NEW SOUTH WALES v LEPORE; SAMIN v QUEENSLAND; RICH v QUEENSLAND*

SCHOOLS’ RESPONSIBILITY FOR TEACHERS’ SEXUAL ASSAULT: NON-DELEGABLE DUTY AND VICARIOUS LIABILITY

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[In Lepore, the High Court jointly considered three cases which raised the question of whether a school authority could be held liable for the sexual assault of a pupil by a teacher while at school. There was a conflict of authority at the Court of Appeal level about whether the doctrine of non-delegable duty was available in such a situation. A majority of the High Court decided that non-delegable duty should be confined to negligence, and there are indications that non-delegable duty in the context of schools may not be seen favourably in the future. In relation to vicarious liability, the Court was divided. In the author’s view, this reflects a deep-seated concern about the basis of vicarious liability in a tort system that is otherwise deeply fault-oriented.]

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I  I NTRODUCTION

One of the enduring puzzles of the law of negligence, which is based on the idea that a person should pay compensation if they have been at fault in injuring another, is the concept of extending liability to parties who are not themselves at fault. This situation arises, for example, where an employee injures another employee and the employer is held either vicariously or directly liable. The latter is called non-delegable or personal duty. Both vicarious liability and non-delegable duty appear to arise even though there is no fault on the part of the liable party. Consider the situation where a person in the care of an institution is

* (2003) 195 ALR 412 (‘Lepore’).
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injured by a staff member of the institution, one of the people charged with providing that care. In the case where the institution is a school, what responsibility does it bear when a pupil is injured? This is a difficult question when the injury happens accidentally or negligently. It is even more difficult when the injury happens through a deliberate or even criminal course of conduct. Where the injury happens negligently in school hours, it has been clear in Australia since Commonwealth v Introvigne that the school is responsible on the basis of a non-delegable duty. Where the injury happens because of an intentional wrong by the teacher or employee, and the employer is not at fault, the courts have been divided on whether to apply the doctrine of non-delegable duty, or that of vicarious liability. In Lepore, the High Court had to consider these issues. In doing so, the majority held that a school is not liable for an intentional act of one of its teachers on the basis of non-delegable duty. The majority also held that whether a school can be vicariously liable for a teacher’s sexual assault depends on whether a close enough connection between the act and the employment can be established. The matter was remitted to the New South Wales District Court for determination.

II  THE CASE

A  The History of the Case

The three cases arose out of allegations that teachers had sexually assaulted students at school. Lepore was a seven year old pupil in New South Wales in 1978 who alleged that he had been sexually assaulted by a teacher in the context of punishment for misbehaviour. On several occasions he was sent to a small room, made to take his clothes off, smacked on his bare buttocks and indecently handled. Sometimes other boys were present. The teacher was convicted of common assault, fined and put on a good behaviour bond. He subsequently resigned from teaching. The trial judge did not make detailed findings on the facts, but there was no dispute that some assaults did occur. Nevertheless, Downs DCJ found that the State had not failed to exercise proper care in any way. On appeal, the case was argued on the basis of non-delegable duty. By majority, the New South Wales Court of Appeal held that non-delegable duty extended to such deliberate conduct. Mason P said:

In my view the State’s obligations to school pupils on school premises and during school hours extend to ensuring that they are not injured physically at the hands of an employed teacher (whether acting negligently or intentionally).2

Rich and Samin were pupils at a one-teacher state school in rural Queensland between 1963 and 1965. They were between seven and ten years old when the alleged assaults took place. The teacher concerned was convicted of sexual

1 (1982) 150 CLR 258 (‘Introvigne’).
assault and imprisoned. There was no allegation of fault against the State of Queensland. The statement of claim alleged that the assaults took place in school hours in the classroom or adjoining rooms. The case was argued on the basis of non-delegable duty. The Queensland Court of Appeal refused to follow the decision of the New South Wales Court of Appeal in *Lepore v New South Wales* and dismissed the appeal.\(^3\)

The High Court therefore had to resolve a difference of opinion at the Court of Appeal level on whether non-delegable duty could be held to exist in relation to a deliberate act. Counsel for Rich and Samin sought to replead the case on the basis of vicarious liability and the High Court permitted this. The Court held that there should be a new trial for Lepore, allowing the appeal, with McHugh J dissenting. In relation to Rich and Samin the appeal was dismissed, McHugh J again dissenting. However, despite the apparent strength of the decision, once again the Court has demonstrated a lack of unanimity on the principles to be applied.

