

Protection at school - the liability of school authorities for teacher misconduct

**Jan McDonald Associate
Professor of Law Bond
University**

Epidemics of flu, gastro and head lice aside, the school environment is generally a safe one. School authorities take care to select appropriate teaching staff. They establish procedures for the supervision of playgrounds, fire and emergency evacuation, and the conduct of sporting and other outdoor events. These procedures ensure that many potential accidents are prevented: science experiments are conducted with care; fights are broken up before anyone gets hurt; classrooms are emptied before fumes or smoke can overwhelm; swimming pools are protected by shade cloth. Occasionally, however, injuries do occur. Many of these injuries are the result of nothing more than unfortunate and unavoidable accidents among boisterous youths. A smaller number result from the intentional torts of third parties, especially assaults and batteries. This article considers recent developments in the law regarding cases where a teacher's tortious conduct injures a student. In particular, it compares two decisions of the New South Wales and Queensland Courts of Appeal, and examines their reasoning in light of relevant High court decisions.

School authorities are vicariously liable for the torts of employees committed within the scope of their employment

When a teacher injures a student in the course of his or her employment, the law has no difficulty in imposing *vicarious liability* on the school authority as the teacher's employer. The school will be vicariously liable for all acts of its teachers and other employees that are performed within the scope of their employment. This is so, even where the school may have expressly prohibited the way in which the teacher performs the acts.¹ Take the example of a teacher who is administering over-zealous corporal punishment by caning a student until the bones in the student's hand break. Assuming that it is part of a teacher's job to discipline students, the school authority will be vicariously liable for the injuries caused. Even if the teacher has breached school guidelines on the use of corporal punishment, the court will say that the teacher was performing an authorised act (i.e. discipline), albeit in an unauthorised manner.² In such cases, the courts impute to the employer the "benefit" derived from the employee's conduct. They say that, since the acts were done for the employer's benefit, the employer should bear responsibility for them.

School authorities owe a non-delegable duty to students

Under general principles of vicarious liability, once an employee acts outside the scope of his employment, the employer cannot be held liable. The employee is regarded as behaving like a stranger, off on a “frolic” of his or her own.³ He or she is not acting as a delegate of the school’s duties and powers. Similarly, if the tortious conduct is performed by an independent contractor, rather than an employee, courts will generally assume that contractors will take responsibility for their own carelessness. There are, however, a small number of circumstances in which courts have recognised a special personal duty on the part of certain persons that makes them liable for injuries to people within their care that are caused by the tort of their delegates, be they independent contractors or employees acting beyond the scope of employment. These cases are exceptional because liability in tort generally requires proof of fault or blame. As Mason P of the NSW Court of Appeal explains,

*the attribution of vicarious liability or a non-delegable duty of care are situations where legal responsibility is fixed upon an “innocent” party by reason of some antecedent relationship with the victim and some capacity to control the conduct of the individual wrongdoer.*⁴

The relationship between school and student is one such relationship.

Primary and secondary school education is compulsory in Australia. Students are beyond the protective care of their parents while at school; during that time, the school is said to stand in loco parentis (in the position of parent) to the pupil. Students are not in a position to protect themselves from harm while at school. Courts have therefore taken a strict view of the duty of care that school authorities owe to their students.⁵ The High Court of Australia has described this duty as non-delegable.⁶ This means that a school cannot simply delegate its obligations to an employee or contract-worker, and wash its hands of responsibility should anything untoward occur. It will continue to owe a personal duty to every student, to ensure that reasonable care is taken for their safety.⁷ In the leading High Court decision regarding school authorities, Mason J described it thus:

*...there is liability on the part of the school authority for its failure to take reasonable steps to prevent the escape of the child on to the highway. It proceeds on the footing that the duty is not discharged by merely appointing competent staff and leaving it to the staff to take appropriate steps for the care of the children. It is a duty to ensure that reasonable steps are taken for the safety of the children, a duty the performance of which cannot be delegated.*⁸

The content of the non-delegable duty

Of course, the question that arises from this is what does “a duty to ensure that reasonable care is taken” entail? If, for example, a student is struck by lightning while playing on a school oval, has the school failed to ensure that reasonable care is taken? Assuming that the bolt of lightning was a freak strike and that the school usually urged students to leave the oval during electrical storms (rather than providing them all with golf clubs and telling them to hold them above their heads!) one would be inclined to say that this was simply an accident, albeit with tragic consequences. If a student is

injured by a deliberate blow from another student, struck during a playground brawl, the school will only be liable for breaching its non-delegable duty if its system of supervision is shown to be inadequate.⁹

The answer is far more complex when harm is inflicted intentionally by a teacher, acting for personal gratification rather than within their role as teacher. Such is the case when a teacher sexually assaults a student. Clearly, this situation falls outside the scope of vicarious liability because the teacher’s conduct is beyond the scope of his or her employment. Assuming that the teacher is prosecuted for criminal assault, to what extent should the plaintiff victim be able to recover from the school authority for failing to protect them from that person while at school? The Queensland and New South Wales Courts of Appeal appear unable to agree.

