have the right to reargue their cases for vicarious liability at a new trial.

³⁴ Per Gleeson CJ at 574-575.

³⁵ An analysis of the differing views of Gaudron J, Kirby J, and Gummow and Hayne JJ about the principles that should apply to vicarious liability and its application in cases of sexual abuse by an employee is beyond the scope of this article.

Comment

If the broad view is to be the principle that determines whether an act of sexual abuse by an employee occurs in the course of employment – and in a sense whether that will happen may ultimately be determined by what the High Court may decide in a similar case in the future, given the diversity of views on the issue expressed by the seven members of the Court in the *Lepore*, *Samin* and *Rich* cases – a number of points seem arguable. The fact that an employee is simply on the staff of a particular enterprise or business in the allied health industry and is thereby, in a sense, provided with an opportunity to commit an act of sexual misconduct will not mean that any act of sexual abuse committed by the employee takes place in the course of employment. So, if a person employed as the accounts clerk in a nursing home was to sexually abuse a patient at the nursing home, it is arguable that that act of sexual misconduct would be found not to have taken place in the course of the accounts clerk's employment. Therefore, the employer of the accounts clerk would not be vicariously liable for the conduct of the accounts clerk.

Where, however, the specific responsibilities and tasks allocated to an employee, such as a nurse in a nursing home, bring about a situation between that nurse and a resident where the nurse acquires a significant degree of power and intimacy over the resident who is vulnerable by reason of his/her age or physical or mental characteristics for example, it may well be arguable that an act of sexual abuse committed by the nurse against the resident in such circumstances could be said to have occurred in the course of employment. So where the specific responsibilities of the nurse include, for example, bathing the resident, a task that the resident is incapable of performing because of infirmity, an act of sexual abuse committed by the nurse in such circumstances may arguably be said to occur in the course of employment. In the *Lepore* case, one of the teacher's assigned responsibilities was the

maintenance of discipline. This responsibility placed the teacher in a position of power in relation to the plaintiff who, by reason of his age and fear, perhaps, at being ordered to remove his clothing, became a vulnerable party in the circumstances. The inappropriate administration of punishment involving smacking the plaintiff on his bare bottom, whether done from a desire for sexual gratification or as a result of the teacher's sadistic leanings, arguably fell within the course of employment. On the other hand, if the conduct of the teacher was found to be so different from anything regarded as chastisement that it was nothing other than sexually predatory behaviour of the teacher, the behaviour would then bear no sufficient connection to the responsibilities of the teacher. The result would be that the conduct would constitute a frolic of the teacher for which the employer is not vicariously liable.³⁶

There are obvious difficulties with the meaning and operation of the 'sufficient connection' test. Whether there is a sufficient connection between the employment tasks assigned to the employee and the act of sexual misconduct is obviously a question of fact and degree. And it may be that not every place of employment in the allied health industry has an allocation of responsibilities for employees that would make the sufficient connection test easy to apply. But it is a test that attempts to address the principle of vicarious liability and its application to what surely is a problem demanding a solution. Whether it is endorsed and applied, or abandoned, or further defined by courts in future cases remains to be seen.

Conclusion

The *Lepore*, *Samin* and *Rich* cases provide an important decision of the High Court of Australia. It is true that the decision addresses the specific context of liability for acts of sexual abuse in schools. But it is also a case in which members of the Court make the

³⁶ See the comments of Gleeson CJ at 575.

observation that the principles of law with which the case is concerned are equally important for institutions and businesses that take on the responsibility of caring for the more vulnerable members of society, such as the elderly, the infirm, the very young and so on.

To a degree, the decision clarifies the meaning and content of the non-delegable duty of care owed by an education authority to students attending its schools, and it is difficult to see why this same duty of care would not apply in the case of institutions such as nursing homes and old people's homes. The case also gave the High Court an opportunity to clarify the meaning and application of the principle of vicarious liability in cases involving acts of sexual abuse committed by teachers against students. But because there are some very clearly opposing views in the judgments as to how the phrase 'in the course of employment' should be interpreted, there is really no consensus spelling out whether, and the circumstances in which, it might specifically include sexual misconduct by an employee. Perhaps in a future court decision these questions will be definitively and clearly answered.