**B The High Court’s Reasoning on Non-Delegable Duty**

All the judges agreed that a non-delegable duty is not an absolute duty to prevent harm. Even McHugh J, whose conception of non-delegable duty was the widest, said that the duty was not as wide as had been stated by Mason P in the New South Wales Court of Appeal. Although negligence had been involved in all of the High Court cases to date on non-delegable duty, McHugh J noted that one can sue in negligence even if the act is intentional.\(^5\) In his Honour’s view, a non-delegable duty is a duty to ensure that children are supervised with reasonable care rather than an absolute duty to prevent harm. McHugh J said that a reasonable education authority would have protected the pupil from the harm-causing event. In his Honour’s view, non-delegable duty includes responsibility even where the act is deliberate. However, McHugh J was alone in this view.

The other judges held that a non-delegable duty could not apply to deliberate acts. Gleeson CJ (with whom Callinan J agreed on the subject of non-delegable duty)\(^6\) observed that the increased stringency of the non-delegable duty is not about the standard of care, but about the inability to delegate the duty.\(^7\) In his Honour’s view, this meant that the standard of care for non-delegable duty had to remain the same as for a personal duty of care. It is a duty to take reasonable care, but one which cannot be delegated. As an intentional act is of a different character than a failure to take care,\(^8\) Gleeson CJ concluded that it was therefore outside the scope of the doctrine of non-delegable duty.

\(^3\) (2001) 52 NSWLR 420.
\(^7\) Ibid 498.
\(^8\) Ibid 422.
Gaudron J characterised a non-delegable duty as a positive duty to take reasonable care.\(^9\) The positive nature of the duty refers to the fact that the duty is generally a duty to do something specific, such as provide a safe system of work or a safe school environment. This is very similar to Gummow and Hayne JJ’s observation that the duty concerns the conduct of the activity rather than being ‘a duty to preserve against any and every harm’.\(^10\) Gaudron J noted that, in either case, ‘safe’ means ‘free of a foreseeable risk of harm’.\(^11\) Her Honour also noted that Gummow J’s statement in *Scott v Davis* that non-delegable duty is ‘in effect, the imposition of strict liability’\(^12\) did not mean that liability is established simply by proof of injury — one must still establish the duty in the first place, then breach and causation.\(^13\) If reasonable care was not taken to avoid a foreseeable risk of injury, then a school authority would be liable even if it employed someone to carry out that duty. Her Honour noted that a non-delegable duty lay on schools or organisations to take reasonable steps to eliminate abuse.\(^14\) This seems to suggest that, in some circumstances, a school could be liable on the basis of a non-delegable duty where an intentional tort had been carried out. However, Gaudron J emphasised that non-delegable duty was not strict liability. If reasonable care was not taken, the school was liable even if it had engaged a competent person. Her Honour said that an increased risk should lead to a duty of care, but that this had no bearing in the absence of fault.

Gummow and Hayne JJ began their joint judgment by suggesting that non-delegable duty is a sub-species of vicarious liability.\(^15\) In their Honours’ view, a party that provides care, supervision or exerts control over others should ensure that its delegates act with reasonable care; but this does not mean that they are responsible for intentional defaults by those delegates.\(^16\) Their Honours went on to observe that all of the cases in which a non-delegable duty has been found have been cases of negligence. In their view, to extend non-delegable duty to intentional acts would be to sever its relationship with negligence.\(^17\) This is directly contrary to McHugh J’s argument that to plead in negligence is merely a minimum requirement for negligence. According to his Honour, one can be sued in negligence for deliberate actions.

It is submitted that the issue of whether intentional infliction of harm can found a claim in negligence is not as clear as Gummow and Hayne JJ suggested. *Williams v Milotin*\(^18\) was given as authority for the proposition that it cannot. While *Williams v Milotin* clearly decided that the causes of action in trespass, which involves intent, and negligence are different, in that case the High Court

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\(^9\) Ibid 439.
\(^10\) Ibid 479.
\(^11\) Ibid 439.
\(^12\) (2000) 204 CLR 333, 417.
\(^14\) Ibid 445.
\(^15\) Ibid 478.
\(^16\) Ibid 479.
\(^17\) Ibid.
\(^18\) (1957) 97 CLR 465.
allowed a plaintiff to bring his action in both negligence and trespass where the negligence of the defendant was in issue.