In *Lepore v State of New South Wales & Anor*,¹⁰ the New South Wales Court of Appeal held that the school breached its non-delegable duty of care when its delegate teacher sexually assaulted the plaintiff. The plaintiff was indecently touched and had been beaten on the naked buttocks in front of other students when he was a primary school student. By contrast, the Queensland Court of Appeal in *Rich & Samin v State of Queensland & Others*¹¹ rejected the NSW approach on the grounds that the non-delegable duty did not impose strict liability on school authorities. The Court held that students who had been indecently assaulted and raped by their teacher while at school would have to allege specific acts or omissions on the part of the school authority that constituted breach of its duty of care to students.

In order to assess which is the preferable view, the reasoning in each case needs to be considered in more detail. The plaintiff in *Lepore* did not allege any failure on the part of the school authority itself, such as a failure to supervise the behaviour of teachers. Instead, he pointed to the intentional tort of the teacher and argued that the very fact of this assault demonstrated that the school authority had failed to ensure that reasonable care was taken. By a majority of 2:1, the Court of Appeal held that there was no conceptual justification for distinguishing between intentionally and negligently inflicted harm and held the school liable.¹²

Mason P and Davis JA saw an analogy between relationships that give rise to a non-delegable duty and the relationship between a bailor and bailee of goods. If a person (the bailor) entrusts goods to another (the bailee), that bailee is duty bound to ensure the goods’ safe return and will be liable for their loss or damage, even if the goods are stolen by some third party. Thus, a woman who left her mink coat with a cleaning company for dry-cleaning was able to recover its value from them when the coat was stolen by a rogue employee of the specialist company to whom the cleaning company had sent it. According to their Honours, were a different approach to be taken to a school’s non-delegable duty, the law would “impose a higher responsibility on a bailee for looking after a fur coat than it does on a school authority for looking after a child.”¹³

Since all vicarious liability is a form of strict liability in any event, the Court saw no conceptual obstacle to extending the non-delegable duty of the school authority to protecting students from the intentional torts of its delegates and agents.¹⁴ There was, in their Honours’ view, an important difference between injuries suffered at the hands of a fellow student and those inflicted by the school authority’s own delegate, the teacher.¹⁵ Provided the school has implemented an

appropriate system of supervision, it will not be held liable for schoolyard injuries caused by other students.¹⁶ The same could not be said in case of teacher misconduct.

The plaintiffs in *Rich and Samin v State of Queensland and Others* also accepted that the teacher's sexual assaults could not result in vicarious liability, as distinct from liability for breach of a non-delegable duty. Their argument was simple: the education department owed students a non-delegable duty to ensure that reasonable care was taken of them, they were sexually assaulted by their teacher; therefore, the department's duty had been breached.

McPherson J, with whom Thomas J agreed, cited judicial comment in earlier cases that emphasised that liability for breach of non-delegable duty was not strict and did not derive from fault on the part of the delegate.¹⁷ McPherson J concluded that the key passage from Mason J's judgment in *Introvigne*¹⁸ - quoted above - was capable of two interpretations. He said that the first sentence focussed on the conduct of the school authority and whether they failed to do something. The last, sentence, by contrast, looks to consequences and asks whether the student's injury arose from someone's tortious conduct, and attributes that conduct to the school authority. The difference is between a school's liability for failing to take reasonable steps and liability whenever reasonable steps have not been taken, by the school or others. The NSW Court of Appeal applied the second test, but McPherson J resisted the imposition of such a strict approach, fearing that it would result in limitless liability for schools.¹⁹ According to McPherson J, while it was clear that the school owed a non-delegable duty,

*... it does not follow that it imposes an obligation to ensure that no harm of any kind befalls children at a school, through the act or omission of others or from any other cause or source. The duty, although non-delegable, does not entail a form of absolute duty or liability to keep them safe from all kinds of harm at all times*²⁰

McPherson J said that schools could not be held liable for injuries caused by venomous snakes, serial murderers, kidnappers or rapists, unless circumstances suggested that such things needed to be guarded against. He left it open to the

plaintiffs to re-draft their case, alleging specific failures on the part of the school, such as a failure to detect the teacher's misconduct or to supervise one-teacher schools.²¹ Williams J took a similar approach, pointing to aspects of the earlier authorities that supported a requirement that the school be shown to be negligent in some way. All three members of the Queensland Court declined to follow the majority's approach in *Lepore*, unable to identify authority or conceptual foundation for such an approach.²²

The preferable view

What does it really mean to say that schools owe a duty to ensure that care is taken? Should it be enough that the school established proper monitoring and supervision if a "bad egg" passes undetected? The school may be innocent in such cases, but surely the student whose life is changed by the sexual assault committed upon them by their trusted and respected teacher is more innocent and worthy of compensation?