Gummow and Hayne JJ further argued that the extension of non-delegable duty to intentional torts should be rejected because doing so would leave no room for orthodox vicarious liability. This appears to be a reference to the ‘incompatibility’ doctrine which appeared in *Sullivan v Moody*. In that case, the High Court held that where finding ‘a duty of care would so cut across other legal principles as to impair their proper application … there is no duty of care of the kind asserted.’ So, where duties could conflict or areas of law would seem to be affected by the expansion of the duty of care in a novel case, a court would not allow that expansion. This is simply a different way of discussing the concern that has always existed for the courts. The classic example was the rule that economic loss was the domain of contract, a rule that *Hedley, Byrne & Co v Heller & Partners* began to overturn. In *Sullivan v Moody*, the High Court appeared to give a name to this conservative approach. This ‘incompatibility’ doctrine is premised on the view that the coherence of the law depends on its structures remaining static and there being no conflict or overlap between different areas of law. However, if that were so, the law of negligence itself would never have developed. The other judges in *Lepore* did not refer to the incompatibility doctrine.

In Kirby J’s view, non-delegable duty should not be used when vicarious liability could be used, as in this case. His Honour said that non-delegable duty was really a device ‘to bring home liability in instances that would otherwise have fallen outside the recognised categories of vicarious liability.’

Callinan J generally agreed with the reasoning of Heydon JA in the New South Wales Court of Appeal, rejecting the use of non-delegable duty in relation to criminal or intentional acts such as sexual assault.

**C Specifying the Content of Non-Delegable Duty**

The High Court has clearly established that non-delegable duty is to be confined to negligence and cannot be applied to intentional acts. However, the scope of non-delegable duty has only been marginally clarified. What most of the judges have emphasised, even if only sub silentio, is that specifying the content of the non-delegable duty is critical. It is submitted that this is what was meant by Gaudron J’s reference to ‘positive duty’ and her Honour’s gloss on Gummow J’s discussion in *Scott v Davis*. Gummow and Hayne JJ noted that non-delegable duty ‘transformed a duty to act carefully into a duty to achieve a

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19 (2001) 207 CLR 562. There the Court decided that to hold that a welfare organisation owed a duty of care to a father who had been accused of sexually assaulting his child would be incompatible with both the duty of the organisation to the child and with the law of defamation.
20 Ibid 580 (Gleeson CJ, Gaudron, McHugh, Hayne and Callinan JJ).
23 Ibid 498.
particular result.'\textsuperscript{24} McHugh J also emphasised that the content of the duty has to be defined. His Honour said that ‘a state education authority owes a duty to a pupil to take reasonable care to prevent harm to the pupil.'\textsuperscript{25} In the case of a state authority, this arises from compulsory education. In the case of a private school, it arises out of contract. In either case, it arises because of the immaturity of the pupil, the control of the school and ‘because the authority has assumed responsibility for the child’s protection’.\textsuperscript{26} The duty needs to be carried out by reasonable supervision, but it is not so wide as to require the authority to ensure absolutely that the child is not harmed. The duty is to take reasonable care to ensure that the pupil is so supervised that he or she does not suffer harm. … [What] the pupil has to show is that, given the general situation that gave rise to the harm suffered, a reasonable education authority would have protected the pupil from the harm-causing event.\textsuperscript{27}

McHugh J suggested that in order to prevent liability, education authorities can:

- institute systems that will weed out or give early warning signs of potential offenders;
- deter misconduct by having classes inspected without warning;
- prohibit teachers from seeing a pupil without the presence of another teacher, particularly during recesses;
- encourage teachers and pupils to complain to the school authorities and parents about any signs of aberrant or unusual behaviour on the part of a teacher.\textsuperscript{28}

Gleeson CJ, referring to the judgment of Lord Greene MR in \textit{Gold v Essex County Council}\textsuperscript{29} noted that ‘[H]is Lordship’s insistence that the first step is to identify the extent of the obligation that arises out of a particular relationship … is important.’\textsuperscript{30} Once this specific content is established, the question is what standard of care should be applied. Gummow and Hayne JJ observed that a reasonable party charged with the care of others will itself act with reasonable care and ensure that its delegates act with reasonable care.\textsuperscript{31} Gleeson CJ noted that the duty is to take reasonable care and that it is a duty which cannot be delegated. This seems similar to Gaudron J’s formulation that it is a duty which does not extend beyond taking reasonable care to avoid a foreseeable risk of injury.

\textsuperscript{24} Ibid 475–6.
\textsuperscript{25} Ibid 447.
\textsuperscript{26} Ibid 449.
\textsuperscript{27} Ibid 454.
\textsuperscript{28} Ibid 456.
\textsuperscript{29} [1942] KB 293, 301–2.
\textsuperscript{30} \textit{Lepore} (2003) 195 ALR 412, 420.
\textsuperscript{31} Ibid 478–9.
D A Shadow on Non-Delegable Duty?

The Court did nothing so radical as to overrule Introvigne or any of the other non-delegable duty cases. There was no expression of disapproval of non-delegable duty in the context of hospitals or employment, but rumblings can be discerned. Gleeson CJ discussed Introvigne as a case which, but for ‘a quirk of federalism’, would have been decided on the basis of vicarious liability. Gummow and Hayne JJ, in discussing the landmark non-delegable duty cases in Australia, Introvigne, Kondis v State Transport Authority and Burnie Port Authority v General Jones Pty Ltd, said:

A reading of the cases suggests perhaps no more than pragmatic responses to perceived injustices or other shortcomings associated with the doctrine of common employment, the rules respecting vicarious liability and the rule in Rylands v Fletcher. The leading United States text concludes: ‘It is difficult to suggest any criterion by which the non-delegable character of such duties may be determined other than the conclusion of the courts that the responsibility is so important to the community that the employer should not be permitted to transfer it to another.’

The foregoing suggests the need for considerable caution in developing any new species of this genus of liability.

In relation to this point, Callinan J’s direct approval of Heydon JA’s dissent in the New South Wales Court of Appeal in Lepore v New South Wales is significant. Heydon JA gave a detailed analysis of the treatment of Introvigne in the cases and said it was at least questionable whether Introvigne had a clear ratio or had been approved directly. His Honour discussed the line of High Court cases that considered non-delegable duty and argued that the favourable comments made about Introvigne have all been made in cases with very different contexts from that of Introvigne itself. Notably, there have been no cases about the duty of school authorities. Added to this is the argument of Gummow and Hayne JJ that non-delegable duty used in this way is incompatible with vicarious liability and Kirby J’s preference for vicarious liability. Thus there is a strong indication given by four High Court judges and one judge who has recently been elevated to the High Court (Heydon J) that the non-delegable duty as it has been conceived in Australia is a concept which may be on the wane.

32 Ibid 422.
34 (1994) 179 CLR 520.
38 Lepore v New South Wales (2001) 52 NSWLR 420, 441 (Heydon JA).
E Vicarious Liability — A Brief History

It is worth sketching the background to vicarious liability. Vicarious liability arises in the employment context where, for example, an employee commits a tort within the course of his or her employment. However the range of possible meanings of ‘within the course of employment’ is wide. Many cases have held employers vicariously liable for acts of employees prohibited by the employer, or acts which seem at first glance not to be part of their work. Where an act is wrongful, Salmond’s test has often been the starting point for the court — if the act ‘is either (a) a wrongful act authorised by the master, or (b) a wrongful and unauthorised mode of doing some act authorised by the master’ then it may be regarded as within the course of employment. A question arises as to whether a sexual assault of a pupil by a teacher is something so far outside the contemplation of employment as to be something for which the employer cannot be held vicariously liable. This issue confronted the High Court in Lepore. Two leading cases seem to establish that an employer can be vicariously liable for an employee’s intentional wrong. In Lloyd v Grace, Smith & Co, a solicitor’s clerk defrauded a client of the firm. The firm was held vicariously liable on the basis of ostensible authority, even though the fraud had not been committed for the firm’s benefit. In Morris v C W Martin & Sons Ltd, a person sent a fur coat to a furrier to be cleaned. The furrier sent it to cleaners whose employee (with the job of cleaning the coat) stole it. The cleaners were held liable because the employment of the tortfeasor included physically holding the fur. The theft was thus said to be committed in the course of employment.

F The High Court’s Reasoning on Vicarious Liability

McHugh J’s view of non-delegable duty made it unnecessary to decide the issue of vicarious liability in Lepore. However, the other judges’ reasoning required them to consider vicarious liability in detail. The Court had the benefit of both the House of Lords and the Supreme Court of Canada have recently considered the question of vicarious liability of educational authorities for sexual assault. In Bazley v Curry and Jacobi v Griffiths, the Supreme Court of Canada took the approach that where there was a significant