The answer to these questions lies in the minds of the justices of the High Court of Australia. As the ultimate court of appeal in Australia's Common Law system, the High Court will have to clarify the content of a school's non-delegable duty. Indeed, counsel in the *Rich and Samin* appeals indicated to the Queensland Court of Appeal that the State of NSW was seeking leave to appeal the *Lepore* decision, although leave has not yet been granted.²³

Which approach the High Court would prefer is unclear, especially since there is considerable disagreement among the justices on the appropriate scope of negligence liability generally. The comments of some justices in recent cases may suggest support for the NSW Court's expansive view. *Modbury Triangle Shopping Centre Pty Ltd v Anzil*²⁴ concerned a claim by the employee of a video store against the landlord of the shopping centre in which the store was located. The plaintiff was assaulted in the centre carpark at the close of business one night. He sued the shopping centre for failing to provide proper lighting in the car park. The High Court rejected the plaintiff's claim, stating that the landlord should not be liable for the intentional torts of the criminal assailants. In a passage relevant to the school situa-

tion, however, Gleeson CJ continued:

*... there are circumstances where the relationship between two parties may mean that one has a duty to take reasonable care to protect the other from the criminal behaviour of third parties, random and unpredictable as such behaviour may be. Such relationships may include those between employer and employee, school and pupil, or bailor and bailee. But the general rule that there is no duty to prevent a third party from harming another is based in part upon a more fundamental principle, which is that the common law does not ordinarily impose liability for omissions.*²⁵

The specific reference to schools and pupils certainly highlights the serious burden placed upon school authorities, but it is not necessarily inconsistent with the Queensland Court's insistence that there be some failure on the part of the school authority, albeit in failing to supervise or monitor teacher behaviour.

It is worth recalling that the Queensland Court of Appeal did not dismiss the plaintiffs claims altogether - it merely required them to redraft their pleadings to allege some act or omission on the part of the Education Department.

In another recent High Court decision, Gummow J addressed the issue of primary concern to the Queensland Court of Appeal, namely its distaste of non-delegable duty as a form of strict liability. In *Scott v Davies*, his Honour said, *... the characterisation of a duty as non-delegable involves, in effect, the imposition of strict liability upon the defendant who owes that duty.*²⁶

While liability is strict in the sense that the school has done nothing wrong, it is worth noting that it will not be liable where there has been no wrongdoing whatsoever on the part of any of its delegates.²⁷ For example, in *ACT v El Sheik*, the Federal Court of Australia held that a school could not be held liable for injuries sustained during a playground brawl because there was no evidence of any negligence or carelessness on the part of the playground supervisor, the school principal or any other Education Department delegate.²⁸

Regardless of whether *Lepore* is appealed, the High Court will eventually have to consider schools' liability for student injuries inflicted by intentional teacher misconduct. It will have to consider its attitude towards non-delegable duties generally, as well as the unique position of schools in a society where education is compulsory. If it concludes that school authorities' non-delegable duty to students extends to intentional torts committed by teachers, the policy and financial implications are potentially significant.

¹ *Deatons v Flew* (1949) 79 CLR 370.

² *Bugge v Brown* (1919) 26 CLR 110.

³ *Joel v Morrison* (1834) 6 Car & P 501, at 503, per Parke B.

⁴ *Lepore v State of New South Wales* [2001] NSWCA 112, 49, located at: www.austlii.edu.au/au/cases/nsw/nswca/2001/112.html

⁵ *Richards v State of Victoria* [1969] VR 136, the Full Court of the Supreme Court of Victoria said (at 138-9); *El-Sheik v Australian Capital Territory Schools Authority* (1999) 151 FLR 397 at 403, Miles CJ.

⁶ *Commonwealth v Introvigne* (1982) 150 CLR 258; *Burnie Port Authority* (1994) 179 CLR 520.

⁷ *Kondis v State Transport Authority* (1984) 154 CLR 672, at 686, Burnie Port Authority, above n6, at 550.

⁸ *Introvigne*, above n6, per Mason J, at 258, 269-270.

⁹ *ACT Schools v El Sheik* (2000) Aust. Torts. Rep 81-5777, Federal Court of Australia, located at www.austlii.edu.au/au/cases/cth/federal_ct/2000/931.html.

¹⁰ *op cit* n4.

¹¹ [2001] QCA 295, located at: www.courts.qld.gov.au/qjudgment/QCA%202001/ca01-295.pdf

¹² *Lepore*, above n4, at 50.

¹³ *Ibid*, at 55.

¹⁴ *Ibid*, at 58.

¹⁵ *Ibid*, at 62.

¹⁶ *El Sheik*, above n9.

¹⁷ *Rich and Samin*, above n11, at 8

¹⁸ See above, text accompanying footnote 8.

¹⁹ *Rich and Samin*, above n11, at 11.

²⁰ *Ibid*, at 13.

²¹ *Ibid*, at 16.

²² *Ibid*, at 18 per McPherson J (with whom Thomas J agreed); 48 per Williams J.

²³ *Ibid*, at 16.

²⁴ [2000] 176 ALR 411.

²⁵ *Ibid*, at 26.

²⁶ *Scott v Davis* [2000] HCA 175 ALR 217, at 248.

²⁷ *Lepore*, above n4, at 63.

²⁸ *Op cit* n9.