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40 Bigge v Brown (1919) 26 CLR 110; Colonial Mutual Life Assurance Society Ltd v Producers and Citizens Cooperative Insurance Co of Australia Ltd (1931) 46 CLR 41; Limpus v London General Omnibus Co (1862) 1 Hurl & C 526; 158 ER 993; Rose v Plenty [1976] 1 All ER 993 (Court of Appeal).
41 The courts have contrasted ‘mere detours’ with ‘frolics’: see, eg, Chaplin v Dunstan Ltd [1938] SASR 245; Harvey v R G O’Dell Ltd [1958] 2 QB 78; contra Storey v Ashton (1869) LR 4 QB 476. See also Heasmans v Clarity Cleaning Co Ltd [1987] ICR 949.
43 [1912] AC 716 (‘Lloyd’).
44 [1966] 1 QB 716 (‘Morris’).
45 [1999] 2 SCR 534 (‘Bazley’).
46 [1999] 2 SCR 570 (‘Jacobi’).
cant increase in risk as a consequence of the employer’s enterprise, vicarious liability could arise, even for intentional or criminal acts that were inimical to that enterprise. The Court made this decision on the basis of a frank discussion of the policy underlying vicarious liability. In *Bazley*, McLachlin J gave the judgment of the Court. Her Honour emphasised that the three policy rationales for vicarious liability — employee acting in furtherance of employer’s aims; employee’s creation of situation of friction; and fairness — were all connected by the thread of creation of risk by the employer.\(^{47}\) The other two policy bases which her Honour discussed were the policy of providing a just and practical remedy to the victim (which, more cynically, has been called the ‘deep pocket’ justification) and deterrence. In her Honour’s view, to decide whether there was vicarious liability, the court should first openly confront the question of whether liability should arise against the employer and secondly, decide whether the wrongful act is sufficiently related to the employment. The test for the second stage was that it would be sufficiently related if there was a ‘significant connection’ between the ‘creation or enhancement of a risk and the wrong that accrues therefrom’.\(^{48}\) Her Honour also listed factors that would be taken into account in deciding whether the employer had created or enhanced the risk.

The majority of the High Court rejected this approach, at least in the form stated in *Bazley*. The majority preferred to use an approach similar to that of the House of Lords in *Lister v Hesley Hall Ltd*,\(^{49}\) which emphasised the closeness of the connection between the wrongful act and the employment. Gleeson CJ referred to Salmond's test for the course of employment and noted that this test is the basis of the leading Australian case, *Deatons Pty Ltd v Flew*.\(^{50}\) His Honour noted that the course of employment has functional, as well as geographical and temporal, aspects. This makes it very important to establish in detail what the employee was meant to do. When Gleeson CJ considered the cases of *Lloyd*\(^{51}\) and *Morris*,\(^{52}\) in which fraud and theft by an employee respectively were held capable of giving rise to vicarious liability on the part of the employer, his Honour emphasised that in those cases the employee was undertaking duties imposed by the nature of the employer’s business. If the solicitor’s clerk had assaulted the client, the solicitor would not have been liable.\(^{53}\)

Gleeson CJ said that when the special responsibility of an employee is a protective function and an intentional wrongful act causes harm, then it is crucial for the court to scrutinise the specific responsibilities of the employee. It is through such scrutiny that the court can determine whether there is a sufficient connection between the employment and the wrongful act to found vicarious liability. His Honour noted that, in the school context, the element of protection

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48 Ibid 559.
49 [2002] 1 AC 215 (‘Lister’).
51 [1912] AC 716.
52 [1966] 1 QB 716.
required in the school–pupil relationship made it difficult to argue for vicarious liability. What was needed was a sufficient connection between the employment and the sexual abuse. Gleeson CJ suggested that in the case of Lepore, the chastisement in private at school might create a situation where the employment was very closely connected to sexual assault. However, because the determination of facts by the trial judge was so unsatisfactory, whether this was in fact the case could not be decided by the High Court. In his Honour’s view, there appears to have been nothing about the duties or responsibilities of the teacher that would have involved him in a relationship with his pupils of such a kind as would justify a conclusion that sexual assault was in the course of his employment.

Gaudron J also used the ‘sufficient connection’ test, but as a criterion for the application of estoppel. Her Honour noted the lack of a comprehensive, jurisprudential basis for vicarious liability, suggesting that the reason for this may be that the policy basis of decisions is not always acknowledged in cases. Her Honour noted that justifications for vicarious liability based on authorisation, as in Lloyd, were really based on the law of principal and agent. This is significant because the agent acts as the principal in a way in which the employee does not act as the employer. In her Honour’s view, most of the cases allowing vicarious liability for deliberate criminal acts are unsatisfactory. In particular, her Honour singled out Morris and Photo Production Ltd v Securicor Transport Ltd as unsatisfactory: the former because she did not accept that theft could be part of the course of employment and the latter because it was ultimately decided on the basis of an exclusion clause and could have been decided on the basis of ordinary or direct duty. Gaudron J also distinguished Bazley and Jacobi on the basis that they were not about ordinary school settings. Her Honour’s criticism of Bazley is valid because its conception of the material increase in risk focused on foreseeable risk and should therefore be dealt with as non-delegable or personal duty. In her Honour’s view, that is not a basis for vicarious liability. Gaudron and Kirby JJ both thought that vicarious liability should not be used in situations where a person could be directly liable. Gaudron J’s reason for this was that this might lead a person held liable to think (wrongly) that they were not at fault.

Her Honour argued that the doctrine of ostensible authority used in Lloyd is a species of estoppel, and that the only principled way to have vicarious liability for an intentional act is on the basis of estoppel. The test, as articulated by Gaudron J, is

whether the person in question has acted in such a way that a person in the position of a person seeking the benefit of the estoppel would reasonably assume the existence of a particular state of affairs … the relevant state of affairs is simply that the person whose acts or omissions are in question was acting as the

54 Ibid 429.
55 [1912] AC 716.
58 Ibid 446.
servant or agent or representative of the person against whom liability is as-
serted.59

Generally, her Honour said, the person would not be estopped unless there was
a close connection between the wrong and what the person was engaged to do.60

Gummow and Hayne JJ discussed Pollock’s view of vicarious liability61 —
which is based on the employer bringing about the conditions for, or creating the
risk of, the wrong occurring — and on deterrence. Pollock’s view is that this
justified the requirement that employers could only be vicariously liable for acts
done within the course of employment. Their Honours observed that Lister does
not stand for any single principle, but that the majority used orthodox vicarious
liability principles in their decisions.62 Their Honours’ reason for rejecting the
Bazley approach was that it goes beyond Pollock in including risks antithetical to
the venture as well as those in furtherance of it.63 In their Honours’ view, Bazley
gives no bright line test for vicarious liability and ignores a number of important
factors, including the intentional nature of the conduct, the fact that it breaches
the contract of employment and that the criminal law is apparently no deterrent.
If the concept of enterprise risk or increasing the risk of the wrong is important,
then in their view the course of employment becomes even more significant.64

The central issue then is what the employee was hired to do. In this, Gummow
and Hayne JJ agreed with Gleeson CJ. Thus their Honours would limit situations
where vicarious liability could arise to those where there was activity in intended
pursuit or performance of the contract of employment or actively done with
ostensible authority. The limits of vicarious liability for deliberate acts had
already been set by Deatons65 In their view, deliberate sexual assault could not
be seen as an unintended by-product of the employer’s venture, nor as something
for which the teacher had ostensible authority. They also referred to estoppel in
relation to Lloyd. In such a case, they said, the employer who had a contract with
a client might be estopped from denying authority was given to their employee.
But their Honours’ ultimate position was that to hold a state liable for sexual
assault in a school would be “to strip any content from the course of employ-
ment”.66

Kirby J regarded policy as the decisive factor in determining vicarious liability
and stated that he had been influenced by both Lister and the Canadian cases.
His Honour referred to fair and efficient compensation and deterrence as
discussed in Bazley as central issues.67 Kirby J favoured a risk analysis like that
undertaken in Bazley and a ‘close connection’ test drawing on Lister. His Honour

60 Ibid 446.
ALR 412, 463.
63 Ibid 469.
64 Ibid.
65 (1949) 79 CLR 370.
said that Australian law had maintained that intentional wrongdoing is no bar to vicarious liability, rejecting what he called ‘feeble attempts to distinguish’ cases such as Morris on the basis of their causes of action. In his view vicarious liability could exist for an intentional act when there is a ‘sufficiently close connection’ to the employment, in a situation where the employer ‘materially and significantly enhanced or exacerbated the risk’ and where wrongs were done by employees against vulnerable people put at risk by the employer’s enterprise. Thus Kirby J combined the Bazley emphasis on increased risk with the Lister close connection test. His Honour noted that close connection could be causal or temporal. In this case, Kirby J suggested that the intimacy might be regarded as enhancing or exacerbating the risk.

Callinan J’s judgment is most surprising in its forthrightness. His Honour held that vicarious liability for an intentional criminal act would be an unreasonable burden to impose on an employer. Callinan J observed that a ‘connection’ as required by Lister could be found in any case, which, it is submitted, was a reference to the problem that defining course of employment appears to depend on the level of generality with which the employment is described. Gleeson CJ also referred to this well-recognised problem. In Callinan J’s view, the limit of vicarious liability in a school situation would be if a teacher unintentionally, but negligently, exceeded reasonable chastisement. His Honour referred briefly to Lloyd and Morris (which his Honour distinguished on the basis of their causes of action) but did not consider any of the other cases where the employee or the principal’s agent appears to have deliberately done wrong.

Is it therefore possible for a school authority to be held vicariously liable for the sexual assault of a pupil by a teacher at school? Three judges seemed to consider that it might be possible — Gleeson CJ, Gaudron and Kirby JJ. Three judges seemed to think it was not possible — Callinan, Gummow and Hayne JJ. However, Gummow and Hayne JJ left the matter slightly open by stating the limits of vicarious liability to be those of the Deatons test. That is, vicarious liability can arise where the conduct was done in intended pursuit of the employer’s interest or the employment, or where it was done with ostensible authority. It is clear that any intentional act which would meet the Deatons test would remain covered, but only a minority of the Court was willing to go beyond that. For these judges, what was critical was the close connection to be established between the act at issue and the employment.

III COMMENT

A Non-Delegable Duty

As the High Court noted, the earliest examples of non-delegable duty arose as a means for the courts to circumvent defences which would defeat both ordinary negligence and vicarious liability. These defences were common employment,
contributory negligence and voluntary assumption of risk. In the late 19th and early 20th centuries, these defences operated as complete defences and defeated many negligence cases which would otherwise have been considered quite worthy. In England in *Wilsons and Clyde Coal Co Ltd v English*, non-delegable duty was used to prevent an employer from arguing that, having delegated a duty, he had done all that was necessary to discharge that duty. The language used was ‘seeing’ that a duty was performed, which came from the 1881 case of *Dalton v Angus*.

In Australia, non-delegable duty received a new lease of life with the case of *Introvigne*. The cases following it developed the view that a non-delegable duty arises where there is vulnerability on one side and power or control on the other. The development of the proximity-as-principle test and its later fall from grace all came after *Introvigne* was decided. For some time the test for negligence could have been formulated as whether there was reasonable foreseeability of harm and whether the plaintiff and defendant were in a relationship of proximity which the court could recognise. One of the forms of proximate relationship recognisable was where there was vulnerability on one side and power and control on the other, as in hospitals and schools.

In *Burnie Port Authority v General Jones Pty Ltd*, this idea of proximity was used to overrule *Rylands v Fletcher*. Here it seems that the High Court used non-delegable duty (rather than the ordinary duty which would also have fit the facts) because it was overruling *Rylands v Fletcher*, which imposed strict liability; ‘non-delegable duty’ gave a connotation of strictness even if it was not a strict liability matter. It could be argued that this was an unnecessary use of non-delegable duty and one of the factors contributing to the loss of legitimacy and decline of proximity in Australia. One of the difficulties in determining the meaning of non-delegable duty has been that the case law to date does not distinguish clearly between ordinary and special (non-delegable) duties of care. This has been exacerbated in recent years by an emphasis on vulnerability in assessing the ordinary duty of care. Examples are *Crimmins v Stevedoring Industry Finance Committee* (where the emphasis may have been appropriate given that the injured worker was an employee of sorts), *Pyrenees Shire Council v Day* and *Perre v Apand Pty Ltd*, among others. This use of vulnerability

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70 [1938] AC 57.
71 (1881) 6 App Cas 740.
74 See *Jaensch v Coffey* (1983) 155 CLR 549, 583 (Deane J), where proximity was first proposed as a limit on the duty of care in Australia. See also *Sutherland Shire Council v Heyman* (1985) 157 CLR 424; *Australian Safeway Stores v Zaluzna* (1987) 162 CLR 479; *Burnie Port Author- ity v General Jones* (1994) 179 CLR 520; *Bryan v Maloney* (1995) 182 CLR 609.
77 (1868) LR 3 HL 330.
as a criterion for the ordinary duty of care blurs the distinction between those individuals to whom an ordinary duty of care is owed and those vulnerable individuals to whom a special duty is owed. However, this particular criticism of non-delegable duty is not one which the High Court has chosen to make. Rather, the Court has struck at the doctrinal and precedential status of non-delegable duty.

During the thirty year period between 1970 and 2000, negligence was a juggernaut which appeared to be unstoppable. The law of negligence has been under attack in Australia in recent times, partly because of the insurance crisis. The criticism has been that negligence has become too unwieldy and has been too eager to compensate. This fails to acknowledge that the High Court has been putting the law of negligence to flight for the past few years. It has been apparent since the decision in Romeov Conservation Commission of the Northern Territory, and a series of subsequent cases, that the High Court has taken on the task of turning the law of negligence around. A consideration of the cases suggests that this is, at least partly, a search for a general principle. This is evidenced, for example, by the cases which abolished special rules, such as Brodie v Singleton Shire Council, Northern Sandblasting Pty Ltd v Harris and Tame v New South Wales. An attempt to expand non-delegable duty has now been firmly rejected, and a signal sent that non-delegable duty may later be disapproved. This might be regarded as another example of an attempt to find a more general approach to negligence.

B Vicarious Liability

Although a clear majority of the High Court decided each of the appeals, the decision on the law was far less clear. Three judges have decided that sexual assault cannot be part of the course of employment and three judges have decided that it can be. The latter three judges have added extra facets to the test for wrongful employment to address the difficulty of dealing with intentional acts of this kind. Their Honours have added a requirement of ‘close connection’ and elements drawn from enterprise risk to validate what may be an unpopular view, arising perhaps from an unwillingness to see children entirely without redress in this situation. What is clear from all the judgments is an insistence on

85 (2001) 206 CLR 512, which abolished the highway non-feasance immunity rule.
86 (1997) 188 CLR 313, which confirmed the abolition of landlord’s immunity.
87 (2002) 191 ALR 449. In this case the High Court rejected the specific rules for nervous shock liability such as the requirement of sudden sensory perception with the unaided senses.
Vicarious liability is a strict liability matter in the sense that it imposes liability regardless of fault. But tort law generally is deeply fault-based. It reflects our deep-seated psychological and moral convictions that responsibility should be attributed to someone on the basis of fault and that other forms of responsibility have less validity. The issue of vicarious liability is thus a difficult one in a fault-based system. What we see in the cases on vicarious liability is courts struggling to justify the imposition of liability on a person who has done nothing wrong. It is this struggle which compels the courts to rely heavily on policy arguments in an attempt to justify the outcome. Gaudron J implicitly acknowledged this when she said that the Supreme Court of Canada, in using the creation or enhancement of risk theory, is really talking about foreseeability. This theory implicitly puts the vicariously liable party at fault and relieves the sense that moral and legal responsibility are at odds in the area of vicarious liability. Again, Gaudron J is right to point to the agency basis of some of the cases on vicarious liability as being profoundly different from the employer–employee cases. The difference between these cases is pointed out by Peter Cane. Where an employer is responsible for an employee’s wrong, there is no attribution of the wrong to the employer. However, in the situation of principal and agent, the agent stands in the shoes of the principal so that the agent is the principal at that moment and responsibility is attributed to the principal. Thus, as soon as a situation of possible vicarious liability moves out of a clear fit with the course of employment, difficulties arise. A clear fit implicitly makes the employer and wrongdoer the same person and the attribution of liability or responsibility to the employer is far less problematic. However, where there seems to be a clear separation between the employer and employee, as when a person does something that seems entirely contrary to the employment, it offends our naive sense of attribution of responsibility. It then becomes far more important to justify the outcome with policy arguments, one of which is the desire to ensure that a person who has been an innocent victim is compensated. This explains the split in Lepore. On one hand were the judges who wished to retain the traditional course of employment rule and who rejected the possibility of vicarious liability for teachers’ sexual assault of pupils. These judges’ views are strongly connected to notions of personal autonomy and responsibility generally. On the other hand were those judges who contemplated the possibility of imposing vicarious liability.

IV Conclusion

Unfortunately, the High Court has once again failed to clarify the law to the point where solicitors can safely advise their clients. The initial excitement at finding a six to one decision quickly fades when one realises that the ratio of *Lepore* is difficult to find and that the judgments differ on various points. It is clear that non-delegable duty is not to be expanded to cover intentional torts, but real clarification of the limits of vicarious liability for intentional conduct remains hovering just over the horizon. Unfortunately, despite the opportunity offered by a case raising the issue, the High Court has failed to give education authorities and other employers clear guidance on how to protect themselves. This failure raises the prospect of innocent victims again being forced onto the long road of litigation all the way to the High Court.